International Competition Network

ANTI-CARTEL ENFORCEMENT MANUAL

CARTEL WORKING GROUP

Subgroup 2: Enforcement Techniques

April 2011

Case resolution chapter

www.internationalcompetitionnetwork.org

CONTENTS

1 INTRODUCTION

There is a wide range of case resolution methods available in anti-cartel enforcement, many of which vary by enforcement regime and/or policy decisions made by the competition agency. Determining which method to use may require the careful consideration of many factors. This Chapter is intended to give an overview of possible case resolution methods, ideas for new case resolution methods, and some factors that agencies might consider when deciding how to resolve a specific case. Some of the methods and relevant factors are reinforced by case studies from different jurisdictions. These case studies may serve as a reference tool for considering the case resolution methods used by different agencies.

The Chapter uses contributions from ICN member agencies as its primary source of information. For this purpose, ICN member agencies were requested to respond to a questionnaire.[1] In addition to the completed questionnaires, this Chapter draws on previous work by the Cartel Working Group[2] and on relevant reports from the Organisation for Economic Cooperation and Development ("OECD").[3]

Cartel enforcement regimes may be criminal, civil, administrative, or hybrid.[4] In criminal enforcement regimes, corporate cartel participants are subject to criminal fines and individuals may be sentenced to incarceration and also to pay fines. In civil enforcement regimes, corporate and individual cartel participants are subject to civil fines. In both civil and criminal enforcement regimes, sanctions are subject to court approval and ultimately imposed by the court. In administrative regimes, competition agencies generally have the power to impose sanctions themselves, ranging from warnings to administrative fines.[5] Hybrid enforcement regimes are any combination of criminal, civil, and administrative, and are commonly referred to as "dual systems" or "dual track systems". In dual track systems, cartels may be prosecuted either criminally or civil/administratively, depending on the provisions of the jurisdiction and the nature of the conduct. In many of these jurisdictions, hard core cartels[6] are prosecuted criminally, whereas other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to civil/administrative review.

Of the twenty-three competition agencies who responded to the questionnaire, thirteen act within administrative/civil regimes, three in criminal regimes, and seven in hybrid regimes.

It is important to note that this Chapter is not intended to serve as a comprehensive guide, but rather as a general overview of case resolution methods and factors considered. A number of case resolution methods that have been described in other sources will not be covered in detail. These methods will be outlined to give a comprehensive background, however; the Chapter will refrain from duplicating existing work. The Anti-Cartel Enforcement Manual is a work in progress. Some of the case resolution methods mentioned in this Chapter are recent additions to the agencies' toolkits of available methods. This Chapter complements existing chapters on searches, raids and inspections, leniency, digital evidence gathering, case initiation, interviewing techniques, and investigative strategy. Finally, this Chapter and others that form a part of the Anti-Cartel Enforcement Manual must be read in the context of current enforcement laws, policies and practices.

1 The responding agencies are listed in Appendix 1 and the actual survey questions are contained in Appendix 2.

2 Previous work done by the Cartel Working Group is available online at: http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx.

3 OECD competition reports are available online at: http://www.oecd.org/.

4 See the ICN Cartel Settlements paper (2008 Annual Conference) for more information.

5 For the purposes of this Chapter, civil and administrative enforcement regimes have been combined.

6 "Hard core cartels" are typically defined as agreements between competitors to restrict competition, most often defined as price fixing, output restriction, market allocation, and bid rigging.

2 OVERVIEW OF POSSIBLE CASE RESOLUTION METHODS AND PROCEDURES

This section focuses on the steps and methods used by competition agencies and other bodies such as public prosecutors, courts, or tribunals (the "relevant body") to resolve cartel cases that are under investigation. To ensure a common starting point, it is assumed that the relevant body's assessment is that there has been a substantive breach of their competition law.

When considering the different types of case resolution methods, it is necessary to take into account leniency programs. For the purposes of this Chapter it is presumed that the issue of leniency precedes the case resolution method decision. Because the Anti-Cartel Enforcement Manual has a chapter on the drafting and implementing of effective leniency programs, this Chapter refrains from dealing in-depth with questions of leniency.[7]

A number of possible case resolution methods were identified in the questionnaire responses from ICN member jurisdictions. This section seeks to give an overview of the possibilities mentioned by agencies, without claiming to be exhaustive. These possibilities depend in part on the legal, economic, and/or regulatory peculiarities of the legal systems. Therefore, some of the described methods may not be available in all jurisdictions. It is also important to note that in some jurisdictions, the possible methods may be used in conjunction with each other.

2.1 INVESTIGATE ANTI-COMPETITIVE CONDUCT AND INITIATE PROSECUTION

About 30% of the responding agencies stated that their choice of case resolution method is limited to initiating proceedings if there is enough evidence for prosecution, or closing the case if the information available is not sufficient for prosecution. In cases where the investigation does not uncover evidence sufficient to establish a violation, competition agencies generally have the ability to close a case without further consultation with other bodies.

2.1.1 Administrative Regimes

In administrative regimes, the competence for investigating potential cartel activity generally rests with the body that will eventually, if necessary, initiate the prosecution.[8] The decision to initiate proceedings will generally also be made by the competition agency.

2.1.2 Criminal Regimes

In some criminal law regimes, the power to investigate cartel conduct may rest with the police, the competition agency, or the public prosecutor's office. Furthermore, in some jurisdictions the sectoral regulators may be involved in investigating the conduct. The decision-making process for initiating a case may lie with one or more of these investigating bodies.

In one jurisdiction where hard core cartels are criminal offences, the competition agency decides whether or not to initiate a case and whether or not to refer it to the public prosecutor's office. Another agency stated that it can only refer a case to the public prosecutor's office if there are concerns of a bid rigging violation.

One agency stated that before making a formal recommendation, staff will inform a potential defendant that they are the target of an investigation. The agency will give defence counsel the opportunity to present their views to staff. In this jurisdiction, parties are generally afforded the opportunity to meet with a senior official before a decision has been made on whether or not to initiate prosecution. However, counsel is not entitled to such a meeting as a matter of right. If, after appropriate meetings with defence

7 For more information please see Chapter 2 "Drafting and Implementing an Effective Leniency Program" of the Anti-Cartel Enforcement Manual. Chapter 2 was first published in April 2006 and was revised in May 2009.

8 In this Chapter the term prosecution refers to court action generally, which includes civil/administrative and criminal proceedings.

counsel, staff concludes that there is sufficient evidence of a violation to prosecute, staff will submit a formal recommendation to initiate prosecution, and the head of agency makes the final decision as to whether to bring the action or decline prosecution.

2.1.3 Hybrid Regimes

In hybrid regimes the relevant bodies usually coordinate their work, at least to some degree. For example, in one jurisdiction, criminal investigation is only launched after the competition agency refers a case to the prosecutor's office. The competence to investigate a case may differ according to the evidence that is initially available. One agency stated that they will informally contact the prosecutor if there is clear evidence of a cartel violation, and if the prosecutor agrees that the matter should continue to be pursued with a view to possible criminal proceedings at a later stage, the case will be formally handed over.

2.2 ISSUE A STATEMENT OF OBJECTIONS

Several responding agencies indicated that after the relevant evidence has been identified and the decision to initiate prosecution has been made, a statement of objections is commonly issued. This statement may have different purposes and may vary in form and/or title (such as a report, handover memorandum or a statement of findings) across jurisdictions and enforcement regimes. However, all statements will generally summarize the facts on which the case is based, and some may inform the parties concerned in writing of the objections raised against them. The addressee of a statement can usually reply in writing, setting out all facts known to it which are relevant to its defence against the objections raised. Therefore, issuing a statement does not prejudge the final outcome of the proceedings.

It is important to note that the competent body responsible for preparing the statement of objections may differ according to legal systems.

2.2.1 Administrative Regimes

In administrative regimes, the statement of objections will generally be prepared by the competition agency.

In some jurisdictions the statement of objections is prepared as an interim step. In other words, the relevant body prepares the file for the next agency to which it will be referred. In other jurisdictions the competition agency may prepare the file for the court, which ultimately makes a decision about the case. Such an approach may be especially necessary in jurisdictions where two or more agencies work together (e.g., the competition agency and a public prosecutor's office). However, there may be various methods to prepare the file in different jurisdictions. In other jurisdictions, the statement of objections may also serve as a possible means to hear the defendants' view on the case.

In some jurisdictions the statement of objections may be the basis for settlement negotiations.[9] The relevant body, which is competent to negotiate the terms of such an agreement, issues the statement of objections and engages in negotiations regarding penalties with the target companies. According to previously collected information, some agencies may negotiate only a fine reduction, whereas others may also be negotiating to obtain confessions from the parties concerned.[10]

2.2.2 Criminal Regimes

In criminal law regimes, the prosecutor's office is often responsible for issuing the statement of objections in those jurisdictions that use them. Other criminal and hybrid law regimes stated that the competition agency prepares a summary of available evidence, which is then referred to the public prosecutor's office for a final decision with regards to the laying of charges.

9 For more on settlement negotiations see section 2.4.

10 See the ICN Cartel Settlements paper (2008 Annual Conference) for more information.

2.3 ISSUE A DECISION

In the absence of a settlement or plea agreement, the prosecution of cartel violations generally results in a decision on whether a violation of law has occurred. Of the responding agencies, about two thirds have the competence to issue the decision without further cooperation with another body. Further, seven more agencies prepare or propose the decision to the competent court, which ultimately issues the decision. One agency reported that it was competent to impose fines in cases where the material circumstances regarding the infringement are clear and not contested. In all other cases the decision to impose a fine lay with the competent court.

In the past, the Cartel Working Group has identified three categories of jurisdictions with respect to the body setting the fine:[11] those jurisdictions in which the competition agency itself sets the fine; those in which non-specialised courts set the fines; and the "intermediate" jurisdictions, in which a cartel may be sanctioned either with criminal penalties or with civil or administrative penalties, and where the choice of sanction determines both the procedure and competent body.

Enforcement experience suggests that some corporations who have been previously fined for price fixing may engage in recidivism. Imposing sanctions on individuals, particularly the directors of the corporation and the perpetrators involved in the anti-competitive behaviour, may help increase deterrence, and has been a growing practice by competition agencies. Of the responding agencies, nineteen reported that they are able to recommend sanctions against individuals.

2.3.1 Administrative Regimes

In administrative regimes, the competence for issuing a decision may be dependent on the type of sanction chosen and on the target of the sanction (e.g., a corporate entity or an individual). In jurisdictions that prosecute cartels administratively, the outcome of a cartel decision may include financial penalties for corporate entities, financial penalties for individuals, cease-and-desist orders with or without fines, and individual sanctions such as disqualification orders.[12]

In some jurisdictions the competition agency can issue a Director Disqualification Order ("disqualification order") or apply to the Court for such an order. One agency reported that a disqualification order may be issued where there has been a breach of competition law involving a director whose behaviour in connection with that breach makes him or her unfit to be involved in the management of the target company. Such disqualification orders are seen to have a deterrent effect. Disqualification orders may be used in combination with other case resolution methods. When deciding whether or not to issue a disqualification order, one agency stated that it considers factors such as the number of competitors in the relevant market, so competition in that market does not decrease.

Eleven agencies reported that they can sanction individuals administratively. Through the administrative process, individuals are largely sanctioned by either the competition agency or by the court upon the recommendation of the competition agency. Most individual sanctions are in the form of a fine. One agency, however, reported that the court may issue a trading prohibition[13] against an individual at the request of the competition agency. Another agency reported that it has the power to sanction not only the immediate perpetrators but also individuals who have assisted in infringing specific anti-competition law. However, this agency also emphasized that they have never imposed sanctions on individuals for contributing to cartel behaviour.

11 See the ICN Cartel report on Setting of Fines for Cartels in ICN Jurisdictions (2008 Annual Conference) for more information.

12 See the ICN Cartel report on Building Blocks for Effective Anti-Cartel Regimes (2005 Annual Conference) for more information on effective penalties.

13 A trading prohibition bars an individual from running business operations, holding a senior position in a corporation, and being employed by a closely related party to the business operation where the individual previously failed to fulfil his or her obligations. A trading prohibition is issued for at least three years and at most ten years.

2.3.2 Criminal Regimes

In jurisdictions that prosecute cartels criminally, ten of the respondents stated that the decision is issued by the prosecutor's office, a jury, or the court. The outcome of a cartel decision in criminal regimes can include penalties such as the imposition of a fine, a prohibition order, and/or a jail sentence. Every responding agency that works within a criminal or hybrid regime reported that they are able to sanction individuals. Individual sanctions are most often imposed by the court; however, the type of court (e.g., local or federal) varies. Sanctions imposed on individuals can include fines, imprisonment, prohibition orders, and disqualification orders.

2.4 SETTLEMENT

Many agencies reported that they have the ability to resolve cartel cases in a non-contentious way by negotiated settlements or plea agreements ("cartel settlement systems"). This method of case resolution has already been the subject of work done by the OECD and ICN.[14] The definition of settlement varies widely among jurisdictions. According to an OECD Competition Committee paper, negotiated settlements or plea agreements "can be regarded as contracts in which each side agrees to give up some entitlements it would have if the case went to a full trial or through a full administrative procedure ending with a formal decision – the competition agency gives up the right to seek or impose higher penalties; the defendant gives up certain protections that a more formal process and trial would provide, as well as the possibility of an acquittal – and both sides agree on a sanction or proposed sanction."[15] Some definitions may further include the full admission of guilt, while others require the admission of the facts of the case. Some negotiated settlements may be confined to issues of liability, where both sides have been unable to agree on a sanction or proposed sanction. Ongoing cooperation with the agency for the duration of any proceedings may also be required.

In hybrid enforcement regimes, one agency noted that it has a policy of not engaging in any discussion with the parties under investigation as to possible resolution of civil proceedings until it has formed a view as to the seriousness of the conduct and the possibility of criminal proceedings has been ruled out. This avoids any perception that the agency is using the possibility of a referral of a matter to the prosecutor for consideration of criminal prosecution to obtain cooperation or resolution of civil proceedings.

As the ICN and OECD reports are still fairly recent, this Chapter does not seek to revisit the definitions and overviews given. The reports do indicate that cartel settlement systems may exist in the criminal, civil, administrative, and hybrid enforcement regimes.

Settlement agreements are very flexible case resolution methods, which allow different designs in the many ICN jurisdictions. One jurisdiction reported that a fining decision becomes legally binding if accepted by the corporation to which it is addressed. This agency may also issue a so-called "fine order" when the material circumstances regarding the infringement are clear and not contested by the companies. In fine orders, the agency sets out the circumstances and suggests a fine; if it is accepted by the company, the case is resolved. If the addressee does not accept the fine order, the system foresees that the agency should initiate court proceedings seeking the same amount of fines as in the fine order. Thus, in this system, there is no reduction of the fine for the companies for resolving the case with this method.

In some jurisdictions the agencies are competent to resolve cases by settlement. In other jurisdictions the result negotiated between the agency and companies has to be affirmed by a court. Especially in hybrid enforcement regimes, settling cartel cases is an onerous task. In such regimes, several possible prosecuting agencies have to coordinate their approach and processes.[16]

14 See the ICN Cartel Settlements paper (2008 Annual Conference) and DAF/COMP(2007)38 "Plea Bargaining/Settlement of Cartel Cases" by the OECD Competition Committee for more information.

15 DAF/COMP(2007)38 "Plea Bargaining/Settlement of Cartel Cases" by the OECD Competition Committee, p. 1.

16 See the ICN Cartel Settlements paper (2008 Annual Conference) for more information.

2.5 COMMITMENT ORDERS

The decision to accept commitments is distinct from other settlement decisions. Some jurisdictions allow the competition agency to adopt a decision whereby companies make legally binding commitments to change their behaviour in order to address the competition concerns, while other jurisdictions do not provide competition agencies with the explicit statutory right to do so. Some competition agencies have the power to accept (and vary or release) commitments offered to the agency by a person or persons if they are satisfied that the commitments meet the relevant competition concerns. This case resolution method is generally not used for cases of hard-core cartels or bid rigging. These commitments are very often binding for the parties and lead to a termination of the investigation by the agency. Therefore, accepting commitments may only seem appropriate where the competition concerns are readily identifiable; the competition concerns are fully addressed by the commitments offered; and the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time. One agency mentioned that in such cases, no infringement decision is issued. Generally, the competition agency has discretion whether to accept the binding commitments offered by the party.

Commitments may be of a structural or behavioural nature. One competition agency stated that where it proposes to accept a commitment, it will give notice to such persons it considers likely to be affected by the commitment. Interested third parties will have an opportunity to make representations to the agency.

2.6 ALTERNATIVE CASE RESOLUTION

In some jurisdictions it is possible to resolve cases by way of an alternative case resolution method. This refers to case resolutions other than formal prosecution or settlement proceedings leading to a decision by either the agency or a court. Approximately 45% of responding agencies reported that they have the statutory possibility to use such an alternative method.

In the jurisdictions that allow them, the competition agency is responsible for alternative case resolutions. Two agencies reported that alternative case resolution methods are most appropriate in cases where the actual or potential economic harm is minimal, and where there is an absence of aggravating factors combined with significant mitigating factors.

There are many kinds of alternative case resolution methods, including but not limited to, information or warning letters, written undertakings,[17] and information visits.[18] An in-depth dialogue with the companies, with the aim of finding a solution where the involved companies change their behaviour to stop the infringement, may be a further alternative case resolution method. The agencies that reported using this approach indicated that this method is generally seen as appropriate for the resolution of lower priority or smaller cases.

Some agencies believe that instituting a corporate compliance program may be considered as an alternative case resolution method. One agency reported that increasing compliance and awareness of their competition laws is a very relevant factor in determining a case resolution method. Such compliance programs may include advice, education, and outreach concerning violations of the competition legislation. If a targeted company already has a compliance program, some agencies consider the existence and effectiveness of that program when reaching a decision. In such a case, some agencies may consider a compliance programme as a mitigating factor, which may lead to a reduction of the fine. One jurisdiction reported that they will issue a compliance advice letter if the matter is comparatively less serious. Another jurisdiction stated that they may send guidance papers that order the discontinuation of the anti-competitive conduct, along with certain obligations for the future conduct of the accused.

Mediation may be considered another possible alternative case resolution method. However, in some jurisdictions it is disputed whether mediation is applicable under cartel legislation.

17 Here, an undertaking refers to a written pledge or promise that is undertaken by the target.

18 Please note that the terminology given in the questionnaire responses was not consistent. Therefore different terms may be used by different jurisdictions to refer to the same alternative case resolution method.

3 FACTORS TO BE CONSIDERED WHEN CHOOSING A CASE RESOLUTION METHOD

The questionnaire responses suggest that choosing a case resolution method is subject to the consideration of various factors. Furthermore, among many responding agencies there is no extensive written guidance with respect to choosing a case resolution method. As a result, this Chapter does not seek to establish good practices; it is intended as an overview of available methods and a discussion of possible factors to be considered when choosing a method.

3.1 RESOURCES

The required financial and human resources necessary to resolve a case can be a highly important factor to consider when choosing a case resolution method. The activities of all agencies are constrained by their resources, but this factor may be of greater importance to small agencies since smaller agencies do not always possess the level of legal/economic specialization, nor the financial resources for large scale investigations, that larger organizations possess. During an investigation, a plea agreement or settlement of uncontested charges may allow agencies to conserve resources.

3.2 VOLUME OF COMMERCE/ECONOMIC IMPACT

The estimated harm to an economy (e.g., the estimated volume of commerce affected in an investigation) was listed by the majority of respondents to be a very relevant factor. Agencies may be more likely to prioritize cases involving significant economic harm. Those agencies that employ alternative case resolution methods may be more likely to utilize them where the actual or potential economic harm is negligible.

3.3 STRATEGIC IMPORTANCE

Agencies may be more likely to devote resources to a case, regardless of the affected volume of commerce, if there is likely to be a high public impact. Other reasons of strategic importance may include whether or not the anti-competitive behaviour harms important domestic interests, the case represents an enforcement priority (e.g., a targeted sector or industry), or will help clarify the law and/or economic principles.

3.4 RECIDIVISM

Several agencies indicated that whether a target has a history of violating competition laws is an important consideration in case resolution. Agencies may be more likely to prioritize prosecution of repeat offenders, and to consider prior offences in determining appropriate sanctions. Even if the specific target does not have a history of violating competition laws, an agency may still wish to prioritize enforcement actions in areas where there is a history of competitors violating competition laws in that specific market.

3.5 TIMELINESS

For various reasons, the timeliness of case resolution is important. In many legal systems, particularly criminal enforcement regimes, there is a limited time period during which challenges can be brought in relation to a suspected infringement. However, even when no such legal constraints exist, timeliness may be an important consideration. For example, an agency may open itself up to the criticism that its work is largely irrelevant when directing significant resources to infringements that did not happen recently, happened in particular markets that do not exist anymore due to technological progress, or where the companies that committed the infringement have exited the market. Further, the quality of testimonial evidence will lessen over time and the cost of taking enforcement actions may increase if witnesses are no longer easily available.

3.6 INTERNATIONAL ASPECTS

An international cartel may require international cooperation, which may reduce the scope for agencies to choose their instrument in order to ensure a consistent approach. If an international cartel case is prosecuted by one or more competition agencies, other agencies affected by that cartel may consider taking into account the enforcement by those other agencies. Nine of the responding agencies indicated that international aspects were either relevant or very relevant when determining a case resolution. One agency reported that they consider the obligations and expectations of other national and international partners. Another agency reported that they will consider requesting collaboration of other national competition authorities ("NCAs") when conducting parallel investigations with the European Commission or other European NCAs.

4 CASE STUDIES

The following case studies were retrieved from the questionnaire responses. Each case study highlights a specific case resolution method used by a specific jurisdiction. Some of the factors considered when selecting a case resolution method are outlined in the case study, along with the specific violations of their relevant competition laws and a description of the market concerned. Even though the individual case studies highlight a specific factor, it should be kept in mind that various aspects are usually considered in selecting a case resolution method.

4.1 STRUCTURAL REMEDIES

Article 27 of the Competition Act (the "Act") allows the Turkish Competition Authority ("TCA") to take necessary measures to terminate violations of the Act and impose administrative fines. Pursuant to Article 9 of the Act, the TCA generally makes a decision that will terminate the anti-competitive behaviour and re-establish competition. Further, companies may sometimes offer commitments to address competition concerns before the TCA makes a final decision.

An investigation conducted by the TCA established that two independent practices within the flat steel products market and its submarkets had violated the Act. These were violations by the ArcelorMittal Group ("A") and Erdemir ("E"), and by E and Borçelik ("B"). With respect to the first violation, it was decided that A and E coordinated their behaviour, controlled the amount of supply, and determined the sales conditions through agreements and business practices related to them. Concerning the second violation involving E and B, various documents were found indicating the regular exchange of information, such as the amount of purchases and sales between the two firms, which restricted competition and resulted in the coordination of their behaviour. It was apparent that the minority shares E had in its competitors (namely in A and B) led to the exchange of commercially sensitive information between the target companies, which further contributed to the coordination of their behaviour.

When determining the case resolution method, the TCA considered the market power of the target companies and the significant lessening of competition in the relevant market. Moreover, the TCA took into account the commitment offered during the investigation by E to sell the minority shares it owned in its competitors, as it was thought to be an important structural measure to avoid a similar negative impact on competition in the market in the future. As a result, the TCA decided to impose administrative fines on the three companies and required the termination of E's shareholder status in both A and in B.

4.2 COMMITMENT

Cyprus' Commission for the Protection of Competition ("CPC") began an ex officio investigation into the banking industry. The investigation revealed that three banks (the "targets") had exchanged information, which resulted in an agreement regarding the geographic location of automated teller machines ("ATMs"). The CPC exercised its formal powers during the investigation, including a dawn raid that was pivotal in finding evidence of collusion among the targets. When determining the severity of the collusion, the CPC considered the targets' effective control over card payments in Cyprus and legal counsel's commitment to avoid future incidents that may lessen competition. Furthermore, the CPC took into consideration the commitment undertaken by the targets to disassociate themselves from the process of determining ATM locations, their cooperation with the CPC, and the acknowledgement on their part that they had engaged in information exchanges.

On February 10, 2006, the CPC issued a prohibition decision that ordered the targets to conform fully with the provisions of Article 4 of the Law for the Protection of Competition, and imposed a fine on the targets amounting to CYP 100,000.

4.3 EDUCATION

The New Zealand Commerce Commission ("NZCC") investigated two traders on the online auction website "Trade Me" for price fixing in respect of certain car tire brands. One of the traders calculated prices and sent his price lists to the other trader, who then matched them. In determining the appropriate resolution, the NZCC took into consideration that very few sales were made during the period and that the small price increases resulted in very little economic harm. However, the NZCC considered it to be a relatively straightforward and low cost investigation that would provide the NZCC with an opportunity to educate the wider public as well as other traders on "Trade Me." Accordingly the NZCC decided to enter into an administrative settlement with the traders, which was comprised of an acknowledgement of breaches, a warning on future conduct, publicity of the case through a media release and compliance training about the Commerce Act at the traders' own cost.

4.4 PROHIBITION ORDER AND REMOVAL OF KEY PERSONNEL

An investigation by the Canadian Competition Bureau ("CB") led to guilty pleas and criminal fines totaling $37.5 million against three competitors in the carbonless paper sheet market in Canada on January 9, 2006. The CB's investigation revealed that the convicted companies conspired to avoid competing with one another in the carbonless paper sheet market, contrary to the conspiracy provision of the Competition Act (the "Act"). Carbonless paper sheets are used by commercial printers in the manufacture of forms and receipts.

The Superior Court of Justice imposed record fines for a domestic conspiracy, including the maximum (at the time) of $10 million for a single count. The court also imposed prohibition orders, which prohibited each company from the continuation and repetition of the offences or the commission of any offence contrary to the conspiracy or price maintenance provisions of the Act for 10 years. The prohibition orders included the requirement to educate directors, officers, employees and agents on the relevant provisions of the Act, the terms of the prohibition order, and the ramifications for non-compliance. The pleading parties voluntarily agreed to remove key personnel involved in the conspiracy from their positions in the paper merchant business, and the prohibition orders also required that the pleading parties identify the persons removed from their positions in connection with this matter. In addition, for three years, each company was ordered to provide any additional information or records requested by the CB for the purpose of monitoring compliance.

4.5 CEASE AND DESIST ORDER

The Japan Fair Trade Commission ("JFTC"), under the provisions of the Antimonopoly Act ("AMA"), issued cease and desist orders and surcharge payment orders on August 27, 2009. The JFTC found that seven companies had agreed to raise the sale price of galvanized steel sheets ("steel"), which substantially restrained competition in the steel market by mutually restricting their business activities. The sales amount for steel was approximately 99.5 billion yen in fiscal year 2006.

In the same case, on November 11, 2008 (i.e., before the cease and desist orders and surcharge payment orders were issued), the JFTC filed a criminal accusation with the Prosecutor-General against three of the seven companies. On September 15, 2009, the Tokyo District Court ordered these three companies to pay criminal fines ranging from 160 million to 180 million yen.

4.6 FINE WITH RECIDIVISM

An investigation by Mexico's Federal Competition Commission ("CFC") revealed that there was a collusive agreement in the trucking industry. CANACAR, a national organization representing individual trucking carriers in Mexico, fixed a rate that reflected the increase in diesel prices, which was charged directly to customers. The anticompetitive conduct began on September 10, 2008, when CANACAR published an announcement inviting its members to establish the aforementioned charge. The President of the CFC stated that this case was an example of how trade associations promote, among their members,

collusion in breach of Mexico's competition laws, which harms consumers. Due to CANACAR's recidivism and the strategic importance of this case, the CFC ordered a suspension of the practice, and fined the involved parties a total of 30 million pesos. CANACAR was fined double the amount that otherwise would have been imposed because the organization was recidivist in such practices. The other targets of this particular investigation did not have their fines doubled, as they were considered to be first-time offenders.

4.7 FAST-TRACK SETTLEMENT

On February 10, 2009, the South African Competition Commission (the "SACC") initiated a complaint against South African construction firms. The complaint triggered an application for leniency under the SACC's Corporate Leniency Program, and the firms were eventually accused of bid rigging. The investigation demonstrated that there were widespread contraventions of the Act, and led to referrals and settlements in cast concrete products, plastic pipes and reinforcing steel. The coordination by these firms was organized by region, with firms agreeing on prices and allocating business amongst themselves through regular meetings and discussions. The SACC interrogated the so-called "policeman" of bid riggers, who was brought forward by the leniency applicant, along with multiple witnesses for questioning.

The SACC has implemented a fast-track policy, which works concurrently with the SACC's Corporate Leniency Policy, whereby a firm that applies for settlement may also apply for leniency. In addition, the firm must undertake to cooperate and cease anti-competitive conduct. Accordingly, the firm must provide truthful disclosure of the information and documents in its possession or under its control, must provide full and expeditious co-cooperation to the SACC, should not destroy, falsify or conceal information, evidence and documents relating to the prescribed and non-prescribed prohibited practice and should not make a wilful or negligent misrepresentation concerning the material facts or otherwise act dishonestly. Upon complying with the requirements, the SACC will settle with participating firms with a lower administrative penalty than what would have been imposed if each transgression were to be prosecuted separately.

When determining an appropriate case resolution method, the SACC considered two factors: first, there are currently 65 bid rigging cases under investigation in the construction sector, amounting to R29 billion of estimated harm; and second, infrastructure and construction were in the SACC's 2006-2009 Strategic Plan as a top priority, particularly since South Africa hosted the 2010 FIFA World Cup. Southern Pipeline Contractors decided not to settle with the SACC, but to contest the matter at the Competition Tribunal. The Tribunal sent a firm message by imposing the maximum penalty of 10% of total turnover on Southern Pipeline Contractors.

4.8 PROHIBITION DECISION

The European Commission ("EC") commenced an investigation into the flat glass supplier market in February 2005. This investigation began after the EC received information from other national competition agencies within the framework of the European Competition Network ("ECN") in regards to complaints from some customers of the largest community of flat glass suppliers, namely Asahi/Glaverbel, Saint-Gobain, Pilkington and Guardian. The customers complained about systematic parallel price increases for similar product ranges and the parallel application of an energy surcharge calculated in similar fashion by those suppliers, which contravened article 101 of the Treaty on the Functioning of the European Union ("TFEU"). It was determined that the four undertakings coordinated price increases, minimum prices and other commercial conditions for four categories of flat glass in the European Economic Area ("EEA"). The EEA is considered to have the most mature market for value added glass products in the international glass industry. The EC employed unannounced inspections during the investigation, followed by oral applications for immunity from Asahi/Glaverbel. When determining whether to pursue the case and adopt a prohibition decision, the EC considered the value of the evidence at hand, the scope and seriousness of the conduct under investigation, and the fact that cartels are an

enforcement priority of the EC. At the time of this case, the EC had not yet introduced their settlement procedure. Therefore, entering into a settlement was not available as a case resolution method. On January 3, 2006, the EC opened formal proceedings followed by the issuing of a statement of findings. After oral hearings were concluded, a prohibition decision was adopted in November 2007.

The undertakings were ordered to immediately bring to an end the infringement against article 101 of the TFEU, insofar as they had not already done so, and refrain from repeating any act or conduct which had been found to be contravening article 101 of the TFEU in this order or conduct having the same or similar object or effect. The EC imposed total fines of € 486.9 million.

4.9 FULL PROSECUTION

The Antitrust Division of the United States Department of Justice ("USDOJ") investigated an international conspiracy to fix prices in the Dynamic Random Access Memory ("DRAM") market in violation of the Sherman Act, 15 U.S.C. § 1. Numerous parties cooperated with the investigation. The USDOJ considered the investigation a high enforcement priority in a strategically important technology industry. DRAM is the most commonly used semiconductor memory product, providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunication, and consumer electronic products. There were approximately $7.7 billion in DRAM sales in the United States in 2004. As a result of the investigation, 15 executives and four companies pleaded guilty. The pleading companies agreed to pay $732.7 million in criminal penalties. One executive was tried in federal district court with the result of a hung jury/mistrial.

5 CONCLUSION

This Chapter provides an overview of possible case resolution methods. It also illustrates that there is no uniform approach when it comes to choosing a case resolution method. This Chapter is intended to highlight the differences between anti-cartel enforcement regimes, describe some common factors considered when choosing a case resolution method, and illustrate some of these factors in case studies, in order to give competition agencies ideas for new case resolution methods.

There is still room for discussion on this topic. This Chapter can be used as a tool to foster discussion about case resolution and contribute to agencies' ability to address and deter cartel activity by implementing the most appropriate cartel case resolution method.

APPENDIX 1: RESPONDING AGENCIES

Competition agencies from the following jurisdictions responded to the questionnaire (see Appendix 2) which served as a primary source of information for this Chapter:

1. Australia (Hybrid)
2. Bulgaria (Administrative/civil)
3. Canada (Criminal)
4. Croatia (Administrative/civil)
5. Cyprus (Administrative/civil)
6. Denmark (Hybrid)
7. European Union (Administrative/civil)
8. Finland (Administrative/civil)
9. France (Hybrid)
10. Germany (Administrative/civil)
11. Hungary (Hybrid)
12. Ireland (Criminal)
13. Italy (Administrative/civil)
14. Japan (Hybrid)
15. Korea (Hybrid)
16. Mexico (Administrative/civil)
17. New Zealand (Administrative/civil)
18. Spain (Administrative/civil)
19. Sweden (Administrative/civil)
20. Switzerland (Administrative/civil)
21. Turkey (Administrative/civil)
22. United Kingdom (Hybrid)
23. United States (Criminal)

APPENDIX 2: QUESTIONNAIRE

INTERNATIONAL COMPETITION NETWORK
CARTEL WORKING GROUP

QUESTIONNAIRE FOR CASE RESOLUTION CHAPTER

Agency name:	
Contact details (contact person, e-mail address):	
Date:	

- Confidentiality: In determining the level of detail to provide in your responses, please keep in mind that the information you provide will be used for the purposes of drafting the Anti-Cartel Enforcement Manual's chapter on case resolution and for discussion within the ICN Cartel Working Group. As a result, the confidentiality of the information cannot be guaranteed. It is therefore strongly advised that no confidential information be given in the answers.
- Repeated information: If you have already provided similar information elsewhere, please simply indicate this under the relevant question(s) on the questionnaire and attach this information to your submission.

INTRODUCTION

The Subgroup 2 of the ICN Cartel Working Group aims to improve the effectiveness of anti-cartel enforcement by identifying and sharing investigative techniques and advancing the educative and information sharing agenda of the Cartel Working Group. It therefore plans to add a further Chapter to the Anti-Cartel Enforcement Manual on the subject of "Case Resolution". This Chapter shall cover the range of actions and outcomes in matters under investigation, including but not limited to alternative case resolution, settlement and prosecution.

The Questionnaire aims at considering and acknowledging all jurisdictions and their diversities. Therefore some questions are phrased very broadly to allow a wide spectrum of answers. Authorities are asked to give concise answers, using tables or diagrams where helpful. Should more detailed information be required, the Drafting Team will be in touch with the respective agency.

We very much welcome your input, and thank you for taking the time to complete this questionnaire.

Questionnaire responses are requested by 10 December 2010

DEFINITIONS IN THIS QUESTIONNAIRE

Alternative Dispute Resolution (ADR): refers to methods of case resolution (i.e. bringing an ongoing case to an end) other than fully fledged proceedings leading to a cartel decision (by a court or an agency).

Cartel case: means any investigation by an agency or other relevant body (such as the prosecutor) of alleged cartel conduct which is considered to involve, or is likely to involve, a substantive breach of the competition law in your jurisdiction.

Case resolution methods: refers to the process your agency and other relevant bodies (such as prosecutors, courts, tribunals, etc.) uses to determine or resolve cartel cases.

Mediation: means a process of dispute resolution whereby an independent party assists the parties to the dispute to reach a mutually acceptable negotiated settlement.

Sanction: refers to a penalty or punishment as a means of enforcing compliance with the law and imposed by a court or an authority. Sanctions for cartel offences include fines, custodial terms, company directorship disqualification or other penal orders.

PLEASE NOTE THAT DEFINITIONS FOR THIS QUESTIONNAIRE WERE KEPT OPEN-ENDED TO FACILITATE ADAPTION TO THE DIFFERENT JURISDICTIONS.

GENERAL QUESTIONS

1) Which system (or systems) applies (or apply) to anti-cartel enforcement in your jurisdiction?

- Administrative/civil ☐
- Criminal ☐
- Both criminal and civil/administrative ("dual system") ☐
- Other (please explain) ☐

2) Under the rules of your jurisdiction identify the body or bodies (e.g. competition agency, prosecutor, court, tribunal, etc., or if the action is not undertaken in your jurisdiction state "N/A") which is/are responsible for the following actions:

Action	**Competent authority or court (please identify: civil/ administrative and/or criminal)**	**If multiple bodies are involved, specify the scope of the body's authority**
Investigating the conduct		
Preparing a statement of findings		
Deciding whether there is a breach of the law		
Granting leniency/immunity		
Imposing a sanction on a company		
Imposing a sanction on an individual		
Closing the investigation		
Remedies against a decision		

TYPES OF CASE RESOLUTION METHODS

3) With regard to case resolution methods:

a. Please list all possible methods of resolving cartel cases in your jurisdiction (for a list of example methods see attachment A).

b. Please also identify the body or bodies (e.g. competition agency, prosecutor, court, tribunal, etc.) which is/are responsible for resolving cartel cases by applying a specific method. Reference can be made to the table in question 2.

Method	**Competent body**

SELECTING CASE RESOLUTION METHODS

4) For each of the methods listed in question 3, please briefly describe the ***process*** for deciding which method to select and the roles of any other relevant bodies in the selection process (max. ½ page).

5) Please identify and describe the ***factors*** that are considered by your agency and any other relevant bodies in selecting a case resolution method for a particular cartel case (for a list of example factors see attachment B).

6) If applicable, please briefly outline the ***relationship/interaction*** (both informal and formal) between your agency and other relevant bodies in selecting the appropriate case resolution method.

7) Please describe the ***relative importance of each factor*** listed in question 5 and the role each plays in deciding how to resolve a case. For this please use the categories: very relevant, relevant, and less relevant.

8) If not included in the response to question 5, please identify and describe the general ***strategic issues*** that play a role in the choice of case resolution method (for a list of example issues see attachment C).

9) Please describe the ***relative importance of each issue*** listed in question 8 and the role each plays in deciding how to resolve a case. For this please use the categories: very relevant, relevant, and less relevant.

10) Please provide short summaries of three examples that illustrate how cartel cases are resolved in your jurisdiction.

    Please note:

    - It would assist if the examples cover a range of types of conduct, with varying seriousness (the examples may be limited to a specific element in the case resolution process).
    - If possible ensure that the examples inter alia include considerations on costs and resources, timeliness and effect in the market.
    - Furthermore, please give examples outlining circumstances where the use of more than one case resolution method may be appropriate and the factors and strategic issues which may be considered in deciding to use more than more method may be helpful.

ASSESSING CASE RESOLUTION METHODS

11) For each of the methods listed in question 3, please specify which method(s) you consider to be most efficient and effective and explain why.

ADDITIONAL COMMENTS

12) Please feel free to provide additional observations, comments or information.

ATTACHMENT A

Examples of case resolution methods:

1) Criminal/Civil Prosecution of cartel conduct
2) Impose a sanction
3) Negotiate and conclude a settlement/plea bargain
4) Refer to ADR
5) Address a procedural infringement associate with the substantive proceedings

ATTACHMENT B

Examples of factors which may be considered in selecting a particular case resolution method:

1) Costs and resources
2) Timeliness
3) Impact of various “sanctions” on the perpetrators
4) Effect in the market
5) Characteristics of the parties involved
6) Consistency, predictability and pragmatism
7) Number of companies involved in the case
8) Potential liability issues
9) Companies’ ability to pay
10) Likelihood of case being contested
11) Quality of the evidence at hand
12) Novelty of legal issues involved
13) Parallel criminal / administrative investigations
14) Parallel private enforcement
15) Deterrence
16) International aspects

ATTACHMENT C

Examples of strategic issues which may be considered in selecting a particular case resolution method:

1) Strategic importance of the case
2) Who is best placed to deal with the case in question
3) Impact of the conduct
4) Duration of the conduct
5) Recidivism
6) Volume of commerce affected