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**CARTELS: SANCTIONS AGAINST INDIVIDUALS**

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**English/French**

## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on sanctions against individuals, including criminal sanctions, in prosecuting cartels which was held by the Working Party n°3 of the Competition Committee in October 2003.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les sanctions, notamment pénales, prononcées à l'encontre de personnes physiques dans des affaires d'entente, qui s'est tenue en octobre 2003 dans le cadre du Groupe de Travail n°3 du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

### *By the Secretariat*

Considering the discussion at the roundtable, the member country submissions, and the background paper, a number of key points emerge:

*(1) As corporate sanctions rarely are sufficiently high to be an optimal deterrent against cartels, there is a place for sanctions against natural persons that can complement corporate sanctions and provide an enhancement to deterrence.*

There is ample empirical evidence that corporate sanctions in the form of fines are almost never sufficiently high to be an optimal deterrent, and in most cases are substantially below that level. In these circumstances, the threat of individual sanctions can strengthen the incentive of directors and employees to resist corporate pressure to engage in unlawful activity, and thus enhance the level of deterrence.

Moreover, as individuals act as agents on behalf of a corporation, it makes sense to deter those individuals directly by threatening them with sanctions, and to impose such sanctions if they violate the law. Since corporate fines rarely reach a level that would maximize their deterrent effect, they also provide insufficient incentives for a corporation to effectively monitor its agents to prevent them from acting unlawfully and from putting the corporation at the risk of being fined for participating in an unlawful cartel. In addition, it is questionable whether a corporation will always have the means to supervise its agents and deter them from unlawful conduct.

*(2) Systematic empirical evidence to prove the deterrent effects of sanctions on individuals, and/ or to assess in a cost/benefit analysis whether such sanctions can be justified, is not available. Ultimately, countries have to consider whether they accept as self evident that individual sanctions, including imprisonment, can be a useful part of effective anti-cartel enforcement. There is a trend among OECD member countries to accept that view.*

Anecdotal evidence exists that criminal sanctions against individuals can have deterrent effects. There is, however, no systematic empirical evidence available to prove such effects, and to assess whether the marginal benefit of introducing sanctions against individuals (in the form of less harm from cartel activity) exceeds the additional costs that in particular a system of criminal sanctions entails (including the costs of prosecution as well as of administering a prison system). There appears to be agreement that it would be virtually impossible to generate the relevant data.

Ultimately, countries that use, or decide to introduce, sanctions against individuals in cartel cases do so because they accept as self evident that corporate sanctions alone cannot ensure adequate deterrence, and that individual sanctions, including imprisonment, can be useful instruments in the fight against cartels. Among OECD members, there is a trend toward accepting that sanctions against individuals can contribute to more effective anti-cartel enforcement.

At the same time, sanctions on individuals are not the only instrument available to agencies in the fight against cartels, and each country must determine its own, "right" mix of sanctions that has the most effective deterrent effects against cartels. The decision whether to provide for sanctions against individuals as part of that mix depends on a number of factors, including a country's cultural and legal environment, its

enforcement history in cartel cases, the relationship between a competition authority and courts and prosecutors, as well as the resources of a competition authority.

*(3) If a country provides for individual sanctions, a strong argument can be made that relatively short prison sentences are the most cost effective deterrent. There are, however, also reasons why countries may provide for longer prison sentences, most importantly that only longer statutory sentences adequately express a society's condemnation of hard core cartels. There appears to be general agreement that the threat of financial penalties alone has little deterrent effects on individuals.*

With respect to jurisdictions that provide for the possibility of imprisonment, it is frequently assumed that the optimal prison term would be short, as after a relatively short time the marginal cost to society of additional prison time likely would exceed the gains from additional deterrence.

Some, however, favour longer statutory sentences. It has been argued, for example, that cost/benefit arguments in favour of shorter prison terms assume that business leader contribute to society in a unique way, but that this assumption was frequently unfounded. In particular in cartel cases, agencies deal with business leaders who have stolen from consumers and weakened the economy. Replacing them for a longer term can be done at acceptable costs for society.

In addition, having longer statutory sentences expresses a society's condemnation of hard core cartels. This might be important also with respect to prosecutors and courts, who may sometimes fail to recognize that cartels are serious offences. With shorter statutory sentences, prosecutors might be less likely to pursue a case, and courts might be more inclined to let defendants off the hook and impose alternative sentences instead. Longer sentences can send a signal to them that cartels should be considered a serious criminal violation.

Some countries consider that disqualification of directors of public corporations can have deterrent effects as well, although they recognize that this type of sanction does not deter managers who do not serve as directors. There appears to be widespread agreement that financial penalties on individuals alone are relatively ineffective because it is difficult to prevent a corporation from reimbursing the individual.

*(4) In addition to increasing levels of deterrence, sanctions against individuals also can be a powerful incentive for individuals to reveal information about existing cartels and to cooperate in investigations.*

Individuals who have information about cartels may have little incentive to reveal evidence about cartels if there is no risk of sanctions against them. Threatening credible sanctions against individuals creates incentives for an individual to disclose cartels that are separate from the incentives of a corporation. They can thus create a greater likelihood that someone will defect from a cartel arrangement and offer information and co-operation. As a result, a leniency programs should become more effective.

In addition, even after a cartel has been disclosed and the investigation is under way, the threat of sanctions against individuals, and the ability to avoid them through co-operation, will strengthen a competition authority's position. The larger number of participants with different interests that can be played off against each other, the greater the likelihood that someone will cooperate with the authority during an ongoing investigation.

The extent to which individual sanctions are an incentive to come forward and cooperate will be influenced by several factors, including (i) the ability of a single authority to operate the leniency program and prosecute criminal cases, or, where these tasks are allocated to separate authorities, close coordination between them; (ii) a credible risk of severe criminal sentences against individuals; (iii) a well-developed, highly transparent and predictable leniency program; and (iv) the ability to offer defendants lesser sentences or immunity in exchange for their co-operation during an investigation.



*(5) If a jurisdiction provides for criminal sanctions against individuals, several issues need careful consideration, including (i) the proper definition of the criminal offence; and (ii) where responsibility for criminal prosecutions is assigned to public prosecutors, proper coordination between prosecutors and the competition authority to ensure that criminal sanctions support leniency programs.*

Several countries that recently considered introducing criminal sanctions against individuals were in favour of using a separate definition of the hard core cartel offence that is narrower than the definition of anticompetitive conduct in general competition law. Such a more targeted definition enables individuals potentially subject to sanctions to *ex ante* clearly understand what conduct would put them at risk, thus ensuring that their fundamental rights are protected. In addition, it minimizes the risk that criminal sanctions might have excessive deterrent effects if the conduct to which they apply is not clearly defined.

Other countries that obtain criminal convictions based on the general language of their competition statutes rely on consistent case law, prosecutorial discretion, and, sometimes, approval or exemption systems to ensure that there is no uncertainty about the scope of the criminal offence and to avoid the potential risk of over-deterrence. Relying on the general competition law definition of anticompetitive conduct can hinder criminal enforcement, however, if there is no recognition of a *per-se* cartel offence. Otherwise, elements of a competition law violation such as market definition, entry barriers, and effects on competition may have to be proven under criminal standards, making it exceedingly difficult to obtain criminal convictions in courts.

Where the authority to criminally prosecute cartels has been allocated to public prosecutors, there is a risk that the effectiveness of leniency programs could be undermined unless there is proper coordination between prosecutors and the competition authority. Individuals as well as corporations might be more reluctant to voluntarily provide information about cartels if they fear the possibility of criminal prosecution of individuals. Clear and transparent rules must assure individuals who come forward and seek leniency that they will also have protection against criminal prosecution. Coordination and compatibility of leniency schemes and criminal sanctions may be particularly important in regional organizations such as the European Union to minimize the risk that leniency applications before one authority lead to criminal prosecution of the applicant's employees or ex-employees by other authorities.

*(6) International law does not recognize the principle of double jeopardy that would prevent authorities in different countries from prosecuting the same person for her participation in the same cartel. Nevertheless, where cartels are investigated in a multi-jurisdictional context, jurisdictions may consider arrangements to ensure that only one of them prosecutes an individual.*

As the number of countries increases that provide for criminal penalties against individuals, multiple prosecutions of individuals in multi-jurisdictional cartel cases become more likely. International law does not recognize double jeopardy or *ne bis in idem* principles. Thus, in principle several jurisdictions could prosecute the same individual for participation in the same international cartel. There is nevertheless a question whether in such a case authorities should take the prosecution of an individual in another jurisdiction into account. If there is something like an "optimal" term of a prison sentence, or it is at least recognized that shorter prison terms are the most efficient deterrent, an accumulation of prison terms in several jurisdictions would be undesirable. Moreover, coordination to avoid prosecutions in more than one country could reduce overall enforcement costs.

In fact, it appears that jurisdictions with a criminal sanctions system have in the past been willing to make arrangements with another jurisdiction which investigated the same cartel to ensure that only one of them would prosecute an individual.



## SYNTHÈSE

*Par le Secrétariat*

Des débats qui ont eu lieu à la table ronde, des documents soumis par les pays Membres et du document de référence, il ressort un certain nombre de points clés :

*(1) Les sanctions infligées aux entreprises étant rarement suffisamment sévères pour avoir un effet dissuasif optimal sur les ententes, les sanctions contre des personnes physiques peuvent compléter les sanctions infligées aux entreprises et accroître l'effet dissuasif.*

On a largement de quoi prouver qu'en fait les sanctions contre les entreprises sous forme d'amendes n'atteignent pratiquement jamais un montant suffisamment élevé pour avoir un effet dissuasif optimal, et dans la plupart des cas sont nettement en dessous de ce niveau. Dans ces conditions, la menace de sanctions individuelles peut inciter davantage les dirigeants et leurs préposés à résister à la pression de l'entreprise qui voudrait qu'ils se livrent à une activité illégale, et donc renforcer le niveau de dissuasion.

En outre, comme les individus agissent pour le compte d'une société, il est logique de dissuader ces individus directement en les menaçant de sanctions et de leur infliger ces sanctions s'ils contreviennent à la loi. Etant donné que les amendes infligées aux entreprises atteignent rarement un niveau qui en maximiserait l'effet dissuasif, elles ne sont pas non plus suffisantes pour inciter une société à surveiller effectivement ses agents pour les empêcher d'agir illégalement et faire courir à la société le risque d'être sanctionnée par une amende pour participation à une entente illégale. En outre, on peut se demander si une société aura toujours les moyens de surveiller ses agents et de les dissuader d'agir illégalement.

*(2) On ne dispose pas de données systématiques permettant de prouver les effets dissuasifs de sanctions contre des personnes physiques et/ou d'évaluer dans le cadre d'une analyse coûts/avantages si ces sanctions peuvent se justifier. Finalement, les pays doivent se demander s'ils acceptent comme allant de soi que des sanctions individuelles, y compris des peines de prison, peuvent utilement faire partie de l'arsenal visant à faire appliquer la loi efficacement. Il y a une tendance parmi les pays Membres de l'OCDE à accepter ce point de vue.*

On observe ponctuellement que les sanctions pénales contre des individus peuvent avoir des effets dissuasifs. Mais on ne dispose pas de données systématiques pour prouver ces effets et évaluer si le bénéfice marginal de l'introduction de telles sanctions contre des individus (sous la forme d'un moindre préjudice résultant de l'activité de l'entente) dépasse les coûts additionnels qu'implique notamment un système de sanctions pénales (y compris les frais de poursuite, ainsi que les frais d'administration d'un système carcéral). On s'accorde à dire, semble-t-il, qu'il serait pratiquement impossible de produire les données pertinentes.

Finalement, les pays qui recourent, ou décident de recourir à des sanctions contre des individus dans les affaires d'ententes le font parce qu'ils acceptent comme une évidence que les sanctions infligées aux sociétés ne peuvent à elles seules assurer une dissuasion adéquate et que les sanctions individuelles, y compris les peines de prison, peuvent être des instruments utiles dans la lutte contre les ententes. Parmi les membres de l'OCDE, on observe une tendance à accepter que des sanctions individuelles puissent contribuer à faire appliquer plus efficacement la loi contre les ententes.

En même temps, les sanctions contre des personnes physiques ne sont pas le seul instrument dont on dispose dans la lutte contre les ententes, et chaque pays doit déterminer son propre « assortiment » de sanctions, le « bon » étant celui qui a les effets dissuasifs les plus efficaces contre les ententes. La décision qui consiste à prévoir ou non des sanctions contre des personnes physiques dans cet assortiment dépend d'un certain nombre de facteurs, notamment de l'environnement culturel et juridique du pays, de sa jurisprudence en matière d'ententes, de la relation entre l'autorité de la concurrence et les tribunaux et le ministère public, ainsi que des ressources de l'autorité de la concurrence.

*(3) Si un pays prévoit des sanctions individuelles, il peut soutenir que des peines de prison relativement courtes sont le moyen de dissuasion le plus efficace du point de vue coût. Il y a aussi des raisons, cependant, pour lesquelles des pays peuvent prévoir des peines de prison plus longues, d'autant plus que seules les peines plus longues prévues par la loi expriment comme il convient la condamnation par une collectivité des ententes injustifiables. Il semble que tout le monde s'accorde à dire que la menace de sanctions financières seules n'a guère d'effets dissuasifs sur les individus.*

En ce qui concerne les pays qui prévoient la possibilité de peines de prison, l'hypothèse fréquemment retenue est que la peine optimale doit être de courte durée, car après un temps relativement court, le coût marginal pour la collectivité d'une durée d'incarcération supplémentaire dépasserait les gains à attendre de ce supplément de dissuasion.

Certains, cependant, sont favorables à ce que la loi institue des peines plus longues. Pour certains, par exemple, les arguments coût/bénéfice en faveur de peines de prison de courte durée supposent que la contribution des chefs d'entreprise à la collectivité est précieuse, mais cette supposition s'est trouvée fréquemment non fondée. Dans les affaires d'ententes notamment, les autorités ont eu à faire à des dirigeants qui ont volé les consommateurs et affaibli l'économie. Les remplacer pour une plus longue durée peut être fait à des coûts acceptables pour la collectivité.

En outre, le fait d'instituer des peines plus longues exprime la condamnation par la collectivité des ententes injustifiables. Ce qui pourrait être important aussi par rapport aux autorités chargées des poursuites et aux tribunaux qui risquent parfois de ne pas reconnaître que les ententes sont des infractions graves. Avec des peines plus courtes, le ministère public serait probablement moins enclin à poursuivre l'action en justice et les tribunaux auraient peut-être plus tendance à ne pas envoyer les défendeurs en prison et à prononcer plutôt des peines de substitution. Des peines plus longues peuvent leur envoyer un signal leur signifiant que les ententes doivent être considérées comme une infraction pénale grave.

Certains pays considèrent que l'interdiction d'exercer prononcée à l'encontre de directeurs d'entreprises publiques peut avoir aussi des effets dissuasifs, bien qu'ils reconnaissent que ce type de sanction ne dissuade pas des managers qui n'ont pas de fonctions de direction. Il semble qu'il y ait un large accord pour dire que les sanctions financières infligées aux personnes physiques sont relativement inefficaces à elles seules parce qu'il est difficile d'empêcher une société de rembourser la personne.

*(4) Outre qu'elles relèvent les niveaux de dissuasion, les sanctions infligées à des individus peuvent aussi être une puissante incitation, pour ces individus, à révéler des informations sur les ententes existantes et à coopérer aux enquêtes.*

Les personnes physiques qui détiennent des informations sur des ententes peuvent n'être guère incités à révéler des preuves sur ces ententes s'ils ne risquent pas eux-mêmes des sanctions. La menace de sanctions crédibles contre des individus crée des incitations pour qu'une personne révèle des ententes, incitations qui sont distinctes de celles d'une société. Elles peuvent donc générer une plus forte probabilité que quelqu'un se désolidarise d'une entente et offre de divulguer des informations et de coopérer. C'est alors qu'un programme de clémence devrait s'avérer plus efficace.

En outre, même après qu'une entente ait été divulguée et que l'enquête soit lancée, la menace de sanctions contre des personnes physiques, et la possibilité de les éviter en coopérant, renforcent la position de l'autorité de la concurrence. Plus est grand le nombre de participants ayant des intérêts différents qui peuvent être montés les uns contre les autres, plus sera grande la probabilité que quelqu'un coopère avec l'autorité pendant l'enquête.

Jusqu'à quel point les sanctions individuelles sont une incitation à se présenter aux autorités et à coopérer dépendra de plusieurs facteurs, notamment (i) la capacité d'une seule et même autorité à gérer le programme de clémence et à engager des poursuites pénales, ou, lorsque ces tâches sont confiées à des autorités séparées, à établir une coordination étroite entre elles ; (ii) un risque crédible de sanctions pénales sévères contre des individus ; (iii) un programme de clémence bien développé, totalement transparent et prévisible ; et (iv) la possibilité d'offrir au défendeur une réduction de peine ou l'immunité en échange de sa coopération pendant l'instruction.

*(5) Si une juridiction prévoit des sanctions pénales contre des personnes physiques, plusieurs questions sont à examiner avec attention, notamment (i) la définition exacte de l'infraction pénale ; et (ii) s'il incombe au ministère public d'engager des poursuites pénales, une bonne coordination entre celui-ci et l'autorité de la concurrence pour s'assurer que les sanctions pénales ne sont pas incompatibles avec des programmes de clémence.*

Plusieurs pays qui ont envisagé récemment d'introduire des sanctions pénales contre des personnes physiques étaient partisans d'utiliser une définition séparée de l'infraction d'entente injustifiable, qui est plus étroite que la définition du comportement anticoncurrentiel dans la législation générale de la concurrence. Une telle définition, plus ciblée, permet aux individus potentiellement passibles de sanctions de savoir clairement à l'avance quel comportement leur fait courir des risques. C'est la garantie que leurs droits fondamentaux sont protégés. En outre, cette définition minimise le risque que des sanctions pénales puissent avoir des effets dissuasifs excessifs si le comportement auquel elles s'appliquent n'est pas clairement défini.

D'autres pays, qui obtiennent des condamnations pénales fondées sur les termes généraux de leur législation sur la concurrence, se fondent sur une abondante jurisprudence, sur le pouvoir discrétionnaire du ministère public et, parfois, sur des systèmes d'approbation ou d'exemption pour être sûrs qu'il n'y a aucune incertitude quant à l'ampleur de l'infraction pénale et pour éviter le risque potentiel de dissuasion excessive. Le fait de se fonder sur la définition du comportement anticoncurrentiel, telle qu'elle figure dans la législation générale sur la concurrence, peut cependant freiner l'application du droit pénal s'il n'y a pas reconnaissance de l'entente en tant qu'infraction. Sinon, il se peut que des éléments de violation de la loi sur la concurrence, tels que définition du marché, barrières à l'entrée et effets sur la concurrence, soient à prouver selon les normes du droit pénal, ce qui peut rendre excessivement difficile l'obtention de condamnations pénales dans les tribunaux.

Lorsque le pouvoir d'engager des poursuites pénales contre des ententes a été attribué au ministère public, il y a un risque que l'efficacité des programmes de clémence soit compromise, à moins qu'il n'y ait une bonne coordination entre le ministère public et l'autorité de la concurrence. Les personnes, comme les sociétés, risquent d'être plus réticentes à fournir volontairement des informations sur les ententes si elles craignent l'éventualité de poursuites pénales contre des individus. Des règles claires et transparentes doivent assurer aux personnes qui se présentent aux autorités et sollicitent la clémence qu'elles seront aussi protégées contre des poursuites pénales. La coordination et la compatibilité des programmes de clémence et des sanctions pénales peuvent être particulièrement importantes dans des organisations régionales telles que l'Union européenne pour réduire au minimum le risque que des demandes de clémence présentées à une autorité ne mènent à des poursuites contre les employés ou ex employés du demandeur par d'autres autorités.

*(6) Le droit international ne reconnaît pas le principe de double incrimination qui empêcherait les autorités de différents pays de poursuivre la même personne pour sa participation à la même entente. Néanmoins, lorsque des ententes font l'objet d'instructions dans un contexte multi-juridictionnel, les juridictions peuvent envisager des arrangements pour faire en sorte qu'une seule d'entre elles poursuive la personne.*

Etant donné l'augmentation du nombre de pays qui prévoient des sanctions pénales contre des personnes physiques, les poursuites multiples d'individus dans des affaires d'ententes multi-juridictionnelles deviennent plus probables. Le droit international ne reconnaît pas la double incrimination, ni le principe *ne bis in idem*. En théorie, plusieurs juridictions pourraient donc poursuivre le même individu pour sa participation à une entente internationale. Il faut néanmoins se poser la question de savoir si dans un tel cas les autorités devraient prendre en compte les poursuites engagées contre cet individu dans une autre juridiction. S'il existe quelque chose qui ressemble à une durée « optimale » pour une peine de prison, ou du moins s'il est reconnu que des durées d'emprisonnement plus courtes sont la dissuasion la plus efficace, une accumulation de peines de réclusion prononcées dans plusieurs juridictions ne serait pas souhaitable. De plus, la coordination nécessaire pour éviter les poursuites dans plus d'un pays pourrait réduire les coûts globaux d'application de la loi.

En fait, il apparaît que, dans le passé, les juridictions dotées d'un système de sanctions pénales ont toujours préféré s'arranger avec une autre juridiction qui enquêtait sur la même entente pour s'assurer qu'une seule d'entre elles poursuivrait un individu.

## **BACKGROUND NOTE**

*By the Secretariat*

### **Introduction**

The Competition Committee as well as this Working Party has on various occasions considered the important role of sanctions against individuals in the fight against hard core cartels.

The 1998 Cartel Recommendation already indicated the importance of sanctions against individuals by recommending that Member countries provide for “effective sanctions, of a kind and at a level adequate to deter firms and *individuals* from participating in such cartels,” to ensure that their competition laws effectively halt and deter hard core cartels.<sup>1</sup>

The Competition Committee’s Report on Harm and Sanctions<sup>2</sup> as well as the Second Cartel Report<sup>3</sup> discussed in greater detail the important role of sanctions against individuals as effective deterrent and enforcement mechanism against hard core cartels. The Second Cartel Report explained:

"Whether or not it is legally possible to impose an optimal organisational fine and practically possible to calculate it in a given case, actually imposing it might present problems. The optimal fine could simply be too large for the entity to bear, causing bankruptcy and possible exit from the market, which itself could diminish competition. Thus, there is a place for sanctions against natural persons, placing them at risk individually for their conduct. Such sanctions can complement organisational fines and provide an enhancement to deterrence."

The Second Cartel Report recommended that member countries consider (i) introducing and imposing sanctions against natural persons; and (ii) introducing criminal sanctions in cartel cases where it would be consistent with social and legal norms.

The Second Cartel Report also acknowledged, however, that introducing sanctions against individuals, especially criminal sanctions, may raise questions in member countries:

"The laws of several OECD countries, but less than half, permit the imposition of administrative fines on natural persons for cartel conduct. In a distinct minority of countries cartel conduct is a crime, punishable by imprisonment, as well as by fines. The prospect of spending time in jail can be a powerful deterrent for businesspeople considering entering into a cartel agreement. Not all countries consider that criminalizing cartel conduct is appropriate, however. Such a step may conflict with existing social or legal norms in a jurisdiction. It also has the effect of imposing a higher burden of proof on the prosecutor and it may make it more difficult to acquire evidence in certain circumstances, as additional procedural safeguards apply in criminal investigations."

While acknowledging the importance of sanctions on individuals in the fight against hard core cartels, the above documents also demonstrate that this is an area where the potential for strengthening the law and enforcement practice in most member countries is significant. A survey of the 1998 to 2000 period disclosed that sanctions against natural persons had actually been applied in only a few countries. Even though 13 countries responding to the survey provided for the possibility of fines on individuals, only four, *Australia, Canada, Germany* and the *United States*, had actually imposed them, and only two, *Canada* and the *United States*, had imposed jail sentences.<sup>4</sup>

A number of member countries have in the recent past undertaken reviews of their sanctions policy with a view toward increasing penalties for cartel conduct, and have considered introducing sanctions against individuals, including criminal sanctions. These reviews have addressed a number of interesting questions that may be raised in other countries as well that are considering or will consider introducing or strengthening sanctions against individuals. This paper proposes to include in the roundtable discussion some of the questions raised in these reviews. The following topics for discussion are proposed: (i) what kind of sanctions against individuals can be imposed, and how effective are these sanctions as a deterrent and as an incentive to cooperate during an investigation; (ii) is there something like an "optimal" level of sanctions against individuals; and (iii) what are the specific issues raised by criminal sanctions, including (a) possible objections to criminal sanctions against individuals; (b) what is a proper definition of the criminal offence; (c) if civil/administrative and criminal sanctions co-exist, what criteria can be applied to decide which one to apply; and (d) could criminal prosecutions of the same individual in more than one jurisdiction raise concerns.

## **I. The Role of Sanctions on Individuals in Hard Core Cartel Cases**

Individual sanctions can be important element in enforcing laws against hard core cartels. Some have concluded that sanctions against individuals are the most effective element in the arsenal of various enforcement tools an agency may have available in the fight against hard core cartels.<sup>5</sup> Properly implemented, they can mean the difference between viewing cartels on a cost/benefit basis as a reasonable risk-taking exercise and serious deterrence that prevents unlawful cartel arrangements. In addition to deterring unlawful conduct, sanctions against individuals also can be a useful tool during the investigation of a cartel.

### **A. Deterrence**

There is a case for deterring not only corporations, but also individuals from unlawful conduct. Hard core cartels do not occur in the abstract, but involve individuals who act on behalf of a corporation. Thus, as agents of corporations commit violations of competition law, it makes sense to prevent them from engaging in unlawful conduct by threatening them directly with sanctions and to impose such sanctions if they violate the law.

The risk of sanctions also may strengthen the incentive of individuals to resist corporate pressure to engage in unlawful activity. Even if the risk of participating in a cartel appears to be acceptable to a corporation in light of the potential gains and the probability of fines, the risk assessment on the part of the individual executive may be very different if she takes her own, personal risks into account, including the risk of spending time in jail. Moreover, a corporation's risk/benefit calculation may be affected when it includes the risks to its own executives, and the cost of losing their services, into its analysis.

#### *1. Complementing Corporate Sanctions*

The case for sanctions against individuals would be much weaker if one could assume that corporate sanctions should be sufficient to (indirectly) prevent individuals from breaking the law. One could argue, for example, that imposing fines on corporations should be a sufficient incentive for a corporation to supervise its agents in order to prevent them from acting unlawfully and from putting the corporation at the risk of being fined for participating in an unlawful cartel.<sup>6</sup>

For several reasons, however, corporate supervision might not always work as effectively as sanctions directly imposed on the agents of a corporation: First, to provide an effective incentive to



implement the necessary supervision of its agents, potential corporate fines would have to be an effective deterrent. It is commonly assumed, however, that corporate fines rarely reach a level that would maximize their deterrent effect.<sup>7</sup> Thus, the corporation may have insufficient incentive to prevent its agents from entering into an unlawful cartel arrangement, if – despite the risk of sanctions – the corporation expects a cartel to be profitable.<sup>8</sup>

The ability of shareholders to effectively control the management is also questionable if shares are widely dispersed. The financial impact of a corporate fine on individual shareholders may be too small to provide sufficient incentive for them to more effectively control management.<sup>9</sup> Last, there are questions whether a corporation will always have the means to deter its agents from unlawful conduct. For example, a manager of a division that has been underperforming for a while may already fear for his position. The threat of dismissal, which is a corporation's most effective sanction against employees engaged in unlawful conduct, may not be much of a threat for him.

## 2. *The Effectiveness of Various Sanctions against Individuals*

The Second Cartel Report states in general terms that sanctions against individuals are an important complement to corporate fines. However, a variety of factors will determine whether any given sanction in fact has deterrent effects and therefore is an effective complement, including whether (i) there is a reasonable probability that unlawful conduct will be detected; (ii) the potential sanction is perceived to be severe; and (iii) an individual believes with some degree of certainty that the sanction will be imposed.

The prospect of spending time in jail will be the most powerful deterrent for business executives considering entering into a cartel agreement. It appears less certain that other sanctions against individuals have strong deterrent effects as well, including, for example, (criminal and non-criminal) fines, barring individuals from serving as an officer of a public company, loss of licenses required to do business, community service, and requirements to publish the fact of a violation of competition laws.<sup>10</sup>

The effectiveness of *fines* might be limited by two factors: First, it may not be possible to impose fines that are sufficiently high to effectively deter individuals from participating in cartels for reasons similar to those which suggest that corporate fines alone are not effective deterrents. Determining the parameters of an “optimal” fine typically will be even more difficult in the case of an individual than in the case of a corporation.<sup>11</sup> And if it is possible to make reasonable assumptions about an “optimal” fine, such a fine might exceed statutory ceilings and/or the individual's ability to pay.

Second, the effectiveness of fines will depend on whether an individual can expect that she - in whatever form - will be reimbursed by the corporation. Reimbursement schemes may be lawful in some countries as their prohibition may be considered an unjustified interference with internal corporate affairs.<sup>12</sup> But even if reimbursement is outlawed, a corporation might find some way of reducing or eliminating the risk to its executives, either by paying in advance a premium to compensate for the risk or by reimbursing for fines that actually were imposed on individuals through pay increases or other ways not prohibited by law.

Questions also have been raised about the effectiveness of other sanctions against individuals. A (temporary or indefinite) prohibition from serving as an officer of a public corporation, for example, potentially could be more “effective” in the sense that it will be more difficult to shift the cost of the sanction from the individual to a corporation.<sup>13</sup> It cannot be excluded, however, that other, informal arrangements can be found that enable an individual to work for the corporation. And even if prohibitions against such arrangements are effective, the question remains whether the risk of losing the ability to serve as a director of a public company alone would be enough to deter an individual from participating in a

cartel. Along the same lines, it can be questioned whether other individual sanctions, such as the creation of negative publicity, for example, through mandatory advertisement in journals, or community service, can be an effective deterrent.

On the other hand, even if it is uncertain whether sanctions other than imprisonment can effectively deter individuals from entering in cartel arrangements if imposed in isolation, a combination of them might create a sufficiently strong deterrent. The deterrent effect of a specific sanction also may depend on its criminal or civil/administrative nature. Criminal convictions represent a condemnation by society of certain conduct in a way that the imposition of a civil penalty cannot. The fact that certain violations of the law are characterized as criminal offence may already be sufficient for individuals to comply with the law and resist attempts by its corporation to engage in unlawful cartel activity. And the prospect of having a criminal record, even if not related to jail time, might sufficiently deter individuals from participating in an unlawful cartel arrangement. Although it is difficult to determine how substantial these losses can be, they might be substantial and therefore create an incentive that might be a much stronger motivation for compliance than the incentive created by civil sanctions.<sup>14</sup>

The following questions could be discussed:

1. *What sanctions in addition to those mentioned above in paragraph 15 can be imposed on individuals who participate in a hard core cartel?*
2. *What are the experiences concerning the effectiveness of various sanctions? Are there ways to assess the effectiveness of sanctions, including combinations of sanctions? How effective are fines imposed on individuals if there is no prohibition against reimbursing an individual? On the other hand, can prohibitions against reimbursement be effective?*

#### ***B. Increased Effectiveness of Investigations***

In cases where the threat of sanctions was not a sufficient incentive for individuals to prevent their corporation from engaging in an unlawful cartel, the ability to impose sanctions on individuals nevertheless can be a powerful tool for a competition authority in the investigation of cartels.

Individuals have information about cartels, but in the absence of a risk of sanctions against them, they will have little incentive to come forward to reveal evidence. Threatening credible sanctions directly against them creates such incentives that are separate from the incentives of a corporation, thus creating a greater likelihood that someone will defect and offer co-operation. As a result, a leniency programs (and other programs that promise reduced sanctions in exchange for co-operation) should become more effective.

In addition, even after a cartel has been disclosed and the investigation is under way, the threat of sanctions against individuals, and the ability to avoid them through co-operation, will strengthen a competition authority's position. The larger number of participants with different interests that can be played off against each other, the greater the likelihood that someone will come forward and not only disclose the existence of a cartel, but also cooperate with the authority during an ongoing investigation.

The important role of sanctions against individuals in the United States Department of Justice's ("DOJ") fight against hard core cartels has been widely recognized. For example, a 2001 Report to the UK Office of Fair Trading published in connection with the introduction of criminal sanctions against individuals in the United Kingdom acknowledged that despite the European Commission's successful anti-cartel enforcement some distance between the EC and US leniency programs remained: "Under EC law, unlike in the US, participation in a cartel is not a criminal offence and hence the incentive for individuals

to inform on other cartel participants in return for immunity from prosecution is lessened under circumstances in which there is no possibility of facing the imposition of custodial sentences."<sup>15</sup> The same Report also more explicitly acknowledges that the DOJ's ability to selectively enter into plea bargaining agreements is the key to success of the US leniency program.<sup>16</sup> Commentators have referred to the dog-eat-dog environment that DOJ has created, which considerably increases the government's leverage and ability to obtain co-operation by individuals and corporations.

U.S. law enforcement institutions and procedures may be uniquely suited for such a program, however, and it may be difficult to replicate it elsewhere. For example, because DOJ administers the leniency program and is prosecuting authority, it does not have to reach an arrangement with a public prosecutor or another prosecuting authority to implement a leniency program. Moreover, the credible risk of severe criminal sentences against individuals, a well-developed, highly transparent leniency program, and the ability to offer defendants lesser sentences or immunity in exchange for their co-operation during an investigation, all appear to contribute to the success of the program.

The need to coordinate a leniency program and criminal sanctions will raise more difficult issues in systems where criminal prosecution is the responsibility of another authority which technically is not bound by decision and policies of the competition authority. In such a system the competition authority might not have the ability to guarantee immunity from prosecution for being the first to disclose an unlawful cartel. In addition, a competition authority may not have the option to offer a defendant a lesser sentence or immunity in exchange for co-operation and, along the same lines, may not have the ability to obtain sentences, including imprisonment, without the need to go through a full trial and produce the necessary evidence to obtain a long prison term and/or stiff fine.<sup>17</sup> For example, the 2001 UK Report concluded that in the absence of a plea bargaining system in the UK the OFT would face the difficulty of being able to provide informants sufficient comfort that they would not face criminal prosecution and/or custodial sentences in exchange for their co-operation.<sup>18</sup>

The following questions could be discussed:

3. *What are the elements that maximize the effectiveness of sanctions against individual during investigations as an incentive to cooperate with authorities?*
4. *If the authority to implement a leniency program and the authority to prosecute criminal cases are divided, what can be done to limit or eliminate the risk that the discretion of public prosecutors to pursue a case could undermine certainty for defendants that they will not be prosecuted if they come forward first?*
5. *In countries in which plea bargaining does not exist, are there mechanisms that can be developed to assure that the competition authority is able to obtain co-operation from individuals in exchange for a promise of immunity or a lesser sentence if neither prosecutors nor courts are bound by such arrangements?*

## **II. Is there an "Optimal" Level of Sanctions against Individuals?**

It is commonly accepted that pecuniary fines imposed on corporations should take into account the unlawful gains from the participation in a cartel as well as the probability that unlawful cartels are being detected in order to be an "optimal" deterrent. In principle the same question about "optimal" fines can be asked for various types of individual sanctions as well. In this case, however, it will be even more difficult than in the case of a corporate defendant to determine an "optimal" level of a fine.

One could consider whether, as in the case of corporations, fines against individuals would be an optimal deterrent if they take into account the unlawful gains of an individual related to the participation in an unlawful cartel, multiplied by the likelihood that cartels are detected.<sup>19</sup> However, it will typically be impossible to determine how much an individual gained from cartel activity. Any gains related to job promotion or higher performance-based salaries might not result only from the unlawful cartel activity of a corporation. In the alternative, taking away a “sufficient” amount of an individual’s net worth and earning power may be considered an “optimal” deterrent. But then, again, the question arises how much of a fine would be “sufficient.”

In jurisdictions that provide for the possibility of imprisonment, it can be asked whether there is something like an "optimal" jail sentence or, at least, whether criteria exist to determine what length of prison term most cost effectively serves the goals of deterrence and increased co-operation. Some have suggested that the optimal prison term should be rather short, in particular because after a relatively short time the marginal cost to society of additional prison time might exceed the gains from additional deterrence. This view is based on the assumption that that even short term prison sentences are viewed by business executives as extremely undesirable and costly, and that the stigma and reputational losses associated with a criminal conviction to serve time in jail would exist for any non-trivial time in jail. The marginal deterrent effect of prison time might remain high only for a relatively short time, however, as an individual might get used to long prison terms and prospects of being able to enjoy a comfortable life after prison diminish. On the other hand, the marginal cost of imprisonment probably would slightly increase over time.<sup>20</sup> Another commentator suggested that it was "more important that the potential defendant knows with some certainty that she was likely to be sentenced to jail than that long sentences be imposed."<sup>21</sup> This also appears to suggest that even short sentences can be an effective deterrent, provided there is a credible threat that they actually can be imposed.

On the other hand, there also is a case for longer statutory sentences. Having a longer statutory sentence might send a signal to prosecutors and courts that cartels should be considered a serious criminal violation. With shorter statutory sentences, courts might be more inclined to let defendants off the hook and impose alternative sentences instead.

The following questions could be discussed:

6. *Is there a way of determining what an "optimal" level of fines is that can be imposed on individuals in hard core cartel cases?*
7. *What are the opinions concerning the above argument in favor of shorter, rather than lengthy prison sentences? What parameters determine the statutory term of imprisonment and the prison terms actually imposed on defendants?*

### **III. Issues Specifically Related to Criminal Sanctions against Individuals**

#### **A. Concerns Raised in Connection with Criminal Sanctions**

One commentator, after analysing the effects of sanctions against individuals on anti-cartel enforcement in the United States, opined with respect to other countries "the case of individual sanctions appears to be relatively strong, which makes the reluctance [to impose them] so particularly puzzling."<sup>22</sup>

However, despite the obvious advantages of criminal sanctions in the deterrence and prosecution of cartels, there can be a number of reasons why countries are reluctant to provide for sanctions against individuals in cartel cases, and in particular to criminalize participation in cartels. A country might

consider, for example, that criminal sanctions are not compatible with its values and social norms, that imprisonment imposes significant costs on society and that non-criminal sanctions would be more cost effective, and/or that criminal sanctions actually might decrease the level of enforcement.

### 1. *Consistency with Social and Legal Norms*

A country might decide against introducing criminal sanctions against individuals because hard core cartels are not considered sufficiently reprehensible to justify this kind of punishment. It could be that this assessment applies generally to white collar-type offences, or specifically to antitrust violations. If a country provides for criminal sanction in other "white collar" cases, such as tax fraud or securities violations, but not with respect to cartels, the decision might be based on the belief that in connection with hard core cartels – unlike tax fraud or certain securities crimes - individuals rarely enrich themselves and that their conduct benefits primarily the corporation (which accordingly should be subject to fines) rather than its directors.

For perhaps similar reasons, a country also could decide to criminalize only selected categories of hard core cartels, especially cases of bid rigging, but not others, or at least to impose harsher sanctions on bid rigging offenders than other participants in cartels. This decision could be based on the assumption that cartels that affect public institutions (and public finances) are more reprehensible than other cartels and therefore should be subject to stiffer sanctions.

### 2. *Costs of Criminal Sanctions, in Particular Imprisonment*

Another concern related to the criminalisation of cartels could be that criminal sanctions that include imprisonment can be an expensive form of punishment for a society and that other sanctions can be more cost effective. According to some economists, for example, a social cost/benefit analysis suggests that only fines (preferably civil fines) should be imposed on individual defendants, provided the defendant is able to pay a fine that has the same deterrent effect as the threat of imprisonment. In principle it would be feasible to determine an "exchange rate" to arrive at an "optimal" (pecuniary) fine has the same deterrent effect as a prison sentence.<sup>23</sup>

Others have rejected this line of reasoning on the following grounds: First, even if it were possible to determine an "optimal fine," the fine would have to be extremely high to have a deterrent effect equivalent to imprisonment, and typically it would be beyond the defendant's ability to pay. Second, "optimal fine" models should not be applied to hard core cartels. They assume that certain conduct, even if unlawful, can be efficient and society would be better off by taxing the conduct in the form of fines rather than prohibiting it. This assumption, however, cannot be applied to hard core cartels which will virtually never be beneficial for society and therefore should never be considered acceptable conduct that can be paid off by paying a fine.<sup>24</sup>

### 3. *Can Criminalisation Make Law Enforcement Less Effective?*

Concerns also have been raised that criminalising anti-cartel laws could make anti-cartel enforcement less effective. This was the conclusion of the report published when New Zealand reviewed its system of sanctions against cartels. The Report concluded that higher standards were likely to lead to *fewer* prosecutions and a reduction in the number of successful cases.<sup>25</sup> Obtaining a conviction could be more difficult in a criminal system in particular because of higher standards of evidence and the right against self-incrimination. For example, the right against self-incrimination will make it more difficult to obtain evidence from individuals involved in a cartel, unless they are willing to co-operate.

As the Harm and Sanctions Report observed, criminalisation of cartel law can therefore have opposite effects: "criminalisation of cartel conduct for individuals makes voluntary co-operation more possible, because of the threat of personal sanctions, but also makes it more necessary, because a right against self-incrimination attaches."<sup>26</sup> This suggests that criminal sanctions against individuals could be most effective in systems where the government has a broad range of tools available to make voluntary co-operation an especially attractive option for at least a few member of an unlawful cartel.

Criminalisation might limit effective anti-cartel enforcement also if a competition authority finds it difficult to persuade prosecutors to investigate and bring cases, and judges to impose the criminal sanctions provided for in the law. Prosecutors might not consider white collar crimes, and hard core cartel case in particular, a high priority in their work, compared with violent crimes and crimes against property. Along the same lines, judges might be reluctant to impose criminal sanctions in cases that in their view do not involve a sufficient degree of "criminality." Court and prosecutors might be confronted with defendants who are considered respectable business people, "pillars of the community," and/or supporters of good causes who pose no physical danger.

The threat of criminal sentences also might make the detection and prosecution of cartels more difficult because they might make individuals more careful, causing them to increase their efforts to hide cartels. In addition, individuals as well as companies might be even more reluctant to provide information in response to requests given the possibility of criminal procedures against individuals.<sup>27</sup>

The following questions could be discussed:

8. *In countries that have considered or are considering introducing criminal sanctions against individuals, or have changed their system of criminal sanctions, have there been any discussions concerning the appropriateness of criminal sanctions for cartels and their consistency with social norms? What arguments were raised in this context? If criminal sanctions exist in other "white collar" areas, but not in cartel cases, what explains the differences?*
9. *If differences exist between bid rigging cases and other forms of hard core cartels in terms of sanctions that can be imposed on individuals, what explains those differences?*
10. *Have considerations about the cost-effectiveness of criminal fines such as the ones discussed above played a role in a country's discussion whether to introduce criminal sanctions against individuals?*
11. *Is there any evidence that criminal sanctions actually can decrease the level of anti-cartel enforcement for the reasons stated above, e.g., because of higher standards of evidence and/or the right against self incrimination?*
12. *In some countries, it may be (or may have been) difficult to "persuade" courts to actually impose criminal sanctions and prosecutors to bring more cases. What can be/has been done to "encourage" courts to impose sanctions more frequently and/or to impose tougher sanctions, and/or prosecutors to bring more cases and demand higher sanctions?*

## **B. Definition of a Criminal Offence**

In several countries that in the recent past considered introducing criminal sanctions against individuals in cartel cases questions were raised about the proper definition of an offence that would be subject to criminal punishment. In particular, it was discussed whether criminal sanctions against cartel participants should be imposed within the framework of the general competition laws or whether a separate

offence should be more narrowly defined. Defining the criminal offence in some detail was considered necessary or at least advisable for several reasons. First, concerns were expressed that criminal sanctions might have excessive deterrence if the conduct to which they apply is not clearly defined. Co-operation between competitors can be beneficial in many arrangements and the line between per-se prohibited conduct (including hard core cartels) and permissible conduct may not always be clear to those operating a business. In these circumstances, the threat of criminal sanctions might deter pro-competitive and innovative arrangements if acts to which criminal sanctions apply were not clearly defined.<sup>28</sup>

A separate, clear definition of acts that are subject to criminal sanctions also may be required to ensure that those potentially subject to sanctions can *ex ante* clearly understand what conduct would put them at risk. A defendant could argue that a criminal conviction would be unlawful and contravene fundamental rights if the unlawful conduct has not been defined with sufficient precision.

There could be various solutions to the above concerns. First, a country could define the culpable act(s) explicitly and more narrowly, for example by listing various types of hard core cartel activity in the definition of the offence, either as an exhaustive list or as an illustration of possible criminal conduct. For example, the new law in the United Kingdom defines the criminal offence in a provision that is separate from the general (national and European) competition provisions and specifically lists various types of conduct that are subject to criminal sanctions. The United Kingdom also decided to introduce a "dishonesty" requirement as part of the definition of the criminal offence, presumably to require that only serious criminal conduct can be subject to criminal sanctions.

Other jurisdictions have been able to obtain criminal convictions based on the general language in the antitrust statute apparently without facing any of the above problems. Thus, it appears possible to rely on case law and prosecutorial discretion to ensure that criminal cases are brought only in clearly defined circumstances that are considered per-se unlawful and to refrain from criminal proceedings in cases that raise questions because, for example, there is no clear evidence of the existence of an agreement or of the necessary state of mind, there are innocent/pro-competitive reasons for the agreement, and for other reasons it is not clear whether the conduct in question would be considered per-se unlawful.

The following question could be discussed:

13. *How have countries addressed concerns related to the definition of hard core cartels as a criminal offence? If the general language in an antitrust statute is used to seek criminal sanctions, how can concerns related to over-deterrence and necessary legal certainty be addressed?*

### **C. *Allocating Responsibility for Prosecuting a Criminal Case***

There are also questions related to the institutional design, in particular whether a competition authority should be in charge of pursuing criminal cases or whether criminal cases should be allocated to a public prosecutor or some other prosecuting authority. There are several reasons to authorize a competition authority to pursue criminal cases. The competition authority may be best suited to investigate a cartel case based on its competition law expertise. There also would be less concern whether a public prosecutor will always be motivated to focus on cartels when she is burdened with cases concerning violent crimes and/or whether she will demand sufficient sanctions. There will be no need to coordinate leniency programs and decisions to prosecute between two separate authorities.<sup>29</sup> Last, there might be concerns that a government could instruct a public prosecutor not to pursue a case, whereas it might not have such an authority over an independent competition agency.

On the other hand, the competition agency will not always have expertise and resources to bring criminal cases. It may not always be cost effective to build up staff for prosecution of criminal cases, especially if it is expected that there will not be many such cases. Using an outside agency or public prosecutor also may be considered useful in terms of checks and balances. If two institutions are involved, and it is the competition authority's decision whether a case should be pursued under criminal statute, the need to convince the public prosecutor to pursue the case may limit criminal cases to those where criminal prosecution is really warranted.

The following question could be discussed:

14. *What are the advantages and disadvantages of having two separate authorities involved in hard core cartel cases where criminal sanctions are being sought? If there are two separate authorities, how can the two coordinate their tasks? In particular, how can the problem of effective cooperation be addressed most effectively to ensure the effectiveness of leniency programs?*

#### **D. Sanctions under Concurrent Criminal and Civil Statutes**

##### *1. Decisions whether to Prosecute under a Criminal Statute*

In some jurisdictions, hard core cartels might qualify as criminal as well as civil offence, and the competition authority has discretion to seek a prosecution under a criminal statute or investigate an alleged cartel under a civil statute. Even in jurisdictions where hard core cartels are always investigated as criminal offence, the authority presumably has power to charge a less serious, civil offence in borderline cases. This could be the case, for example, where the amount of affected commerce is small, it appears unlikely that sufficient evidence for a criminal conviction can be obtained, or it is not entirely clear whether the conduct under investigation clearly is considered per se lawful or might fall in a grey area where the per se categorization is less clear.

Especially where an authority has full discretion to pursue an investigation under either statute, a number of questions arise. First, there will be a question what criteria the authority can use to decide whether to seek a criminal conviction. Criteria could include the amount of commerce affected by a cartel, the cartel's duration, and the role of a defendant in a cartel. The amount of available evidence required to meet increased evidentiary requirements under criminal law, including proof of intent, also might be an important factor. However, the decision whether to seek a criminal proceeding presumably would have to be made at an early stage of a proceeding, and it might be unclear at this point how much evidence will be discovered. Thus, such decisions presumably have to be made based on limited evidence.

Second, if the competition authority itself can bring only civil cases, but not criminal cases, there must be early coordination between a prosecutor and the competition authority. The possibility that the competition authority can initiate a civil investigation may make a prosecutor more reluctant to bring a criminal action. This suggests that the two authorities may have to find an arrangement to decide under which statute to proceed.

On the other hand, private parties might be concerned that a competition authority's discretion to pursue a case under either a criminal or a civil statute might confer inappropriate leverage on the authority, using the threat of criminal proceedings to obtain evidence where it had no intention to bring a criminal case.<sup>30</sup>

The following question could be discussed:



15. *What are the factors used to determine whether criminal sanctions should be sought in a specific hard core cartel case? If an authority has the choice between criminal and civil sanctions, when and how can it decide which sanctions it should seek?*

2. *Obtaining and Using Evidence*

Jurisdictions in which civil and criminal proceedings are possible in the same cartel case (for example, by permitting the authority to bring a civil case against a corporation while a criminal case can be brought against its directors) also face questions about how evidence obtained in a criminal procedure can be used in a civil/administrative procedure and *vice versa*. For example, statements that can be used in civil procedures may be inadmissible in criminal procedures because of the right against self-incrimination, whereas documents obtained through criminal enforcement powers may not be admissible in civil trials. Evidentiary admissibility rules must ensure that evidence obtained in one procedure cannot be misused in the other.

The following question could be discussed:

16. *What limitations exist concerning the use of evidence obtained in a criminal procedure in a civil trial and vice versa? Can such limitations affect criminal proceedings against individuals?*

**E. *International Investigations and Double Jeopardy***

The principle of double jeopardy would - in very general terms - prevent a single jurisdiction from subjecting an individual twice to criminal prosecution for participation in the same cartel. There appears to be no similar principle in public international law that would prohibit authorities in different countries from prosecuting the same person on the basis of the same facts.<sup>31</sup> A question nevertheless can be asked whether authorities should take prosecutions of an individual in other jurisdictions into account when they consider bringing criminal charges against the same individual for participation in a cartel. For example, if it were accepted that there is something like an “optimal” term of a prison sentence, or at least that in principle shorter prison terms are the most efficient deterrent,<sup>32</sup> there could be a question whether an accumulation of prison terms in several jurisdictions would be desirable. Coordination to avoid prosecutions in more than one country also could reduce overall enforcement costs.

Given that in the past criminal sanctions have been imposed on individuals only in a small number of countries, there was only a small probability that in an investigation of an international cartel by several competition authorities the same individual could be subject to criminal sanctions in more than one country. Especially in cartels affecting Canada and the United States, however, such a situation may already have come up, or may at least have been discussed between the competition authorities in both countries. As more countries consider introducing criminal sanctions against individuals, it is conceivable that situations will arise more frequently where two or more authorities consider bringing criminal charges against the same person in connection with the same cartel.

The following question could be discussed:

17. *If two or more countries prosecute a cartel under their criminal statutes, could there be concerns about prosecuting the same individual based on the same facts more than once? If so, how could these concerns be addressed?*

## NOTES

- 1 Council Recommendation Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL. (emphasis added).
- 2 Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws, DAFFE/COMP(2002)7 (hereinafter Harm and Sanctions Report).
- 3 Second Report by the Competition Committee On Effective Action Against Hard Core Cartels, DAFFE/COMP (2003)2.
- 4 Israel also has in the recent past imposed jail sentences on participants in cartels. *See* most recently Annual Report for 2002, DAFFE/COMP(2003)11.
- 5 Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693, 713 (2001).
- 6 Such a system of vicarious liability arguably could be more efficient than a system that relies on imposing sanctions on individuals. *See, e.g.*, Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporation*, 69 Geo. Wash. L. Rev. 715, 737 (2001).
- 7 *See, e.g.*, Harm and Sanctions Report, *supra* note 15.
- 8 The costs of supervision (including indirect costs if an effective supervision mechanism becomes so intrusive that it creates distrust among employees) may also lower a corporation's incentive to supervise management and employees.
- 9 Further, there is the possibility that management will have left a firm when the firm's participation in an unlawful cartel is detected.
- 10 One commentator, for example, opined that only prison sanctions would have sufficiently strong deterrent effects. Wouter P.J. Wils, *Does the Effective Enforcement of Articles 81 and 82 Require not only Fines on Undertakings but also Individual Penalties, in particular Imprisonment?*, in *Effective Private Enforcement of EC Antitrust Law* (Ehlerman and Atanaiu eds. 2001)
- 11 The issue of “optimal” sanctions is more fully discussed *infra*, at 19.
- 12 The New Zealand Commerce Commission, for example, did not support a proposal to prohibit reimbursements for this reason. *See*, Optimal Sanctions in Cartel Cases, Report by New Zealand on the Review of the Penalties, Remedies and Court Processes under the Commerce Act 1986, DAFFE/CLP/WP3(2001)14, at 21.
- 13 In addition, because barring someone from serving as an officer functionally is very similar to a fine (based on the difference between the future income in the occupation from which a defendant is barred and the best alternative occupation), a corporation also might stipulate to compensate an individual for any lost income related to such a sanction.

- 14 New Zealand Report, *supra* note 12, at 20.
- 15 Anthony Hammond and Roy Penrose, Proposed criminalisation of cartels in the UK (2001), at 29.
- 16 *Id.*, at 30.
- 17 In the United States, all criminal sentences must be imposed by a court, but plea bargaining makes it possible to do so without the need for a full trial or detailed evidentiary hearing.
- 18 Hammond and Penrose, *supra* note 15, at 30. It appears that in the United Kingdom the OFT and the authorities responsible for prosecuting criminal antitrust offenses have found arrangements that enables the OFT to offer a potential informant immunity from prosecution under its leniency program with a high degree of certainty.
- 19 Even though a corporation will be the principal beneficiary of an unlawful cartel, individual executives also might directly benefit from unlawful cartels in the form of higher remuneration and better careers, especially if remuneration is tied to the corporations financial performance. Sometimes direct advantages from cartel activities also can be substantial. See Scott Hammond, *Lessons common to detecting and deterring cartel activity*, in *Fighting Cartels – why and how*, Proceedings of the 3rd Nordic Competition Policy Conference on Fighting Cartels (2001), at 193.
- 20 Gregory J. Werden & Marilyn J. Simon, *Why price fixers should go to jail*, 1987 *The Antitrust Bulletin* 917. They concede, however, that it would be difficult to determine the marginal cost /benefit relationship in reality, and it might well be that the marginal benefits will always exceed the marginal costs, which would support longer rather than shorter prison sentences.
- 21 Baker, *supra* note 5, at 706.
- 22 Baker, *supra* note 5, at 695.
- 23 Richard A. Posner, *Optimal Sentences for White Collar Criminals*, 17 *Am. Crim. L. Rev.* 409 (1980). Posner also argues that ultimately sanctions against individuals should be avoided because so long as sanctions can be imposed on corporations and these sanctions are sufficiently high, the corporations will take effective measures to monitor its agents.
- 24 Werden & Simon, *supra* note 20.
- 25 New Zealand Report, *supra* note 12, at 20.
- 26 Harm and Sanctions Report, at ¶16.
- 27 Julian Joshua, *A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic? A Close Look at the United Kingdom Proposals to Criminalise Hardcore Cartel Conduct*, 23 *ECLR* 231, 237 (2002).
- 28 For example, prior to introducing criminal sanctions in the UK, there was considerable discussion concerning the appropriate definition of the new criminal offence to ensure it clearly covers only hard core restrictions. See, e.g., DTI, *White Paper: A World Class Competition Regime* (2001), at ¶ 7.22; Hammond & Penrose, *supra* note 15, at 10.
- 29 See *supra* at 18.
- 30 Review of the Trade Practices Act 1974 (Dawson Report), Chapter 10, Penalties and other remedies, at 156 (2003).

31        *See, e.g.*, Case T-224/00, *Archer Daniels Midland Company v. Commission*, Court of First Instance of the European Communities, July 9, 2003, at ¶92. The Court also emphasized that different rules apply within the European Union.

32        *See supra*, at 19.

## NOTE DE RÉFÉRENCE

*Par le Secrétariat*

### Introduction

Le Comité de la Concurrence, ainsi que ce Groupe de Travail, a étudié à différentes occasions l'importance du rôle des sanctions contre des personnes physiques, dans la lutte contre les ententes injustifiables.

La Recommandation sur les Ententes de 1998 soulignait déjà l'importance de sanctions contre des personnes physiques, en recommandant que les Pays membres instituent des "sanctions efficaces, d'une nature et d'une gravité appropriées pour dissuader les entreprises et les *personnes physiques* de participer à ces ententes," afin de garantir que leurs lois sur la concurrence soient efficaces pour faire barrage aux ententes injustifiables et dissuader d'y recourir.<sup>1</sup>

Le Rapport du Comité de la Concurrence sur l'Impact des Ententes et les Sanctions<sup>2</sup> ainsi que le Second Rapport sur les Ententes<sup>3</sup> ont traité en détail du rôle important des sanctions contre les personnes physiques, considérées comme un mécanisme efficace de dissuasion et de mise en œuvre de la législation sur les ententes injustifiables. Le Second Rapport sur les Ententes expliquait :

" Qu'il soit ou non légalement possible d'infliger une amende optimale à l'entreprise et pratiquement possible de la calculer dans un cas donné, le fait d'infliger réellement cette amende pourrait poser des problèmes. L'amende optimale pourrait simplement être trop lourde à supporter pour l'entreprise, ce qui entraînerait sa faillite et sa sortie possible du marché, et, dès lors, réduirait la concurrence. On pourrait donc envisager des sanctions contre des personnes physiques, qui leur feraient encourir un risque individuel au titre de leur comportement. Ces sanctions pourraient compléter les amendes infligées à l'entreprise et accroître l'effet dissuasif.."

Le Second Rapport sur les Ententes recommandait que les Pays membres envisagent (i) d'introduire et d'imposer des sanctions à l'encontre des personnes physiques, et (ii) d'introduire des sanctions pénales dans les affaires d'ententes dans les pays où cela sera compatible avec des normes sociales et légales.

Le Second Rapport sur les Ententes reconnaissait également, toutefois, que l'introduction de sanctions contre des personnes physiques, et plus particulièrement de sanctions pénales, pouvait poser des difficultés dans certains Pays membres :

" Les lois de plusieurs Pays membres de l'OCDE permettent, pour moins de la moitié d'entre eux, d'infliger des amendes administratives à des personnes physiques pour comportement d'entente. Dans une petite minorité de pays, le comportement d'entente constitue un délit pénal, passible de peines d'emprisonnement et d'amende. La perspective d'être emprisonné peut fortement dissuader les collaborateurs des entreprises de conclure un accord d'entente. Cependant, les pays n'envisagent pas tous d'incriminer le comportement d'entente. Cette mesure pourrait entrer en conflit avec les normes sociales ou légales en vigueur dans un ressort juridictionnel donné. Elle pourrait avoir pour effet d'alourdir la charge de la preuve incombant au ministère public et rendre plus difficile de réunir des preuves dans certaines circonstances, car des sauvegardes procédurales additionnelles s'appliquent en matière pénale. "

Tout en reconnaissant l'importance de sanctions contre des personnes physiques dans la lutte contre les ententes injustifiables, les documents précités démontrent également que la plupart des Pays membres ont encore beaucoup à faire pour renforcer leur législation et leurs pratiques de mise en œuvre de celle-ci. Une enquête réalisée entre 1998 et 2000 a révélé que des sanctions n'ont été infligées à des personnes physiques que dans un petit nombre de pays. Bien que 13 pays ayant participé à l'enquête prévoient la possibilité d'infliger des amendes à des personnes physiques, seuls quatre pays, à savoir l'*Australie*, le *Canada*, l'*Allemagne* et les *Etats-Unis*, ont effectivement infligé ces amendes pendant la période couverte par l'enquête, et seuls deux pays, à savoir le *Canada* et les *Etats-Unis*, ont prononcé des peines d'emprisonnement.<sup>4</sup>

Plusieurs Pays membres ont récemment entrepris des études de leur arsenal de sanctions en vue d'aggraver les sanctions réprimant les comportements d'entente, et ont envisagé d'introduire des sanctions contre des personnes physiques, y compris des sanctions pénales. Ces études ont traité plusieurs questions intéressantes qui peuvent également se poser dans d'autres pays qui envisagent, ou envisageront de renforcer les sanctions contre les personnes physiques. Ce document propose d'inclure dans les débats de la Table Ronde certaines des questions soulevées dans ces études. Les questions suivantes sont proposées pour discussion : (i) quel type de sanctions peut-on infliger à des personnes physiques, et quelle est l'efficacité de ces sanctions en termes d'effet dissuasif et d'incitation à coopérer pendant une enquête ; (ii) existe-t-il un certain niveau "optimal" de sanctions contre des personnes physiques ; et (iii) quelles sont les questions spécifiques posées par les sanctions pénales, y compris (a) les objections que peuvent soulever les sanctions pénales contre des personnes physiques ; (b) la définition appropriée de l'infraction pénale ; (c) si des sanctions civiles/administratives et pénales coexistent, quels critères peut-on appliquer pour décider des sanctions qui doivent s'appliquer, et (d) quels problèmes pourrait poser l'engagement de poursuites pénales à l'encontre de la même personne physique dans plusieurs ressorts juridictionnels.

## **I. Le rôle des sanctions infligées aux personnes physiques dans les affaires d'ententes injustifiables**

L'existence de sanctions contre les personnes physiques pourrait être un élément important dans la mise en œuvre des lois réprimant les ententes injustifiables. Certains observateurs sont parvenus à la conclusion que les sanctions contre des personnes physiques sont l'élément le plus efficace dans l'arsenal des moyens de répression disponibles pour lutter contre les ententes injustifiables.<sup>5</sup> Convenablement appliquées, elles peuvent faire toute la différence entre le fait de voir les ententes comme un exercice de prise de risque raisonnable, sur une base coût/bénéfice, et une dissuasion sérieuse qui empêche les accords d'entente illicites. Les sanctions contre les personnes physiques n'ont pas seulement un effet dissuasif sur les comportements illicites, mais elles peuvent également être un outil précieux pendant l'enquête sur une entente.

### **A. Dissuasion**

Il s'agit de dissuader non seulement les sociétés, mais également les personnes physiques, de se livrer à une conduite illégale. Les ententes injustifiables ne sont pas des phénomènes abstraits, mais impliquent des personnes physiques qui agissent pour le compte d'une société. Ainsi, sachant que ce sont des agents de sociétés qui commettent des violations du droit de la concurrence, il s'agit de les empêcher de se livrer à une conduite illégale en les menaçant directement de sanctions, et de leur infliger ces sanctions s'ils violent la loi.

Le risque de sanctions peut également inciter davantage les personnes physiques à résister à la pression que leur société pourrait exercer sur elles pour qu'elles se livrent à une activité illégale. A

supposer même que le risque de participer à une entente semble acceptable à une société, à la lumière du gain potentiel qu'elle peut en tirer et du risque d'encourir des amendes, l'évaluation du risque par le cadre personne physique peut être très différente s'il tient compte de ses propres risques personnels, y compris le risque de faire un séjour en prison. En outre, le calcul risque/bénéfice d'une société peut être différent si elle inclut dans son analyse les risques encourus par ses propres cadres, et le coût de la perte de leurs services.

### 1. *Compléter les sanctions contre les sociétés*

La question des sanctions à l'encontre des personnes physiques serait beaucoup moins importante si l'on pouvait supposer que les sanctions à l'encontre des sociétés suffisent à empêcher (indirectement) les personnes physiques de violer la loi. On pourrait soutenir, par exemple, que le fait d'infliger des amendes à des sociétés suffise à inciter une société à superviser ses préposés afin de les empêcher d'agir illégalement et d'exposer la société au risque d'être condamnée à une amende pour avoir participé à une entente illégale.<sup>6</sup>

Cependant, la supervision exercée par une société risque de ne pas être toujours aussi efficace que des sanctions infligées directement aux préposés de cette société, et ce pour plusieurs raisons. En premier lieu, pour encourager effectivement une société à contrôler ses préposés comme il convient, il faudrait que les amendes risquant d'être infligées aux sociétés aient un effet dissuasif efficace. Or, il est communément admis que les amendes infligées aux sociétés atteignent rarement un niveau qui maximiserait leur effet dissuasif.<sup>7</sup> Dans ces conditions, la société ne sera pas suffisamment incitée à empêcher ses préposés de conclure un accord d'entente illicite, si – en dépit du risque de sanctions – elle espère qu'une entente sera profitable.<sup>8</sup>

La capacité des actionnaires à contrôler efficacement la direction est également sujette à caution si les actions sont largement dispersées. L'impact financier d'une amende infligée à la société sur les actionnaires individuels peut être trop faible pour les inciter suffisamment à exercer un contrôle plus efficace sur la direction.<sup>9</sup> Enfin, on peut se demander si une société aura toujours les moyens de dissuader ses préposés de se livrer à une conduite illégale. Par exemple, le directeur d'une division qui réalise des sous-performances depuis un certain temps peut déjà craindre pour son poste. La menace de licenciement, qui est la sanction la plus efficace contre des salariés se livrant à une conduite illégale, ne sera pas vraiment une menace pour lui.

### 2. *L'Efficacité de différentes sanctions contre des personnes physiques*

Le Second Rapport sur les Ententes indique en termes généraux que des sanctions contre les personnes physiques sont un complément important des amendes infligées aux sociétés. Toutefois, différents facteurs détermineront si une sanction donnée produit réellement des effets dissuasifs et constitue donc un complément efficace. Ces facteurs sont notamment les suivants : (i) l'existence d'une probabilité raisonnable qu'une conduite illégale soit détectée ; (ii) le fait que la sanction potentielle soit perçue comme sévère ; et (iii) le fait qu'une personne physique soit convaincue, avec un certain degré de certitude, que la sanction sera prononcée.

La perspective de faire un séjour en prison sera l'argument dissuasif le plus puissant pour les cadres de sociétés qui envisagent de conclure un accord d'entente. Il est moins certain que d'autres sanctions contre des personnes physiques auront des effets dissuasifs aussi puissants, y compris, par exemple, des amendes (pénales et non pénales), l'interdiction d'exercer les fonctions de dirigeant d'une société cotée en bourse, la perte d'autorisations requises pour exercer une activité professionnelle ou

commerciale, l'obligation d'accomplir des travaux d'intérêt général et l'obligation de publier l'infraction commise à la législation sur la concurrence.<sup>10</sup>

L'efficacité des *amendes* pourrait être limitée par deux facteurs. En premier lieu, il peut être impossible d'infliger des amendes qui soient suffisamment élevées pour dissuader efficacement des personnes physiques de participer à des ententes, pour des raisons similaires à celles qui suggèrent que les amendes infligées aux sociétés ne constituent pas, à elles seules, des armes de dissuasion suffisantes. La détermination des paramètres d'une amende "optimale" sera généralement plus difficile encore dans le cas d'une personne physique que dans celui d'une société.<sup>11</sup> Par ailleurs, à supposer même que l'on puisse formuler des hypothèses raisonnables à propos d'une amende "optimale", cette amende pourrait excéder les plafonds légaux et/ou les capacités financières de l'intéressé.

En second lieu, l'efficacité des amendes dépendra du point de savoir si la personne physique peut espérer être remboursée par la société – sous une forme quelconque -. Des plans de remboursement peuvent être licites dans certains pays, au motif que leur interdiction pourrait être considérée comme une immixtion injustifiée dans les affaires internes de l'entreprise.<sup>12</sup> Cependant, à supposer même que le remboursement soit interdit par la loi, une société pourrait trouver un moyen quelconque de réduire ou éliminer le risque pour ses cadres, soit en payant d'avance une prime pour compenser le risque, soit en remboursant les primes effectivement infligées aux intéressés, au moyen d'augmentations de salaire ou par d'autres moyens non interdits par la loi.

Des questions ont également été posées à propos de l'efficacité d'autres sanctions contre les personnes physiques. Par exemple, l'interdiction (temporaire ou définitive) d'exercer les fonctions de dirigeant d'une société cotée en bourse pourrait être potentiellement plus "efficace" dans la mesure où il sera alors plus difficile de transférer à la société le coût de la sanction infligée à la personne physique.<sup>13</sup> Toutefois, on ne peut pas exclure de trouver d'autres accords informels pour permettre à une personne physique de travailler pour la société. En outre, à supposer même que les interdictions de ces accords soient efficaces, la question demeure de savoir si le risque de perdre la capacité d'exercer les fonctions d'administrateur d'une société cotée en bourse suffit, à lui seul, à dissuader une personne physique de participer à une entente. Dans la même lignée, on peut douter de l'efficacité, en termes de dissuasion, d'autres sanctions individuelles comme la création d'une publicité négative, par exemple, par voie d'annonces dans la presse, ou la condamnation à des travaux d'intérêt général.

Par ailleurs, bien qu'il ne soit pas certain que des sanctions autres que des peines d'emprisonnement puissent dissuader effectivement des personnes physiques de conclure des accords d'entente si elles sont infligées isolément, une combinaison de ces sanctions pourrait créer une dissuasion suffisamment forte. L'effet dissuasif d'une sanction spécifique peut également dépendre de sa nature pénale, ou civile/administrative. Les condamnations pénales représentent une condamnation par la collectivité d'une certaine conduite, d'une manière qui n'est pas réalisable par une sanction civile. Le fait que certaines violations de la loi soient caractérisées comme une infraction pénale peut déjà suffire à inciter des personnes physiques à respecter la loi et à résister aux tentatives des sociétés qui les emploient de se livrer à des activités d'entente illicite. Par ailleurs, la perspective d'avoir un casier judiciaire, même sans peine d'emprisonnement, peut dissuader suffisamment des personnes physiques de participer à un accord d'entente illicite. Bien qu'il soit difficile de déterminer l'ampleur de ces pertes, celles-ci peuvent être substantielles et donc créer une incitation à respecter la loi, beaucoup plus forte que celle créée par des sanctions civiles.<sup>14</sup>

Les questions suivantes pourraient être débattues :

1. *Quelles sanctions, autres que celles mentionnées au paragraphe 15 ci-dessus, pourraient être infligées à des personnes qui participent à une entente injustifiable ?*



2. *Quelles sont les expériences acquises en ce qui concerne l'efficacité de différentes sanctions? Existe-t-il des moyens d'évaluer l'efficacité des sanctions, y compris des combinaisons de sanctions? Quelle est l'efficacité d'amendes infligées à des personnes physiques si rien n'interdit de rembourser ces amendes aux intéressés? Par ailleurs, les interdictions de remboursement peuvent-elles être efficaces?*

### **B. Efficacité accrue des enquêtes**

Dans les cas où la menace de sanctions n'a pas suffi à inciter des personnes physiques à empêcher leur société de se livrer à une entente illicite, la capacité à imposer des sanctions à ces personnes physiques peut néanmoins être un outil puissant au service de l'autorité de la concurrence dans son enquête sur cette entente.

Les personnes physiques détiennent des informations sur les ententes, mais, en l'absence de risque de sanctions contre elles, elles seront peu incitées à offrir de révéler des preuves. La menace de sanctions crédibles directes à leur encontre crée ces incitations, qui sont distinctes des incitations d'une société, générant ainsi une plus forte probabilité que quelqu'un fasse secession et offre sa coopération. C'est pourquoi un programme de clémence (et d'autres programmes promettant des sanctions réduites en échange d'une coopération) devrait s'avérer plus efficace.

En outre, même après qu'une entente ait été divulguée et que l'enquête soit lancée, la menace de sanctions contre des personnes physiques, et la capacité à les éviter grâce à une coopération, renforceront la position de l'autorité de la concurrence. Plus le nombre de participants ayant des intérêts différents pouvant être montés les uns contre les autres est important, et plus grande sera la probabilité que quelqu'un se présente aux autorités et ne se contente pas de divulguer l'existence d'une entente, mais coopère également avec l'autorité pendant une enquête en cours.

L'importance du rôle des sanctions contre les personnes physiques, dans la lutte du Département de la Justice des Etats-Unis ("DOJ") contre les ententes injustifiables a été largement reconnue. Par exemple, un Rapport de 2001 adressé à l'Office of Fair Trading britannique, publié à l'occasion de l'introduction de sanctions pénales au Royaume-Uni, a reconnu qu'en dépit du succès de la Commission Européenne dans sa lutte contre les ententes illicites, il demeurait une certaine distance entre les programmes de clémence de l'Union Européenne et des Etats-Unis. : "Sous l'empire de la législation de l'Union Européenne, et à la différence des Etats-Unis, la participation à une entente n'est pas une infraction pénale, et c'est pourquoi l'incitation des personnes physiques à donner des informations sur d'autres participants à l'entente, en échange d'une immunité de poursuites, est réduite dans des circonstances où il n'existe aucun risque de se voir infliger des peines privatives de liberté."<sup>15</sup> Le même Rapport reconnaît également plus explicitement que la capacité du DOJ à conclure sélectivement des accords de négociation de peine est la clé du succès du programme de clémence américain.<sup>16</sup> Certains commentateurs ont fait allusion à l'environnement de « dog-eat-dog » (« le chien mange le chien ») que le DOJ a créé, qui accroît considérablement la marge de manoeuvre du gouvernement et sa capacité à obtenir la coopération des personnes physiques et des sociétés.

Cependant, il est possible que les institutions et procédures d'application de la loi aux Etats-Unis soient taillées sur mesure pour un tel programme, et qu'il soit difficile de le répliquer ailleurs. Par exemple, étant donné que le DOJ administre le programme de clémence et est l'autorité chargée des poursuites, il peut appliquer ce programme de clémence sans devoir parvenir à un accord avec un procureur général ou tout autre représentant du ministère public. En outre, le risque crédible de sanctions pénales sévères contre des personnes physiques, un programme de clémence bien élaboré et extrêmement transparent, et la

capacité à offrir aux défendeurs des peines moins lourdes ou une immunité en échange de leur coopération pendant une enquête, constituent autant d'éléments qui semblent contribuer au succès du programme

La nécessité de coordonner un programme de clémence et les sanctions pénales applicables posera de plus grandes difficultés dans des systèmes où les poursuites pénales relèvent de la responsabilité d'une autre autorité qui n'est pas techniquement liée par les décisions et politiques de l'autorité de la concurrence. Dans ces systèmes, l'autorité de la concurrence peut ne pas avoir le pouvoir de garantir l'immunité de poursuites au premier qui divulguera une entente illicite. En outre, l'autorité de la concurrence peut ne pas avoir l'option d'offrir à un défendeur une peine inférieure ou une immunité en échange de sa coopération, et, dans la même lignée, peut ne pas avoir la capacité d'obtenir des condamnations, y compris à des peines d'emprisonnement, sans devoir en passer par une procédure complète jusqu'à l'audience de jugement et produire les preuves nécessaires afin d'obtenir une longue peine de prison et/ou une forte amende.<sup>17</sup> Par exemple, le Rapport britannique de 2001 concluait qu'en l'absence d'un système de négociation de peine au Royaume-Uni, l'OFT se heurterait à la difficulté de pouvoir donner aux informateurs des assurances suffisantes qu'ils échapperont à des poursuites pénales et/ou à des peines privatives de liberté en échange de leur coopération.<sup>18</sup>

Les questions suivantes pourraient être débattues :

3. *Quels sont les éléments qui maximisent l'efficacité des sanctions contre les personnes physiques pendant les enquêtes, en tant qu'incitation à coopérer avec les autorités ?*
4. *Si le pouvoir d'appliquer un programme de clémence est séparé du pouvoir d'engager des poursuites pénales, que peut-on faire pour limiter ou éliminer le risque que le pouvoir discrétionnaire du ministère public d'engager des poursuites puisse saper la certitude des défendeurs qu'ils ne seront pas poursuivis, s'ils prennent les devants en offrant leur coopération ?*
5. *Dans les pays où la négociation de peine n'existe pas, est-il possible de développer des mécanismes qui garantissent que l'autorité de la concurrence puisse obtenir la coopération de personnes physiques, en échange d'une promesse d'immunité ou d'une peine moins lourde, si ni le ministère public ni les tribunaux ne sont liés par ces accords ?*

## **II. Existe-t-il un niveau "optimal" de sanctions contre les personnes physiques ?**

Il est communément admis que les sanctions financières infligées à des sociétés devraient tenir compte des gains illicites tirés de la participation à une entente, et de la probabilité que des ententes illicites soient détectées, afin de constituer une dissuasion "optimale". En principe, cette question des amendes "optimales" peut se poser dans les mêmes termes pour différents types de sanctions contre les personnes physiques. Dans ce cas, toutefois, il sera encore plus difficile de déterminer un niveau "optimal" d'amende que dans le cas de sanctions contre les sociétés.

Comme dans le cas des sociétés, on pourrait examiner si les amendes prononcées contre des personnes physiques constitueraient une dissuasion optimale si elles tenaient compte des gains illicites réalisés par une personne physique grâce à sa participation à une entente illicite, multipliés par la probabilité que des ententes soient détectées.<sup>19</sup> Cependant, il sera généralement impossible de déterminer combien une personne physique a gagné grâce à l'entente. En effet, les gains liés à une promotion professionnelle ou à une augmentation des salaires liés à la performance peuvent ne pas résulter seulement de l'activité d'entente illicite de la société concernée. Alternativement, le fait de prélever un montant "suffisant" de la fortune nette et du pouvoir d'achat d'une personne physique pourrait être considéré

comme une dissuasion "optimale". Mais, ici encore, la question se pose de savoir quel doit être le montant de l'amende pour être "suffisant."

Dans les ressorts juridictionnels qui prévoient des peines d'emprisonnement, la question se pose de savoir s'il existe une peine d'emprisonnement "optimale" ou, du moins, des critères permettant de déterminer la longueur de la peine d'emprisonnement qui sert le plus efficacement les objectifs de dissuasion et de coopération accrue. Certains ont suggéré que la peine d'emprisonnement optimale doit être plutôt courte, en particulier au motif qu'après une période relativement brève, le coût marginal pour la société d'une durée d'emprisonnement supplémentaire pourrait excéder les gains tirés de l'effet dissuasif d'une longue peine de prison. Cette vue se fonde sur l'hypothèse que les cadres d'entreprises considèrent des peines de prison, même courtes, comme extrêmement indésirables et coûteuses, et que les stigmates et pertes de réputation liés à une peine d'emprisonnement découlent de n'importe quelle peine d'emprisonnement, dès lors qu'elle n'est pas symbolique. Cependant, l'effet dissuasif marginal d'une peine d'emprisonnement ne peut rester élevé que pendant une période relativement courte, car un individu peut s'habituer aux conditions d'un emprisonnement de longue durée et ses perspectives de pouvoir mener une vie confortable à sa sortie de prison diminuent. Par ailleurs, le coût marginal de l'emprisonnement devrait probablement augmenter légèrement au fil du temps.<sup>20</sup> Un autre commentateur a suggéré qu'il était "plus important que le défendeur potentiel sache avec un certain degré de certitude qu'il risque une peine de prison, plutôt que de savoir que de longues peines peuvent être infligées."<sup>21</sup> Ces observations semblent également suggérer que même des peines courtes peuvent avoir un effet dissuasif efficace, sous réserve qu'il existe une menace crédible qu'elles puissent effectivement être infligées.

D'autres arguments militent au contraire pour que la loi institue des peines plus longues. Un arsenal légal de peines plus longues pourrait envoyer un signal au ministère public et aux tribunaux, leur signifiant que les ententes doivent être considérées comme une infraction pénale grave. Un arsenal légal de peines courtes pourrait au contraire inciter les tribunaux à ne pas envoyer les défendeurs en prison et à prononcer plutôt des peines de substitution.

Les questions suivantes pourraient être discutées :

6. *Existe-t-il un moyen de déterminer ce qu'est le niveau "optimal" des amendes pouvant être infligées à des personnes physiques dans des affaires d'ententes injustifiables ?*
7. *Quelles sont les opinions plaidant en faveur de peines d'emprisonnement courtes plutôt que longues ? Quels paramètres déterminent la longueur des peines et conditions d'emprisonnement effectivement infligées aux défendeurs en vertu de la loi ?*

### **III. Questions spécifiquement liées aux sanctions pénales contre des personnes physiques**

#### **A. Préoccupations liées aux sanctions pénales**

Un commentateur, après avoir analysé les effets des sanctions contre des personnes physiques dans le cadre de la lutte contre les ententes aux Etats-Unis, a émis l'opinion, à propos d'autres pas, que "les arguments en faveur de sanctions contre des personnes physiques semblent être relativement forts, ce qui rend d'autant plus mystérieuse la réticence [à les infliger]."<sup>22</sup>

Toutefois, en dépit des avantages manifestes des sanctions pénales dans la dissuasion et la poursuite des ententes, plusieurs raisons peuvent expliquer que des pays soient peu disposés à instituer des sanctions contre des personnes physiques dans des affaires d'ententes, et, en particulier, à criminaliser la participation à des ententes. Un pays peut considérer, par exemple, que des sanctions pénales ne sont pas

compatibles avec ses valeurs et ses normes sociales, que l'emprisonnement fait peser des coûts significatifs sur la collectivité, et que des sanctions non pénales seraient plus rentables, et/ou que des sanctions pénales pourraient diminuer le taux de poursuites.

1. *Compatibilité avec les normes sociales et légales*

Un pays peut décider de ne pas introduire des sanctions pénales contre des personnes physiques, jugeant que les ententes injustifiables ne sont pas suffisamment répréhensibles pour justifier ce type de peine. Ce raisonnement peut s'appliquer généralement à toutes les formes de délinquance en col blanc, ou spécifiquement aux violations du droit des ententes. Un pays qui institue des sanctions pénales dans d'autres cas de délinquance en "col blanc", par exemple la fraude fiscale ou les délits boursiers, mais s'abstient de ce faire pour les affaires d'ententes, peut fonder sa décision sur la conviction qu'en matière d'ententes injustifiables – à la différence de la fraude fiscale ou de certains délits boursiers – les personnes physiques s'enrichissent rarement elles-mêmes et leur conduite bénéficie principalement à la société (qui doit donc être condamnée à des amendes) plutôt qu'à ses dirigeants.

Pour des raisons probablement similaires, un pays peut également décider de ne criminaliser que certaines catégories sélectionnées d'ententes injustifiables, particulièrement des affaires de soumissions concertées, et non les autres catégories, ou, du moins, d'imposer des sanctions plus sévères à ceux qui participent à des soumissions concertées qu'à d'autres participants à des ententes. Cette décision peut se fonder sur le postulat que les ententes qui affectent des institutions publiques (et les finances publiques) sont plus répréhensibles que d'autres ententes et, par voie de conséquence, doivent être réprimées par des sanctions plus lourdes.

2. *Coûts des sanctions pénales, en particulier les peines d'emprisonnement*

La criminalisation des ententes suscite une autre préoccupation, tenant au fait que les sanctions pénales comportant des peines d'emprisonnement peuvent être une forme onéreuse de répression pour la collectivité, et que d'autres sanctions peuvent être plus rentables. Selon certains économistes, par exemple, l'analyse coût social/bénéfice suggère que seules des amendes (de préférence des amendes civiles) doivent être infligées à des défendeurs personnes physiques, sous réserve que le défendeur soit en mesure de payer une amende produisant le même effet dissuasif que la menace d'un emprisonnement. En principe, il serait faisable de déterminer un "taux de change" pour parvenir à une amende (pécuniaire) "optimale" qui ait le même effet dissuasif qu'une peine d'emprisonnement.<sup>23</sup>

D'autres ont rejeté cette ligne de raisonnement pour les motifs suivants : en premier lieu, à supposer même qu'il soit possible de déterminer une "amende optimale," il faudrait que cette amende soit extrêmement élevée pour avoir un effet dissuasif équivalent à une peine d'emprisonnement, auquel cas elle excéderait généralement les moyens financiers du défendeur. En second lieu, les modèles d'"amende optimale" ne doivent pas être appliqués à des ententes injustifiables. Ces modèles partent du postulat que certaines conduites, même illégales, peuvent être efficaces et que la collectivité a tout intérêt à taxer ces conduites sous la forme d'amendes plutôt que de les interdire. Cependant, ce postulat ne peut pas être appliqué aux ententes injustifiables, qui ne seront pratiquement jamais bénéfiques pour la collectivité et ne doivent donc jamais être considérées comme une conduite acceptable qui peut être « rachetée » en payant une amende.<sup>24</sup>

3. *La criminalisation peut-elle rendre la mise en oeuvre de la loi moins efficace ?*

Certaines craintes ont également été exprimées à propos de la criminalisation des lois anti-entente, dans la mesure où elle risquerait de rendre la mise en oeuvre de ces lois moins efficace. Telle est la conclusion du rapport publié lorsque la Nouvelle Zélande a révisé son système de sanctions contre les ententes. Le Rapport concluait que des normes plus élevées étaient susceptibles de conduire à *réduire* le nombre des poursuites et des affaires menées à bien.<sup>25</sup> En effet, il peut être plus difficile d'obtenir une condamnation dans le cadre d'un système pénal, en particulier en raison des normes plus élevées en matière de collecte des preuves et des droits de la défense protégeant contre l'auto-incrimination. A titre d'exemple, le droit de protection contre l'auto-incrimination rendra plus difficile l'obtention de preuves de la part des personnes physiques impliquées dans une entente, à moins qu'elles n'acceptent de coopérer.

Comme l'a fait observer le Rapport sur l'Impact des Ententes et les Sanctions, la criminalisation du droit des ententes peut donc produire des effets radicalement opposés : "la criminalisation du comportement d'entente de la part de personnes physiques facilite la coopération volontaire, en raison de la menace de sanctions personnelles, mais la rend également plus nécessaire, en raison des droits de la défense contre l'auto-incrimination qui s'y attachent."<sup>26</sup> Cette conclusion suggère que des sanctions pénales contre des personnes physiques pourraient être les plus efficaces dans des systèmes où le gouvernement dispose d'une vaste gamme d'outils pour faire de la coopération volontaire une option particulièrement attrayante, au moins pour un petit nombre des membres d'une entente illicite.

La criminalisation pourrait également limiter la répression efficace des ententes, dans la mesure où l'autorité de la concurrence pourra avoir des difficultés à persuader le ministère public d'ouvrir des enquêtes et d'engager l'action publique, et à convaincre les juges de prononcer les sanctions pénales prévues par la loi. Les magistrats du ministère public peuvent ne pas considérer que la criminalité en col blanc, et les ententes injustifiables en particulier, constituent une haute priorité dans leur travail, par rapport aux crimes violents et aux crimes contre les biens. Par ailleurs, les magistrats pourraient, pour les mêmes raisons, être peu disposés à infliger des sanctions pénales dans des affaires qui n'impliquent pas, selon eux, un degré suffisant de "criminalité." Le ministère public et les tribunaux pourraient se trouver confrontés à des défendeurs qui sont considérés comme des hommes d'affaires respectables, des "piliers de la collectivité," et/ou des supporters de bonnes causes qui ne présentent aucun danger physique pour la société.

La menace de condamnations pénales pourrait également rendre la détection et la poursuite des ententes plus difficiles, au motif qu'elle pourrait rendre les individus plus prudents, les incitant à redoubler d'efforts pour cacher les ententes. En outre, les personnes physiques comme les sociétés pourraient être encore moins disposées à fournir des informations en réponse à des demandes, sachant le risque de poursuites pénales contre des personnes physiques.<sup>27</sup>

Les questions suivantes pourraient être débattues :

8. *Dans les pays qui ont envisagé ou envisagent d'introduire des sanctions pénales contre des personnes physiques, ou ont réformé leur système de sanctions pénales, y a-t-il eu des débats sur le caractère approprié des sanctions pénales en matière d'ententes et leur compatibilité avec les normes sociales ? Quels arguments ont été soulevés dans ce contexte ? S'il existe des sanctions pénales dans d'autres domaines de la criminalité en "col blanc", mais non pas dans les affaires d'ententes, qu'est-ce qui explique ces différences ?*
9. *Si des différences existent entre les affaires de soumissions concertées et d'autres formes d'ententes injustifiables en termes de sanctions pouvant être imposées à des personnes physiques, qu'est-ce qui explique ces différences ?*

10. *Des considérations sur la rentabilité des amendes pénales, telles que celles discutées ci-dessus, ont-elles joué un rôle dans les débats de ces pays sur l'opportunité d'introduire des sanctions pénales contre des personnes physiques ?*
11. *Existe-t-il une preuve quelconque que des sanctions pénales puissent effectivement diminuer le taux des poursuites anti-ententes pour les raisons énoncées ci-dessus, par exemple en raison de normes plus élevées en matière de preuve et/ou des droits de la défense protégeant contre l'auto-incrimination ?*
12. *Dans certains pays, il peut être (ou avoir été) difficile de "persuader" les tribunaux d'infliger effectivement des sanctions pénales et le ministère public de mettre l'action publique plus souvent en mouvement. Qu'est-ce qui peut être/a été fait pour "encourager" les tribunaux à infliger des sanctions plus fréquemment et/ou à infliger des sanctions plus sévères, et/ou pour "encourager" le ministère public à engager l'action publique contre un plus grand nombre d'ententes et à requérir des sanctions plus lourdes ?*

#### **B. Définition de l'infraction pénale**

Plusieurs pays ayant récemment envisagé d'introduire des sanctions pénales contre des personnes physiques en matière d'ententes, ont débattu de ce que devrait être la bonne définition d'une infraction passible de sanctions pénales. Les débats ont en particulier porté sur l'opportunité d'infliger des sanctions pénales à des participants à des ententes, dans le cadre de la législation générale sur la concurrence, ou sur l'opportunité de définir plus étroitement une infraction séparée. Il a été jugé nécessaire ou du moins souhaitable de définir l'infraction pénale de manière assez détaillée, et ce pour plusieurs raisons. En premier lieu, la crainte a été exprimée que des sanctions pénales ne puissent avoir une force de dissuasion excessive si la conduite à laquelle elles s'appliquent n'est pas clairement définie. La coopération entre concurrents peut être bénéfique dans le cadre de nombreux accords et la frontière entre la conduite interdite en soi (y compris les ententes injustifiables) et la conduite permise peut ne pas toujours être claire pour ceux qui exploitent une entreprise. Dans ces circonstances, la menace de sanctions pénales pourrait dissuader de conclure des accords pro-concurrentiels et innovants si les actes auxquels des sanctions pénales s'appliquent n'étaient pas clairement définis.<sup>28</sup>

Une définition claire et séparée des actes qui sont passibles de sanctions pénales pourrait également être nécessaire pour garantir que ceux qui encourent potentiellement ces sanctions peuvent clairement comprendre *ex ante* la conduite qui les mettrait à risque. Un défendeur pourrait soutenir qu'une condamnation pénale est illégale et viole les droits fondamentaux si la conduite illégale n'a pas été définie avec une précision suffisante.

Plusieurs solutions peuvent être envisagées pour répondre aux préoccupations précitées. En premier lieu, un pays pourrait définir le ou les actes coupables de manière explicite et plus étroite, par exemple en énumérant différents types d'activités d'entente injustifiable dans la définition de l'infraction, soit à titre de liste exhaustive, soit à titre d'illustration d'une conduite passible de sanctions pénales. Par exemple, la nouvelle loi entrée en vigueur au Royaume-Uni définit l'infraction pénale dans une disposition séparée des dispositions générales (nationales et européennes) sur la concurrence, et énumère spécifiquement différents types de conduite qui sont passibles de sanctions pénales. Le Royaume-Uni a également décidé d'introduire une exigence de "malhonnêteté" en tant qu'élément de la définition de l'infraction pénale, probablement afin d'exiger que seule une conduite grave puisse être passible de sanctions pénales.

D'autres juridictions ont pu obtenir des condamnations pénales fondées sur les termes généraux de la loi anti-ententes, apparemment sans se trouver confrontées aux problèmes ci-dessus. Ainsi, il semble possible de se fonder sur la jurisprudence et le pouvoir discrétionnaire de déclencher l'action publique pour garantir que des actions pénales soient uniquement engagées dans des circonstances clairement définies, considérées comme illégales en soi, et pour s'abstenir d'engager des poursuites pénales dans des cas posant problème, par exemple au motif que rien ne prouve clairement l'existence d'un accord ou de l'état d'esprit nécessaire, ou au motif que l'accord repose sur des raisons innocentes/pro-concurrentielles, et dans d'autres cas où il n'est pas clair que la conduite en question soit considérée en soi comme illégale.

La question suivante pourrait être débattue :

13. *Comment certains pays ont-ils traité les préoccupations liées à la définition des ententes injustifiables en tant qu'infraction pénale ? Si les termes généraux de la loi anti-ententes servent de fondement pour requérir des sanctions pénales, comment peut-on traiter les préoccupations liées à une dissuasion excessive et à la garantie du degré nécessaire de certitude juridique ?*

### **C. Allocation des responsabilités pour l'engagement de poursuites pénales**

Plusieurs questions se posent également à propos de la structure institutionnelle, en particulier sur le point de savoir si une autorité de la concurrence doit être chargée des poursuites pénales ou si ces poursuites doivent être confiées à un procureur ou à toute autre autorité du ministère public. Plusieurs raisons justifient d'autoriser une autorité de la concurrence à se charger des poursuites pénales. L'autorité de la concurrence peut être la mieux à même d'enquêter sur une affaire d'entente, en raison de son expertise du droit de la concurrence. Par ailleurs, cette solution écarterait la crainte que le ministère public ne soit pas toujours motivé pour se focaliser sur des ententes, s'il est déjà débordé d'affaires concernant des crimes violents et/ou la crainte qu'il ne requière pas nécessairement des sanctions suffisantes. En outre, cette solution rendrait inutile de coordonner les programmes de clémence et les décisions d'engager des poursuites entre deux autorités séparées.<sup>29</sup> Enfin, l'on pourrait craindre qu'un gouvernement donne instruction au ministère public de ne pas engager des poursuites dans une affaire donnée, alors qu'il n'aurait pas ce pouvoir sur une autorité de la concurrence indépendante.

Par contre, l'autorité de la concurrence n'aura pas toujours l'expertise et les ressources nécessaires pour engager des poursuites pénales. Il se peut également qu'il ne soit pas toujours rentable de se doter d'effectifs de personnel supplémentaires pour engager des poursuites pénales, particulièrement si l'on prévoit que le volume d'affaires ne sera pas important. Faire appel à une autorité externe ou au ministère public peut également être utile en termes d'équilibre et de contrôle des pouvoirs. Si deux institutions sont impliquées, et s'il incombe à l'autorité de la concurrence de prendre la décision d'engager des poursuites pénales, la nécessité de convaincre le ministère public de poursuivre pourra limiter le nombre d'affaires pénales à celles qui justifient réellement des poursuites pénales.

La question suivante pourrait être débattue :

14. *Quels sont les avantages et inconvénients d'impliquer deux autorités séparées dans des affaires d'ententes injustifiables, lorsqu'il s'agit d'obtenir le prononcé de sanctions pénales ? S'il existe deux autorités séparées, comment peuvent-elles coordonner leurs tâches ? En particulier, comment le problème d'une coopération effective peut-il être traité le plus efficacement pour garantir l'efficacité de programmes de clémence ?*

**D. Sanctions en vertu de lois pénales et civiles concurrentes**

*1. Décisions de poursuivre sur le fondement d'une loi pénale*

Dans certaines juridictions, les ententes injustifiables peuvent être qualifiées de délit pénal comme de délit civil, et l'autorité de la concurrence dispose du pouvoir discrétionnaire d'engager des poursuites sur le fondement d'une loi pénale, ou d'enquêter sur une entente alléguée sur le fondement d'une loi civile. Même dans les juridictions où les ententes injustifiables font toujours l'objet d'enquêtes en tant que délits pénaux, l'autorité a probablement le pouvoir de retenir une qualification civile moins grave dans des cas limites. Tel pourrait être le cas, par exemple, si le volume du commerce affecté est faible, s'il apparaît improbable d'obtenir des preuves suffisantes pour une condamnation pénale, ou s'il n'est pas entièrement certain que la conduite objet de l'enquête soit clairement considérée comme légale en soi, ou si elle se situe dans une zone floue où la catégorisation en soi est moins claire.

De nombreuses questions surgissent, spécialement lorsqu'une autorité a le pouvoir discrétionnaire de diligenter une enquête en vertu de l'une ou l'autre loi. En premier lieu, il se posera la question des critères que l'autorité peut appliquer pour décider de réclamer une condamnation pénale. Ces critères peuvent inclure le volume du commerce affecté par une entente, la durée de l'entente et le rôle du défendeur dans l'entente. La masse des preuves disponibles requises pour satisfaire aux exigences accrues du droit pénal en la matière, y compris les preuves de l'intention, peut également être un facteur important. Cependant, la décision de recourir à la voie pénale devra probablement être prise à un stade précoce de la procédure, à un moment où le volume des preuves qui seront découvertes est encore inconnu. Ainsi, ces décisions doivent probablement être prises sur la base de preuves limitées.

En second lieu, si l'autorité de la concurrence elle-même ne peut engager que des poursuites civiles, il doit y avoir une coordination précoce entre le ministère public et l'autorité de la concurrence. La possibilité que l'autorité de la concurrence puisse ouvrir une enquête civile peut rendre le ministère public moins disposé à engager une action pénale. Cette situation suggère que les deux autorités pourront devoir trouver un accord pour décider en vertu de quelle loi poursuivre.

Par ailleurs, les parties privées peuvent craindre que le pouvoir discrétionnaire d'une autorité de la concurrence, qui lui permet de choisir entre la voie pénale ou civile, ne confère un pouvoir d'influence excessif à l'autorité, en lui permettant de brandir la menace d'une procédure pénale pour obtenir des preuves, alors qu'elle n'avait aucune intention d'engager des poursuites pénales.<sup>30</sup>

La question suivante pourrait être débattue :

15. *Quels sont les facteurs appliqués pour déterminer si des sanctions pénales doivent être demandées dans une affaire d'entente injustifiable ? Si une autorité a le choix entre des sanctions pénales et civiles, quand et comment peut-elle décider des sanctions qu'elle doit solliciter ?*

*2. Obtenir et utiliser les preuves*

Les juridictions dans lesquelles une même affaire d'entente peut être poursuivie au civil et au pénal (par exemple, en permettant à l'autorité d'engager des poursuites civiles contre une société, tout en engageant des poursuites pénales contre ses dirigeants) sont confrontées à des questions sur la manière dont les preuves obtenues dans une procédure pénale peuvent être utilisées dans une procédure civile/administrative et *vice versa*. Par exemple, des déclarations pouvant être utilisées dans des procédures civiles peuvent être inadmissibles dans des procédures pénales, en raison du droit de la défense à se



protéger contre l'auto-incrimination, tandis que des documents obtenus dans le cadre de la procédure pénale peuvent être inadmissibles dans le cadre de procès civils. Les règles d'admissibilité à titre de preuve doivent garantir que les preuves obtenues dans le cadre d'une procédure ne puissent pas être utilisées abusivement dans l'autre.

La question suivante pourrait être débattue :

16. *Quelles limitations restreignent l'utilisation dans une procédure civile des preuves obtenues dans le cadre d'une procédure pénale et vice versa ? Ces limitations peuvent-elles affecter les procédures pénales contre des personnes physiques ?*

### **E. *Enquêtes internationales et double condamnation***

Le principe de la double condamnation doit – en termes très généraux – empêcher une même juridiction de soumettre une personne physique deux fois à des poursuites pénales au titre de sa participation à la même entente. Il semble qu'il n'existe pas de principe similaire en droit international public, qui interdise aux autorités de différents pays de poursuivre la même personne sur la base des mêmes faits.<sup>31</sup> La question peut néanmoins se poser de savoir si les autorités doivent tenir compte des poursuites engagées contre une personne physique dans d'autres juridictions, lorsqu'elles envisagent de poursuivre la même personne au pénal pour participation à une entente. Par exemple, s'il était admis qu'il existe quelque chose comme une peine d'emprisonnement "optimale", ou du moins que des peines de prison assez courtes constituent l'arme dissuasive la plus efficace,<sup>32</sup> l'on pourrait se demander si l'accumulation de peines de prison dans plusieurs juridictions serait souhaitable. La coordination pour éviter des poursuites dans plusieurs pays pourrait également réduire les coûts totaux des poursuites.

Sachant que par le passé, seul un petit nombre de pays ont prononcé des sanctions pénales contre des personnes physiques, il n'existait qu'une faible probabilité qu'une enquête sur une entente internationale, diligentée par plusieurs autorités de la concurrence contre la même personne puisse l'exposer à ces sanctions pénales dans plusieurs pays. Cependant, particulièrement en ce qui concerne les ententes affectant le Canada et les Etats-Unis, cette situation a déjà pu se produire ou peut au moins avoir été discutée entre les autorités de la concurrence des deux pays. Etant donné qu'un plus grand nombre de pays envisagent d'instituer des sanctions pénales contre des personnes physiques, il est concevable que les situations dans lesquelles deux autorités ou davantage envisagent des poursuites pénales contre la même personne, au titre de la même entente, se produiront plus fréquemment à l'avenir.

La question suivante pourrait être débattue :

- 17 *Si deux pays ou davantage poursuivent une entente sur le fondement de leur loi pénale respective, existe-t-il un risque que la même personne soit poursuivie plusieurs fois sur la base des mêmes faits ? Dans l'affirmative, comment pourrait-on traiter ce problème ?*

## NOTES

- 1 Recommandation Concernant une Action Efficace contre les Ententes Injustifiables, C(98)35/FINAL. (soulignage ajouté).
- 2 Rapport sur la Nature et l'Impact des Ententes Injustifiables et Sanctions prévues contre les Ententes par les Législations Nationales de la Concurrence, DAFPE/COMP(2002)7.
- 3 Second Rapport du Comité de la Concurrence sur une Action Efficace contre les Ententes Injustifiables, DAFPE/COMP (2003)2.
- 4 Dans un passé récent, Israël a également infligé des peines d'emprisonnement à des participants à des ententes. *Voir* sur le tout dernier état de la question, Rapport Annuel pour 2002, DAFPE/COMP (2003)11.
- 5 Baker, The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging, 69 Geo. Wash. L. Rev. 693, 713 (2001).
- 6 On pourrait soutenir que ce système de délégation de responsabilité pourrait être plus efficace qu'un système qui se fonde sur l'imposition de sanctions à des personnes physiques. *Voir, par ex.*, Kobayashi, Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporation, 69 Geo. Wash. L. Rev. 715, 737 (2001).
- 7 *Voir supra*, p. 2
- 8 Les coûts de supervision (y compris les coûts indirects, si un mécanisme efficace de supervision devient si intrusif qu'il crée un climat de méfiance entre les employés) peuvent également réduire l'incitation d'une société à superviser les cadres et les employés.
- 9 En outre, il est possible que les dirigeants aient quitté l'entreprise lorsque la participation de celle-ci à une entente illicite est détectée.
- 10 Un commentateur a par exemple estimé que seules des peines de prison auraient des effets dissuasifs suffisamment forts. Wouter Wils, Does the Effective Enforcement of Articles 81 and 82 Require not only Fines on Undertakings but also Individual Penalties, in particular Imprisonment?, in Effective Private Enforcement of EC Antitrust Law (Ehlerman and Atanaiu eds. 2001)
- 11 La question des sanctions "optimales" est plus amplement analysée *infra*, p. 7.
- 12 La Commission du Commerce de Nouvelle-Zélande, par exemple, n'a pas soutenu une proposition visant à interdire les remboursements pour ce motif. *Voir*, Optimal Sanctions in Cartel Cases, Report by New Zealand on the Review of the Penalties, Remedies and Court Processes under the Commerce Act 1986, DAFPE/CLP/WP3(2001)14, p. 21.
- 13 En outre, étant donné que l'interdiction d'exercer des fonctions de dirigeant est fonctionnellement très similaire à une amende (en termes de différence entre les revenus futurs du poste que l'intéressé est empêché d'exercer du fait de cette interdiction, et le meilleur poste de remplacement possible), une société pourrait également stipuler une indemnisation en faveur de l'intéressé, afin de le compenser de toute perte de revenus liée à cette sanction.

- 14 New Zealand Report, *supra* note 12, p. 20.
- 15 Hammond and Penrose, Proposed criminalisation of cartels in the UK (2001), p. 29.
- 16 *Id.*, p. 30.
- 17 Aux Etats-Unis, toutes les sanctions pénales doivent être infligées par un tribunal, mais la négociation de peine permet de ce faire sans qu'il soit nécessaire de suivre toutes les étapes de procédure jusqu'à l'audience de jugement ou de procéder à une enquête préliminaire détaillée.
- 18 Hammond and Penrose, *supra* note 15, p. 30. Il apparaît qu'au Royaume-Uni, l'OFT et les autorités chargées de poursuivre les délits pénaux d'entente ont trouvé des solutions permettant à l'OFT d'offrir à un informateur potentiel une immunité de poursuites en vertu de son programme de clémence, avec un haut degré de certitude.
- 19 Bien qu'une société soit le principal bénéficiaire d'une entente illégale, certains cadres peuvent également bénéficier directement de cette entente, sous la forme d'une rémunération plus élevée et d'un avancement de carrière, particulièrement si la rémunération est liée à la performance financière de la société. Les avantages directs des activités d'entente peuvent parfois être également substantiels. Voir Hammond, Lessons common to detecting and deterring cartel activity, in *Fighting Cartels – why and how*, Proceedings of the 3rd Nordic Competition Policy Conference on Fighting Cartels (2001), p. 193.
- 20 Werden & Simon, Why price fixers should go to jail, 1987 *The Antitrust Bulletin* 917. Ils concèdent, toutefois, qu'il serait difficile de déterminer le ratio coût marginal/bénéfice dans la réalité, et qu'il se pourrait parfaitement que les bénéfices marginaux excèdent toujours les coûts marginaux, ce qui justifierait des peines d'emprisonnement plus longues plutôt que plus courtes.
- 21 Baker, *supra* note 5, p. 706.
- 22 Baker, *supra* note 5, p. 695.
- 23 Posner, Optimal Sentences for White Collar Criminals, 17 *Am. Crim. L. Rev.* 409 (1980). Posner soutient également qu'en fin de compte, il faudrait éviter les sanctions contre des personnes physiques, car aussi longtemps que des sanctions peuvent être infligées à des sociétés et que ces sanctions sont suffisamment élevées, les sociétés prendront des mesures efficaces pour surveiller leurs agents.
- 24 Werden & Simon, *supra* note 20.
- 25 New Zealand Report, *supra* note 12, p. 20.
- 26 Harm and Sanctions Report, ¶16.
- 27 Joshua, A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic? A Close Look at the United Kingdom Proposals to Criminalise Hardcore Cartel Conduct, 23 *ECLR* 231, 237 (2002).
- 28 Par exemple, avant l'introduction de sanctions pénales au Royaume-Uni, des débats considérables ont eu lieu sur la définition appropriée de la nouvelle infraction pénale concernée, afin de s'assurer qu'elle ne couvrait clairement que les ententes injustifiables. *Voir, par ex.*, DTI, White Paper: A World Class Competition Regime (2001), ¶ 7.22; Hammond & Penrose, *supra* note 15, p. 10.
- 29 *Voir supra* p. 6.
- 30 Review of the Trade Practices Act 1974 (Dawson Report), Chapitre 10, Pénalités et autres recours, p. 156 (2003).

- 31 *Voir, par ex.*, Affaire T-224/00, *Archer Daniels Midland Company v. Commission*, Tribunal de Première Instance des Communautés Européennes, 9 juillet 2003, ¶92. Le Tribunal a également souligné que différentes règles s'appliquent au sein de l'Union Européenne.
- 32 *Voir supra*, p 7.

## AUSTRALIA

### I. Overview

Punishing firms that engage in cartel behaviour is essential to deterrence, however, Australia also views the treatment of individuals under its sanctions regime as necessary to halting both the formation of cartels, and their detection. If individuals are not held personally liable for their actions, then the threat of sanctions may be perceived to be so remote from the illegal conduct that it constitutes an acceptable risk, particularly when contrasted against the supranormal profits that flow from the illegal conduct. Australia's *Trade Practices Act 1974* (TP Act), which prohibits anti-competitive agreements, provides for significant pecuniary penalties against both corporations and individuals for breaches of the TP Act. It has also recently introduced a leniency policy to enhance its enforcement activities.

Australia's recent independent review of the competition provisions of the TP Act, the Dawson Review, examined options for strengthening the sanctions against individuals for cartel conduct. The Review recommended that courts have the option to exclude those implicated in anti-competitive breaches of the TP Act from holding company positions, and that corporations be prevented from indemnifying their agents and employees from pecuniary penalties for breaches under the TP Act. The Review also recommended that criminal sanctions be introduced, subject to solutions being found to identified problems such as an appropriate definition for the offence, and a workable method of combining a clear and certain leniency policy within the criminal regime.

The Government has accepted, and is working to implement, the Review recommendations. On 3 October 2003, the Treasurer announced terms of reference for an officials' working party to examine the issues identified in the Dawson Review in relation to the introduction of criminal sanctions. The working party will comprise officials from the Treasury, the Attorney-General's Department, the Australian Competition and Consumer Commission (ACCC) and the Commonwealth Director of Public Prosecutions.

### II. Penalties for cartel conduct under the tp act

Part IV (Restrictive Trade Practices) of the TP Act prohibits cartel conduct, specifically:

- competitors making or giving effect to a contract, arrangement or understanding which contains a provision which has the purpose or effect of substantially lessening competition (s45(2)(a)(ii) & 45(2)(b)(ii)). While Courts will have to determine whether the provision did in fact substantially lessen competition, this process is assisted by the fact that provisions which have the purpose or effect of fixing, controlling or maintaining prices are deemed to substantially lessen competition (s45A(1)); and
- competitors making or giving effect to a contract, arrangement or understanding which contains an exclusionary provision (s.45(2)(a) (i) and 45(2)(b)(i)). An exclusionary provision (as defined in s4D) is an agreement between persons in competition with each other which excludes or limits dealings with particular suppliers or customers.

Under section 78 of the TP Act, criminal penalties cannot be imposed upon individuals or corporations who breach Part IV of the TP Act, however, the Federal Court can impose significant

pecuniary penalties. The maximum penalties under the Act are A\$10 million for companies, and A\$500 000 for individuals. The Court may also impose civil community service orders, probation orders and publicity orders. Those harmed by the anti-competitive conduct may also seek damages to recover the loss or damage resulting from the contravention.

### **III. Pecuniary penalties against individuals**

In Australia, since 1988, there have been 46 convictions for breaches of s45 (anti-competitive arrangements) and s45A (price-fixing) of the TP Act. Of these, where the court has imposed fines on corporations, there are only five cases where they have not also been imposed on individuals. In three cases, fines have been imposed on individuals, but not companies. The average pecuniary penalty for individuals for breaches of s45 and s45A of the TP Act, over the period 1988-1999 was A\$32 800; since 1999 it has been A\$45 500. The courts are yet to impose a maximum fine on an individual.

### **IV. Criminal sanctions against individuals**

On 9 May 2002, the Treasurer announced the terms of reference for the Dawson Review, which included the identification of additional measures to achieve a more efficient, fair, timely and accessible framework for Australia's competition law. The Government accepted the recommendations of the Review, including those in relation to individual sanctions for breaches of Part IV of the Act, to:

- introduce criminal penalties for serious cartel behaviour, with penalties to include fines for corporations, and imprisonment and fines for individuals, subject to the satisfactory definition of serious cartel behaviour, and a workable way of combining criminal sanctions with a clear and certain leniency policy;
- give the court the option to exclude an individual implicated in a breach of the Act from holding a directorship or from being involved in the corporation's management; and
- prohibit corporations from indemnifying, either directly or indirectly, employees, officers or agents against pecuniary penalties against the individual.

The Review also discussed increasing penalties to corporations, and the Government accepted its recommendation to increase the maximum pecuniary penalty for corporations to the greater of A\$10 million or three times the gain from the contravention or, where this cannot be ascertained, ten per cent of the turnover.

By increasing the risk to individuals of engaging in anti-competitive conduct, these changes will strengthen Australia's ability to deter cartel activity. In proscribing the ability of corporations to subvert decisions of the Court to impose pecuniary penalties on individuals, the changes will also ensure that fines retain their deterrent effect.

### **V. Individual sanctions and leniency**

The threat of significant sanctions against individuals, combined with a program of leniency or immunity, will increase the likelihood of detection. Competitors who act collusively are not only able to achieve supranormal profits, but remove the threat of exposure as possible complainants are often their co-conspirators. By removing the threat of sanctions for the first cartel member to come forward, a leniency policy provides the impetus for a cartel member to approach authorities, thereby breaking the cartel. A leniency policy is primarily designed to uncover cartels that would otherwise go undetected. However,

given the quality of evidence that is often received under a leniency policy direct from cartel participants, it can also make investigations and court proceedings more efficient, timely and effective.

The ACCC is the agency responsible for enforcing the competition provisions of the TP Act and the associated State/Territory application legislation. Under the present arrangements, in the context of the leniency policy, only the ACCC can request that the court impose a pecuniary penalty upon corporations and individuals engaged in contraventions of Australia's competition laws.

Where the ACCC believes that it has sufficient evidence to establish that there has been a cartel operating in Australia, it will ordinarily need to make the following decisions:

- whether or not to institute court proceedings against the individuals and businesses allegedly involved in the cartel; and
- if proceedings are instituted, the form of relief to be sought from the Federal Court against each of the individuals and businesses, including whether or not to seek a pecuniary penalty.

Once the ACCC has instituted proceedings, it is then up to the Federal Court to determine whether contraventions of the TP Act have occurred, and if so, the types of relief/penalties that will be imposed upon the respondents.

On 30 June 2003, the ACCC released a leniency policy for cartel conduct ("the leniency policy"). The main features of the leniency policy are:

- where the ACCC is unaware of a cartel, the first company or individual to come forward will receive an offer of conditional 'immunity' from ACCC-instituted Court proceedings;
- where the ACCC is aware of a cartel but has insufficient evidence to institute Court proceedings, the first company or individual to come forward will receive an offer of conditional 'immunity' from pecuniary penalty;
- a cartel participant that is "second through the door" will not be able to take advantage of the leniency policy;
- a leniency applicant is required to make restitution to injured parties, where this is possible;
- immunity will be conditional upon full and ongoing cooperation;
- immunity relates only to Commission instituted proceedings;
- the ACCC will not grant leniency to any person that has coerced others to break the law or who was the clear leader in the cartel; and
- the policy will apply in a similar way to corporations and individuals that assist the ACCC.

While the ACCC's leniency policy sets out how it will make decisions in certain circumstances, it does not in any way affect the rights of third parties to take action under the TP Act (to obtain restitution for loss or damaged suffered, for example).

There have been two formal applications for leniency since the policy was released on 30 June 2003. A review of the ACCC's leniency policy would be influenced by the introduction of

criminal sanctions for cartel behaviour, which are now being considered in the context of the Dawson Review.

## **VI. Conclusion**

While Australia's pecuniary penalties against individuals for cartel conduct are substantial, and have provided a sound basis for an effective leniency policy, the Dawson Review identified several changes that would strengthen Australia's anti-cartel law. Principal among these is the possible introduction of criminal sanctions, which raises the prospect that individuals could be imprisoned for engaging in illegal cartel activity.

As Australia works towards implementing the Government's response to the Dawson review, it is to be expected that its sanctions against individuals will be significantly enhanced.



## CANADA

The following are comments related to the issues and questions identified by the Secretariat on the topic of sanctions against individuals, including criminal sanctions in prosecuting cartels.

### **I. The Role of Sanctions on Individuals in Hard Core Cartel cases**

#### **A. Deterrence**

#### **What sanctions in addition to fines and imprisonment can be imposed on individuals who participate in a hard core cartel?**

In addition to fines or imprisonment<sup>1</sup>, orders prohibiting the continuation or repetition of all anti-competitive conduct may be imposed. When such prohibition orders are issued, they are usually broadly worded and may be sought against corporations, their officers, directors and even employees. Failure to comply with an order renders the accused liable to a fine at the discretion of the court or to imprisonment for a term not exceeding two years.

Prohibition orders may include prescriptive terms requiring positive steps or acts that are considered necessary to prevent the commission, continuation or repetition of the offence, including the establishment of a corporate compliance program or the implementation of seminars on competition law and policy for officers and employees of the company. In addition to remedying the anti-competitive activity, these enforceable orders encourage future compliance with the legislation and provide an educational benefit to others with respect to competition offences.

Orders allowing for the seizure of proceeds of crime and conditional sentences (to be served in community) may also be issued by the court. For instance, as a condition of sentence, a judge may order that an individual will have to report to a probation officer.

#### **What are the experiences concerning the effectiveness of various sanctions?**

Based on our experience, there is no greater deterrent to the commission of cartel activity than a credible risk of fines and/or imprisonment for individual corporate officials. Corporate fines alone simply are not sufficient to deter some would-be offenders. In some cartels, individuals personally pocketed millions of dollars in increased salaries and bonuses as a direct result of their criminal activity. In our view, a corporate fine alone will not deter such individuals. The effectiveness of a sanction in a hard core cartel case relies on a credible threat of effective investigation, coupled with the certainty of prosecution and stringent penalties, for both individuals and corporations.

Canadian legislation also provides for individual and class actions for recovery of compensatory damages by cartel victims. This is also an effective deterrent to cartel activities. In this regard, class actions have been filed in Canada e.g. in relation to the vitamin conspiracies. While we are not aware of any studies related to this issue, anecdotal evidence indicates that class action and private action suits act as deterrents. In addition, the negative publicity surrounding a conviction as well as wavering consumer confidence can act as deterrents and may have a greater impact than criminal penalties alone.

**Are there ways to assess the effectiveness of sanctions, including combinations of sanctions?**

In our view, sanctions are effective when they deter cartel participants from re-offending (specific deterrence) and others from committing similar crimes (general deterrence). With respect to specific deterrence, we have not studied the rates of recidivism for cartel participants and are aware of no studies on this issue. However, we can say that sanctions are effective in light of the relatively small numbers of repeat offenders that we deal with. General deterrence is even more difficult to measure and could only be measured by conducting targeted surveys. We have not undertaken any such studies.

**How effective are fines imposed on individuals if there is no prohibition against reimbursing an individual? On the other hand, can prohibitions against reimbursement be effective?**

This is impossible to assess as there is no law in Canada prohibiting indemnification of individuals where a corporation chooses to do so. This is why criminal liability for individuals (and the resulting criminal record) combined with the possibility of imprisonment are invaluable sanctions in support of deterrence.

***B. Increase Effectiveness of Investigation***

**What are the elements that maximize the effectiveness of sanctions against individuals during investigations as an incentive to cooperate with authorities?**

As mentioned above, the principal purpose of sanctions in cartel cases is deterrence. The decision to form or join a cartel is primarily a financial one. An effective deterrent, therefore, is one that on average, takes away the financial gains that otherwise would accrue to the cartel members. The possibility of avoiding stringent sanctions may also provide an incentive for cartel participants, both individuals and companies, to defect from the secret agreement and provide information to the Bureau.

In this respect, in 1991 the Bureau launched its Immunity Program. Since the introduction of the Program the number of convictions in respect to both domestic and international cartel behaviour has significantly increased. The transparency and certainty of the Program provides a strong incentive for companies and individuals to come forward and cooperate with the Bureau. The Program also creates an unstable environment among cartel participants who fear that one of the participants may cooperate with the Bureau to avoid criminal sanctions.

The possibility of avoiding strong sanctions against individuals provides added incentives for those individuals to "blow the whistle" on cartel conduct and to offer cooperation to government investigators in exchange for reduction or elimination of a potential punishment.

**If the authority to implement a leniency program and the authority to prosecute criminal cases are divided, what can be done to limit or eliminate the risk that the discretion of public prosecutors to pursue a case could undermine certainty for defendants that they will not be prosecuted if they come forward first?**

The Bureau's Immunity Program was developed in consultation with the Attorney General of Canada and is consistent with the Attorney General's own Immunity Program. While the Bureau's Immunity Program does not legally bind the Attorney General of Canada, who has the exclusive authority to grant immunity in competition cases, there is a high degree of certainty that on complying with the Bureau's Immunity Program the party will qualify for immunity under the Attorney General's own Immunity Program.

## II. Is there an “Optimal” level of Sanctions against Individuals?

### Is there a way of determining what an “optimal” level of fines is that can be imposed on individuals in hard core cartel cases?

We have not conducted any research into methods for determining optimal fine levels. However, in trying to determine the appropriate level of fine in a particular case, the Attorney General of Canada will take into consideration:

- The jurisprudence on sentencing for conspiracies established in recent cases;
- The size of the companies involved, their market share, their influence;
- The role of the participant in the offence, including whether they initiated participation in the offence;
- The effort’s made by the accused to conceal the conspiracy;
- The duration of the conspiracy, the geographical scope of the market, the nature of the product;
- The overall effect of the conspiracy on the market;
- Whether the accused has acknowledged the serious nature of the offence and expressed any regret for having participated in the conspiracy.
- Whether the victim is a public authority (i.e. hospital) or vulnerable group (i.e. older people, children etc.);
- Whether the accused has plead guilty and the point in the investigation the plea was entered;
- The extent and timeliness of cooperation with the Bureau and the Attorney General of Canada;
- Whether restitution was made by the accused to the victims.

In addition, the Criminal Code sets out fundamental principles of sentencing including the following:

- a) a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; and;
- b) a sentence should be proportionate to sentences imposed on similar offenders for similar offences committed in similar circumstances.

### What are the opinions concerning the above argument in favour of shorter, rather than lengthy prison sentences?

Given their status as the most serious offences under the Act cartel prosecutions should attract very significant penalties, including individual and corporate fines, imprisonment and prohibition orders. The duration of the prison sentence must be long enough to send an unequivocal promise of serious sanction so as to deter powerful companies and their officers and employees from conspiring.

**What parameters determine the statutory term of imprisonment and the prison terms actually imposed on defendants?**

The conspiracy provision of the *Competition Act* (section 45) specifies that on conviction, the penalty may include a fine of up to \$10 million, imprisonment for up to five years, or both. With respect to bid-rigging (section 47), upon conviction, individuals and corporation may be liable for an unlimited fine. Individuals may be imprisoned for up to five years.

Part XXIII of the *Criminal Code* establishes the sentencing purposes and principles that apply to the disposition of cartel prosecutions under the *Competition Act*. Two key purposes of criminal sentences invariably have been alluded to in contested and in consensual outcomes in Canadian cartel prosecutions: (1) the denunciation of unlawful conduct; and (2) specific and general deterrence.

Among the fundamental principles of sentencing laid down in the Code are the following:

- a) a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; and;
- b) a sentence should be proportionate to sentences imposed on similar offenders for similar offences committed in similar circumstances.

**III. Issues Specifically Related to Criminal Sanctions against Individuals**

**A. Concern raised in Connection with Criminal Sanctions.**

**If differences exist between bid rigging cases and other forms of hard core cartels in terms of sanctions that can be imposed on individuals, what explains those differences?**

Under the *Competition Act*, the fine for conspiracy cases is a maximum of \$ 10 million per count while the fine for bid-rigging is not subject to a maximum fine. Both specify a maximum of 5 years of imprisonment. Notwithstanding the difference in the fines specified in the provisions, both are subject to the factors and principles regarding sentencing described above. Therefore, in practice sanctions are similar for both provisions and include either a fine and term of imprisonment up to five years or both.

**Is there any evidence that criminal sanctions actually can decrease the level of anti-cartel enforcement because of higher standards of evidence and/or the right against self-incrimination?**

**Answer:**

We are not aware of any evidence on this point.

**In some countries, it may be (or may have been) difficult to “persuade” courts to actually impose criminal sanctions and prosecutors to bring more cases. What can be/has been done to “encourage” courts to impose sanctions more frequently and/or to impose tougher sanctions, and/or prosecutors to bring more cases and demand higher sanctions?**

We have not had any difficulties in persuading prosecutors to bring cases. With respect to the Courts in Canada, although we have successfully raised fine levels in non-contested cases, we have had some problems in conspiracy cases where the court has viewed the conspiracy offence as a regulatory one

rather than a true crime. Another difficulty in raising fines in contested cases is the fact that courts tend to impose fines in similar ranges to those imposed in past cases.

## **B. Definition of a Criminal Offence**

### **How have countries addressed concerns related to the definition of hard core cartels as a criminal offence?**

Canada's *Competition Act* contains a broad conspiracy provision which prohibits agreements which injure competition unduly. Section 45 (the conspiracy provision), as interpreted by the jurisprudence, requires evidence of the following elements: the parties intended to and did enter into an agreement; the parties intended **or** ought reasonably to have known that this agreement would injure competition unduly. Concerns have been raised with respect to the existing section 45 that, on the one hand, pro-competitive agreements among competitors may be chilled by the potential criminal stigma while, on the other hand, hard-core cartels may be insufficiently deterred because of the difficulty of showing, under a criminal burden of proof, such a complex economic concept as their undue impact on competition.

The Canadian Government has recently endorsed the idea of a reform of section 45 under a dual-track approach. According to this approach, a new *per se* section 45 would define cartels by their objective nature (such as possibly those agreements that fix prices, restrict output or allocate markets) without the existing undue impact on competition requirement. As well, a new civil reviewable section would be added to the Act, under which other types of agreements among competitors would be assessed using a substantial impact on competition test.

The Government has recently launched a consultation process on this proposed reform of section 45. The main objective of this reform is to create a system which efficiently and effectively proscribes hard-core cartel behaviour, while encouraging strategic alliances and collaborations among competitors that produce pro-competitive benefits. Careful consideration will be given to the identification of unlawful activities in order to minimize the potential for over-reach of the new *per se* provision.

### **If the general language in an antitrust statute is used to seek criminal sanctions, how can concerns related to over-deterrence and necessary legal certainty be addressed?**

Section 45 of the Act has been described by commentators as being both over-inclusive and under-inclusive. It may be over-inclusive in the sense that the prospect of criminal sanctions can unintentionally discourage people from entering into agreements that cause no harm to consumers and which may be pro-competitive. For example, section 45 may discourage strategic alliances which would otherwise make more efficient use of resources and be pro-competitive. It is said to be under-inclusive in the sense that the complex market-effects test described above is difficult to apply in a criminal context, making convictions overly difficult in contested conspiracy cases.

The response to the preceding question describes our efforts to address this issue.

It should be noted that the current wording of section 45 addresses the issue of over deterrence to some extent by providing twelve specific exemptions. Among these, the following may be more likely to have application to strategic alliances: the exchange of statistics; the definition of product standards; the size and shapes of product packaging; cooperation in research and development; restrictions on advertising or promotion; or, measures to protect the environment. There are also specific defences dealing with export consortia and specialization agreements.

In addition to the body of case law that clarifies the general language of the conspiracy provisions, the Bureau publishes interpretative guidelines and also provides binding advisory opinions to those requiring specific clarification as to the legality under the Act of proposed transactions.

**C. *Allocating Responsibility for Prosecuting a Criminal Case***

**What are the advantages and disadvantages of having two separate authorities involved in hard core cartel cases where criminal sanctions are being sought?**

In Canada, competition cases are investigated by the Competition Bureau and prosecuted in the Courts by the Attorney General of Canada.

The advantages of this separation of responsibilities are:

- Collaboration between the authorities by exchanging views and opinions on the actions to be taken can provide a broader approach and better solutions;
- The Department of Justice lawyers (who represent the Attorney General) assigned to the Competition Law Division have developed an expertise in prosecuting (as opposed to investigating) competition matters.
- The Department of Justice lawyers provide an objective and neutral opinion of the facts presented for their review.
- Each authority can focus on its particular mandate and develop a complementary expertise of the other authority.

The disadvantages are:

- Having multiple authorities has the potential to slow the process for prosecution if the relationship between the two authorities is not managed effectively;
- Extra care must be taken to ensure that communication is clear and consistent.

**If there are two separate authorities, how can the two coordinate their tasks?**

As described above, the Bureau investigates allegations of criminal conduct under the *Competition Act*; the Attorney General prosecutes; and the courts adjudicate.

As soon as a complaint is submitted by any member of the public, the Competition Bureau examines the matter and opens a formal inquiry if reasonable grounds exist to believe that a violation of the Act has been or will be committed. From this point, a lawyer from the Attorney General will be appointed and may be actively involved in the investigation. The lawyer will assist investigators by reviewing information to obtain search warrants or Court orders and providing advice to investigators during the investigation. Once the Bureau refers a matter to the Attorney General with a recommendation to prosecute, the Attorney General may go forward with the recommendation, or (s)he may request that additional information be obtained or inform the Bureau that the evidence does not support prosecution. Once the Attorney General proceeds with the recommendation to lay charges, the Bureau's staff play a supportive and important role in the prosecution as part of the case team.

The Bureau will also make recommendations which are taken into account by the Attorney General as to what charges should be laid, who should receive immunity, and on the level of fines or penalties.

**In particular, how can the problem of effective cooperation be addressed to ensure the effectiveness of leniency programs?**

In Canada the investigators work closely with officials from the Attorney General during the investigation process. As soon as an inquiry is opened, the Bureau will request that a lawyer from the Attorney General, Competition Law Division be assigned to the file as a legal advisor. These lawyers represent the Attorney General and often are involved in the review of all relevant information provided, the examination of witnesses, and approve the entry of immunity applicants into the Immunity Program. They are also kept apprised of the development of the investigation on an ongoing basis so that legal issues can be addressed in a timely manner.

***D. Sanctions under Concurrent Criminal and Civil Statutes***

**What are the factors used to determine whether criminal sanctions should be sought in a specific hard core cartel case?**

Before initiating any formal procedures under the conspiracy provision, the Bureau may elect to review the matter under the abuse of dominance provision (section 79) or under the merger provision (section 92). Abuse of dominance and mergers challenges are adjudicated in a civil process by the Competition Tribunal<sup>2</sup>. Generally, matters involving anti-competitive agreements, price fixing, market sharing, market allocation and boycotts are pursued under the criminal provisions of the Act.

Should the Bureau elect to pursue the matter under the criminal provisions, case screening criteria are used to rank the projects so that resources are allocated to the highest priority projects within the Criminal Matters Branch. Identification of key factors and a numerical scoring system makes case ranking simpler and more uniform. A new assessment of the weighting is done whenever the project status changes, whenever a significant event occurs, when the project has not been reviewed in the preceding months.

The case screening criteria for hard core cartel consists of four categories:

1. Economic Impact
2. Enforcement Policy Considerations
3. Strength of the Case
4. Management Considerations

Each category is divided into several key factors relevant to the analysis of each category to facilitate weighting.

**If an authority has the choice between criminal and civil sanctions, when and how can it decide which sanctions it should seek?**

The Bureau can decide to pursue conduct under either the civil or criminal provisions at any time before the start of formal court proceedings.

**What limitations exist concerning the use of evidence obtained in a criminal procedure in a civil trial and vice versa? Can such limitations affect criminal proceedings against individuals?**

Under the Act, a witness is not excused from testifying on the ground that the testimony may incriminate the person. However, no evidence obtained from a witness under a section 11 order may be used against that person in any subsequent criminal proceedings. Where an individual employee of a corporation has been compelled to give evidence under section 11, the evidence is admissible against the corporate accused as well as against other individuals.

**E. *International Investigation and Double Jeopardy***

**If two or more countries prosecute a cartel under their criminal statutes, could there be concerns about prosecuting the same individual based on the same facts more than once? If so, how could these concerns be addressed?**

It is clear from Canada's track record of enforcement action against international cartels that the Bureau position is that it possesses the authority under section 45 of the Act to prosecute participants in conspiracies regardless of whether the companies or individuals have been criminally convicted under foreign statutes or whether they could be prosecuted under the laws of his or her country. This is the case whether the accused are located in or outside Canada.

The principle of double jeopardy is enshrined in Canada in subsection 11(h) of the *Canadian Charter of Rights and Freedoms*<sup>3</sup>. In addition to being constitutionally enshrined, the defences of *autrefois acquit* and *autrefois convict* are also available through sections 465 and 607 of the *Criminal Code*.

The *Charter*, the *Criminal Code* and the common law require that the offence for which someone is claiming double jeopardy be the same. The provisions of the *Competition Act* are not the same as those of other jurisdictions. Moreover the Act is concerned with offences with a substantial link to Canada. Therefore, while another country may have prosecuted a cartel under their criminal statutes, it will not have done so with respect to the harm caused to competition or consumers in Canada and the defence will not apply.



## NOTES

- 1 Under section 45, the conspiracy provision of the *Competition Act*, a person found guilty may be subject to a fine not exceeding ten million dollars. Under section 47, the bid-rigging provision, the person found guilty is subject to a fine at the discretion of the Court. In addition to a potential fine, both provisions also subject a person found guilty to possible imprisonment for a term not exceeding five years.
- 2 Section 45.1 of the Act stipulates that “no proceedings may be commenced under subsection 45(1) against a person against whom an order is sought under section 79 or 92 on the basis of the same or substantially the same facts as would be alleged in proceedings under that subsection”.
- 3 Subsection 11(h) states that “Any person charged with an offence has the right...if finally acquitted of the offence, not to be sued for it again and, if finally found guilty and punished for the offence, not to be sued or punished for it again”



## CHINESE TAIPEI

### 1. The Role of Sanctions on Individuals in Hard Core Cartel Cases

#### A. *Deterrence*

##### 1.1. *What sanctions in addition to those mentioned above in paragraph 15 can be imposed on individuals who participate in a hard core cartel?*

In terms of sanctions against hard core cartels, the Fair Trade Commission (the FTC) can order cartel members to cease their operations, rectify the illegal practices, or take any necessary measure within the time prescribed in the order. The FTC may also impose an administrative fine ranging from NT\$50 thousand to NT\$25 million. At this stage, only the FTC has the jurisdiction over the cartels.

However, if the cartel participants fail to comply with the issued order, or comply once but engage in the same or similar practices later, administrative and criminal investigations will then be launched in sequence. The FTC may continue to order the participants to comply with the order, and each time may successively impose an administrative fine of between NT\$100 thousand and NT\$50 million until the order has been complied with. The FTC will then refer the case to prosecutors for criminal investigation. Individuals responsible for the cartel may be punished by imprisonment for up to three years or detention, or by a criminal fine of no more than NT\$100 million, or by both imprisonment and a criminal fine.

##### 1.2. *What are the experiences concerning the effectiveness of various sanctions? Are there ways to assess the effectiveness of sanctions, including combinations of sanctions? How effective are fines imposed on individuals if there is no prohibition against reimbursing an individual? On the other hand, can prohibitions against reimbursement be effective?*

Sanctions against cartels might be seen as being effective in Chinese Taipei. During the early stages of the nearly nine years that have passed since the Fair Trade Act began to be enforced, it was very easy to discover cartels due to the insufficient awareness of the newly-passed law. However, cartels have learned from these experiences, and it has recently become more and more difficult to find them out.

Imprisonment proved to be a very powerful deterrent in the past, but the perpetrators of cartels also learned to avoid being discovered. A significant example would be that, in the early days, in cartels formed by trade associations, the presidents of these trade associations were often held solely liable for criminal sanctions because most members argued that it was the president who made the decision. Later on, the FTC found out that most cartels formed by trade associations were “without a president” and found it difficult to impose criminal sanctions on all members, who might number more than thirty or forty.

Prohibition against reimbursement is not allowed under current law, and also may not be feasible in practice.

**B. Increased Effectiveness of Investigations**

- 1.3. *What are the elements that maximize the effectiveness of sanctions against individual during investigations as an incentive to cooperate with authorities?*

To maximize the effectiveness of sanctions against individuals, the traditional “carrot-and-stick” approach might still be very useful. On the one hand, sanctions including monetary fines involving large amounts and/or imprisonment should be provided in relevant laws to serve as a powerful deterrent. On the other hand, there should be a well-designed leniency program to attract individuals to cooperate with the competition authorities during the investigation or even to come forward first before the cartel’s discovery.

- 1.4. *If the authority to implement a leniency program and the authority to prosecute criminal cases are divided, what can be done to limit or eliminate the risk that the discretion of public prosecutors to pursue a case could undermine certainty for defendants that they will not be prosecuted if they come forward first?*

A way to solve the uncertainty in the case of defendants who come forward first and expect that they will not be prosecuted due to the discretion of the prosecutors might be to clearly stipulate the leniency program in relevant laws. The leniency program should prescribe that, once an individual reaches an agreement with the competition authority or the prosecutors, he/she should receive immunity or a lesser sentence.

- 1.5. *In countries in which plea bargaining does not exist, are there mechanisms that can be developed to assure that the competition authority is able to obtain co-operation from individuals in exchange for a promise of immunity or a lesser sentence if neither prosecutors nor courts are bound by such arrangements?*

No such mechanism can be guaranteed without authorization by law.

**2. Is there an “Optimal“ Level of Sanctions against Individuals?**

- 2.1. *Is there a way of determining what an “optimal” level of fines is that can be imposed on individuals in hard core cartel cases?*

No such study has been carried out yet.

- 2.2. *What are the opinions concerning the above argument in favor of shorter, rather than lengthy prison sentences? What parameters determine the statutory term of imprisonment and the prison terms actually imposed on defendants?*

Considering cost-effectiveness from the point of view of implementing imprisonment, the FTC would favor shorter over longer prison sentences. Criminal sanctions will not only be disadvantageous to individuals by depriving them of their freedom of living, economic benefits, and personal reputation, but they will also seriously affect the individuals’ future career life due to their having a criminal record. Those disadvantages will be felt to a certain extent, regardless of how long the prison sentence is.

Therefore, by taking social perceptions, economic effects, and criminal deterrence into account, since shorter prison sentences are sufficient to create an effective deterrent and require less resource for their implementation, they would be a better choice.

The Criminal Code requires the courts to take the following factors into account when deciding prison terms:

1. motivation in committing the crime;
2. purpose in committing the crime;
3. stimulation encountered when committing the crime;
4. method used to commit the crime;
5. living condition of the defendant;
6. moral personality of the defendant;
7. level of education and knowledge of the defendant;
8. general relationship between the defendant and the victim;
9. danger and harm resulting from the crime; and
10. remorse shown for the crime and cooperative attitude in the investigation.

### **3. Issues Specifically Related to Criminal Sanctions against Individuals**

#### **A. Concerns Raised in Connection with Criminal Sanctions**

- 3.1. *In countries that have considered or are considering introducing criminal sanctions against individuals, or have changed their system of criminal sanctions, have there been any discussions concerning the appropriateness of criminal sanctions for cartels and their consistency with social norms? What arguments were raised in this context? If criminal sanctions exist in other “white collar” areas, but not in cartel cases, what explains the differences?*

During the time between the date on which the Fair Trade Act came into force on February 4, 1992, and its first amendment on February 3, 1999, the administrative and criminal measures were given quite equivalent positions in combating hard core cartels. The provisions concerning hard core cartels were enforced under a dual track system. Any cartel case punished by the FTC was then referred to the prosecutors for criminal investigation and legal litigation.

However, soon after the provisions were enforced, the FTC encountered numerous difficulties and had to review the appropriateness of using criminal sanctions against individuals. Difficulties on all sides were encountered, including the business community, academia, the judicial system, and even the FTC itself.

Both the business community and also academia first of all expressed strong negative feelings toward the criminal sanctions against individuals. Insufficient awareness of the newly effective Fair Trade Act resulted in numerous trade associations still being engaged in price fixing or market division

agreements, based on decisions of general meetings or even the trade associations' charters. The FTC actually faced a situation in which violators were everywhere. If most trade associations' members had been sent to prison, this would have given rise to social disturbances beyond imagination.

The two-track system designed by the Fair Trade Act also gave rise to potential conflicts between the competition authority, the prosecutor and the court. Due to the hard core cartel's criminal nature, the prosecutors and the courts were used to demanding a higher standard of evidence than the FTC. There were occasions when the prosecutor's fact-finding or the court's judgment was different from that of the FTC. The resulting conflict between the two systems jeopardized the certainty required by the legal system.

Serious disputes among the FTC's Commissioners also arose as hard core cartel cases were reviewed. Some Commissioners refused to employ criminal sanctions against "white collar" cases and thus hesitated to punish cartels which did not have a very strong impact.

In 1994, only two years after the Fair Trade Act took effect, the FTC proposed a draft amendment to adopt what was called the "administrative sanction prior to the criminal one" principle to deal with hard core cartels. The amendment was finally passed in 1999 in the way the FTC advised.

Currently criminal sanctions still exist in many "white collar" areas, such as the Company Act, the Stock Exchange Act and the Futures Exchange Act. One reason for this is that the directors or managers in those companies, whether listed or not, are deemed to have a better understanding of relevant laws and regulations than the general public. If they violate the laws, they normally do so deliberately, and they should be punished more severely. However, in general, there is a trend to gradually weaken or eliminate criminal sanctions in "white collar" areas.

3.2. *If differences exist between bid rigging cases and other forms of hard core cartels in terms of sanctions that can be imposed on individuals, what explains those differences?*

In Chinese Taipei, differences exist between bid rigging in relation to public procurement cases and other forms of cartels in terms of the sanctions that can be imposed on individuals. Bid rigging cases had been part of the FTC's jurisdiction until the Government Procurement Act (the GPA) was passed and the Public Construction Commission was established in 1998 to take care of all public procurement cases, including the bid rigging of public construction cases. Sanctions against individuals provided by the GPA include imprisonment from six months to five years, accompanied by a criminal fine of no more than NT\$1 million. In comparison, the GPA provides a heavier prison sentence and a smaller monetary fine (at least six months and at most five years, and less than NT\$1 million) than the Fair Trade Act does (up to three years, and less than NT\$100 million).

There are different goals for prosecuting the bid rigging of public procurement cases and for other forms of cartels under different Acts. The Fair Trade Act protects the market's function and thus prohibits cartels from eliminating competition in relevant markets. The GPA, however, is concerned with individual public procurement cases rather than specific markets. Although the value of a public procurement case might not be high enough to affect a relevant market's function, it is the national treasury that is being violated and thus the public interest that is suffering due to the bid rigging. Thus the goal of the GPA to employ criminal sanctions against individuals who jeopardize the national treasury is different from that of the Fair Trade Act.

- 3.3. *Have considerations about the cost-effectiveness of criminal fines such as the ones discussed above played a role in a country's discussion whether to introduce criminal sanctions against individuals?*

Along with the aforementioned argument, during the first amendment to the Fair Trade Act to adopt the “administrative sanction prior to the criminal one” principle, the Act was equipped with more effective economic tools to eliminate the “motivation” of individuals and enterprises to violate the provisions. Both administrative and criminal fines were thus increased in order to constitute a meaningful deterrent. The current maximum criminal fine for individuals responsible for cartels, NT\$100 million, is one hundred times that under the previous provision.

- 3.4. *Is there any evidence that criminal sanctions actually can decrease the level of anti-cartel enforcement for the reasons stated above, e.g., because of higher standards of evidence and/or the right against self-incrimination?*

As stated above, the two-track system used by the Fair Trade Act before February 1999 did give rise to conflicts between the administrative and judicial systems, due to different standards of evidence. The prosecutors and the courts require more solid evidence to prove a criminal case.

Since the amendment in 1999, so far, no cartels have been caught twice – which will trigger a criminal investigation. This situation could be interpreted in two ways: one being that the administrative sanction is enough to deter the violation, and another being that cartel members have learned how to escape prosecution.

- 3.5. *In some countries, it may be (or may have been) difficult to “persuade” courts to actually impose criminal sanctions and “persuade” prosecutors to bring more cases. What can be/has been done to “encourage” courts to impose sanctions more frequently and/or to impose tougher sanctions, and/or prosecutors to bring more cases and demand higher sanctions?*

In Chinese Taipei it is quite unlikely for the FTC to “persuade” or “encourage” courts to do what we expect. Still, the FTC does believe there is a need to strengthen communication with courts to minimize potential conflicts. An annual seminar jointly organized by the competition authority, the prosecutors and the courts will significantly facilitate the exchange of viewpoints among each of the parties and produce very fruitful results. If the FTC does expect the courts to impose tougher criminal sanctions, it could put its ideas on the table through this annual event.

## **B. Definition of a Criminal Offence**

- 3.6. *How have countries addressed concerns related to the definition of hard core cartels as a criminal offence? If the general language in an antitrust statute is used to seek criminal sanctions, how can concerns related to over-deterrence and necessary legal certainty be addressed?*

The Fair Trade Act defines a “concerted action” in a quite detailed fashion to mitigate the concerns over excessive deterrence or legal uncertainty. A “concerted action” is defined as “the conduct of an enterprise, by means of a contract, agreement or any other form of mutual understanding, with other competing enterprise, to jointly determine the prices of goods or services, or to limit the terms relating to the quantity, technology, products, facilities, trading counterparts, or trading territory with respect to such goods and services, etc., and thereby restrict each other’s business activities.” The usage of the term

“concerted action” is further limited to “horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, trade in goods, or the supply of and demand for services.”

Besides, to minimize the possibility that the anti-cartel provisions might deter pro-competitive and innovative arrangements, the Fair Trade Act also defines seven types of concerted action that may be beneficial to the economy as a whole and the public interest in very concrete terms. Enterprises that intend to engage in such kinds of concerted action should obtain the FTC’s prior approval and thus could avoid unnecessary legal action.

### **C. *Allocating Responsibility for Prosecuting a Criminal Case***

3.7. *What are the advantages and disadvantages of having two separate authorities involved in hard core cartel cases where criminal sanctions are being sought? If there are two separate authorities, how can the two coordinate their tasks? In particular, how can the problem of effective cooperation be addressed most effectively to ensure the effectiveness of leniency programs?*

The institutional issue that Chinese Taipei faces might be a little different from that in other countries. A cartel is defined as an administrative case and should be dealt with by the FTC only. However, if the same cartel, once punished by the FTC, were formed again, the case will be handled by the FTC again, but still in an administrative capacity, and then it will be referred to the prosecutor for criminal investigation. In other words, the repeated violation will be investigated by the FTC and the prosecutor both successively and independently. The FTC in fact is not directly involved in pursuing the criminal case.

There are advantages and disadvantages with this institutional design. Administrative sanctions are more acceptable to the business community and cost less in terms of investigation resources. A criminal investigation takes place where the same cartel discovered after it is ordered by competition authority to cease and where it is revealed that there is a need for more effective deterrence. However, there is also the risk that differences between the competition authority and the prosecutor, or the decisions made by competition authority and those made by the court, could exist and thus cause legal uncertainty. In this regard, the communication of concepts of competition law and the sharing of evidence between the competition authority and the judicial system may be a subject that needs to be further addressed.

### **D. *Sanctions under Concurrent Criminal and Civil Statutes***

3.8. *What are the factors used to determine whether criminal sanctions should be sought in a specific hard core cartel case? If an authority has the choice between criminal and civil sanctions, when and how can it decide which sanctions it should seek?*

As stated above, once a cartel punished by the FTC is discovered again, the case will still be handled by the FTC. The FTC then has to refer the case to decide whether to pursue the case. Neither the competition authority nor the prosecutor may choose between criminal and civil sanctions.



- 3.9. *What limitations exist concerning the use of evidence obtained in a criminal procedure in a civil trial and vice versa? Can such limitations affect criminal proceedings against individuals?*

There is no limitation prohibiting the use of evidence obtained in a criminal procedure in a civil trial and vice versa, unless the evidence is of a nature that is protected by relevant laws, e.g., business secrets, personal privacy, etc.

***E. International Investigations and Double Jeopardy***

- 3.10 *If two or more countries prosecute a cartel under their criminal statutes, could there be concerns about prosecuting the same individual based on the same facts more than once? If so, how could these concerns be addressed?*

According to the Criminal Code, Chinese Taipei has jurisdiction over practices which have already been judged in other countries. Therefore, in accordance with the law, the prosecutor should pursue international cartels that adversely affect Chinese Taipei's market and prosecute individuals responsible for the cartels, regardless of the action taken by the foreign authorities.

As regards the double jeopardy issue, the Criminal Code stipulates that if the defendant has already served the full or partial term of his or her sentence in foreign countries because of the same case, then the term already served can be remitted. Therefore, there are no problems associated with the accumulation of prison terms in Chinese Taipei.



## ISRAEL

### 1. General

According to the Israeli Restrictive Trade Practices Law 5748 - 1988 (hereinafter – “the Antitrust Law” or the “Law”) there are two kinds of offences regarding cartels, that an individual can be involved in. The first one is defined in section 47 of the Antitrust Law, according to which:

*“(a) Any person committing one of the following:*

*(1) Being party to a restrictive arrangement not duly approved, nor issued with a temporary permit nor granted an exemption in accordance with Section 14;.....*

*(2)...*

*(3)...*

*(4)...*

*(4a)...*

*(5)...*

*(6)...*

*shall be liable to three years’ imprisonment or a fine ten times the fine provided by section 61(a)(4) of the Penal Law, 5737-1977 (hereinafter - the Penal Law) and an additional fine ten times the fine provided by section 61(c) of the Penal Law (hereinafter - additional fine) for each day that such offense persists.....”*

The second offence is defined in section 48 of the Antitrust Law, according to which:

*”In the case that an offense, as provided by this Law, is committed by a corporation, each person serving in such corporation, at the time of the commission of the offense, as an active director, a partner – other than a limited partner - or a senior administrative employee with responsibilities in the relevant field, shall be indicted with such offense, unless he can show that the offense was committed without his knowledge and that he took all reasonable steps to ensure compliance with this Law”.*

As can be seen from the wording of the Law, the Law explicitly applies criminal sanctions on individuals. While section 47 of the Law applies both to corporations and to executives that were active in the restrictive arrangement, section 48 applies mostly to executives that were not active in reaching or operating the restrictive arrangement but are responsible by law for the offences, because the corporation in which they were serving as executives was party to a restrictive arrangement.

To this end the Antitrust Law is not different from many other economic statutes in Israel, according to which executives of corporation are held criminally responsible for the corporation’s actions. (This is the case in the Israeli securities laws, the Israeli tax laws and the Israeli statute for money laundering).

Until 1994, when the Antitrust Authority was established, the Antitrust Law was not widely enforced. Since 1994, we have been experiencing a permanent expansion in the enforcement of the Antitrust Law, both from civil and criminal aspects. This tendency has been led by the IAA and by the

Israeli courts, the latter of which showed their willingness to aggravate the criminal sanctions on hard-core cartels.

Throughout the last nine years, the courts were generally partners to the view of the IAA that corporations are built of the individuals that manage them. Therefore, the view of the IAA and the relevant courts was that the main entities, who should bear the criminal responsibility for the corporation's participation in the cartel, are its executives.

In the last few years, Israel has been experiencing an almost unprecedented aggravation in the sanctions that are imposed on individuals that served as executives in the corporation that was party to a cartel. While criminal fines that were imposed on the corporations (and on the individuals) remained considerably low, courts went a few steps forward in imposing jail sentences on executives that were found involved in their corporation's activity in cartels.

The IAA believes that imprisonment sentences are the most effective way to achieve deterrence; much more so than fines imposed on the corporations and the individuals. While the IAA puts an effort into raising the level of fines that are imposed on corporations and individuals, it still views the imprisonment sanctions imposed on individuals as the most substantial.

## **2. Milestones in the Progress of Criminal Sanctions on Individuals**

It is worthwhile to point out the major milestones in the progress of criminal sanctions on individuals in Israel and the increase in the level of punishments imposed on executives involved in hard-core cartels.

In 1985, in the spirit of that time, the Attorney General of Israel issued a directive regarding plea bargains reached under the offences of the Antitrust Law. According to the aforesaid directive, in cases where it is difficult to prove the existence of a criminal offence, it is possible to make plea bargains with the accused, according to which, the accusations against individuals will be canceled or the proceedings against them will be stayed, if the corporation will undertake to carry out rules of behavior that, in the General Director of the IAA's opinion, may improve competition in the relevant market.

In 1999, when the criminal enforcement of antitrust offences increased, the Attorney General decided to cancel the directive, after coming to the conclusion that this guidance does not represent well the appropriate enforcement policy in the antitrust field. The cancellation of this guidance constitutes a milestone in the tendency to raise the level of criminal enforcement of the Antitrust Law.

**The cartel of the optometrists and opticians** was the first case, in which the accused were convicted after a full trial and not following a plea bargain. The indictment was filed in 1984, concerning arrangements carried out in 1983. The involved were convicted and sentenced in 1987. The sentence established fines of 2500 NIS only, for the involved (i.e. approx. \$1,500 at that time).

**The cartel of insurance companies** included almost all the leading insurance companies in Israel. They coordinated rates, restricted and coordinated discounts, coordinated reduction of policy components and insurance liability and allocated markets in the automobile and housing insurance branches. The exposure of the insurance cartel drew a lot of public attention. The indictment was filed in 1996, concerning arrangements carried out in 1991-1993. Six companies and their executives were convicted following plea bargains in 1997. For the first time a plea bargain was achieved according to which suspended prison sentences and substantial fines were imposed on the executives. (The fines were between 75,000 – 300,000 NIS for each executive – i.e. approx. \$22,000-90,000). The two remaining insurance companies and their executives tried the case, which culminated in convictions in December 2001. By the time the conviction against the two remaining insurance companies and their executive was

handed down, at the end of 2001, the punishment level for hard-core cartels changed substantially (see below). The executives of the aforesaid remaining insurance companies were sentenced to 6 months of imprisonment to be served by community services (see below) and fines at the rate of 150,000 – 600,000 NIS (approx \$32,000-130,000). In its decision, the court made it quite clear that hadn't there been other executives at the same cartel that were sentenced only to suspended prison (following the abovementioned plea bargain), the court might have imposed on the two executives imprisonments to be served in jail. The sentence that was reached following the plea bargain was another milestone in raising the level of criminal enforcement and punishment on individuals.

**The cartel of pesticides manufacture companies** was the first case in which the sentence established imprisonment sentences up to five months, to be served as community service. The indictment was filed in 1999, concerning arrangements carried out in 1993-1995. In its sentence, the court took into consideration the partial enforcement of the Antitrust Law at the time the offences took place, and saw it as a consideration in easing the punishments imposed<sup>1</sup>.

**The floor tile cartel** was active for 14 years between 1983 and 1997 and encompassed virtually all manufacturers of floor tiles on the market. The cartel included price fixing, setting quotas and dividing the market. This cartel was the first case in which the verdict imposed imprisonment sentences to be served in jail. The court proceedings against the parties started in 1999, and the last companies and executives involved were convicted and sentenced in the beginning of 2002. The prison sentences in this case, up to 9 months terms of imprisonment, are the harshest prison sentences given in Israel in connection with hard-core cartels. This sentence was a major breakthrough in the level of criminal enforcement and punishment of hard-core cartels.

Attached is a short table to emphasize the changes in sanctioning individuals throughout the years:

The year	The case	The sentences imposed on individuals
1985	Attorney General Directive	Accusations against individuals may be canceled, if the corporation undertakes to carry out rules of behavior
1987	The cartel of the optometrists and opticians	<u>Fines</u> of 2,500 NIS.
1997	The cartel of insurance companies - plea bargain with 6 of the companies and their executives	<u>Fines</u> of 75,000 – 300,000 NIS. <u>Suspended prison sentences</u>
1999	Attorney General Directive	The directive of 1999 was cancelled
1999	The cartel of pesticides manufacturers	<u>Imprisonment sentences</u> up to 5 months, to be served as community service. <u>Fines</u> of 30,000 – 60,000 NIS. <u>Suspended prison sentences</u>
2001	The cartel of driving teachers in the Krayoth area	<u>Imprisonment sentences</u> of up to 6 months, to be served as community services. <u>Fines</u> – of 30,000 – 60,000 NIS <u>Suspended prison sentences.</u>
2002	The floor tile cartel	<u>Imprisonment sentences</u> up to 9 months to be served in jail. <u>Fines</u> of 150,000 –250,000 NIS. <u>Suspended prison sentences.</u>
2002	The cartel of insurance companies - The two insurance companies that did not enter plea bargain.	<u>Fines</u> of 150,000 – 600,000 NIS. <u>Imprisonment sentences</u> up to 6 months, to be served as community service. <u>Suspended prison sentences.</u>

### **3. The Problems Facing the IAA in Connection with the Gradual Process of Raising the Level of Punishment on Individuals**

#### ***Long Criminal Proceedings Harm the Effectiveness of Deterrence and Serve as an Easing Consideration for Punishment***

Although courts have shown the willingness to raise the level of punishment, they have always kept an “open ear” to the argument according to which, when the cartel took place, there wasn’t as much enforcement of Antitrust Law, and that too harsh sanctions will be, under these circumstances, unjustified. In addition, courts were extremely hesitant in imposing a sanction for the first time. Judges emphasized in their decisions, more than once, that the cartel under discussion took place at a time when no one bothered to enforce the Antitrust Law. In one case it was called the twilight period between no enforcement and enforcement of Antitrust Law.

In addition to the abovementioned considerations, one must take into account that a criminal case that is fully tried may take several years. By the time the verdict is given, the punishment level by courts may change substantially on the one hand, but on the other hand, the time that elapsed from the offence is a material consideration in easing the sanctions.

A good example of this can be seen in the cartel of the insurance companies. The indictment was filed in 1997, concerning arrangements carried out during 1991-1993. Six companies and their executives were convicted following plea bargains in 1997. The sentence imposed fines of 75,000 – 300,000 NIS on the directors and suspended prison sentences as well. The court that approved the plea bargain mentioned as one of the considerations for allowing the plea bargain, the fact that the offences took place at a time when no real enforcement of the Antitrust Law took place. The two remaining insurance companies and their executives tried the case, which culminated in convictions only in December 2001. By the time the conviction against the two remaining insurance companies and their executive was given, at the end of 2001, the punishment level for hard core cartels had changed substantially. The executives of the aforesaid remaining insurance companies were sentenced to 6 months of imprisonment to be served by community service and fines at the rate of 150,000 – 600,000 NIS. In its decision, the court made it quite clear that, hadn’t there been other executives at the same cartel that were sentenced only to suspended prison (following the abovementioned plea bargain), the court might have imposed on the two executives imprisonments to be served in jail.

Indeed some of the main breakthroughs in imposing sanctions on individuals were reached through quick and effective plea bargains. In this connection one might mention the floor tile cartel, where, shortly after the indictment, a plea bargain was reached with some of the minor parties to the cartel, according to which the executives were willing to agree to serve up to 5 months of imprisonment in jail. This plea bargain set the level of punishment for the rest of the cartel members.

It is worthwhile to point out that increasing the level of sanctions on individuals was possible also due to the recognition of the public that hard-core cartels are severe economic crimes.

There is no doubt that the raising of the level of sanctions on individuals is a long and gradual process. Courts are hesitant to make the modifications in the level of sanctions regarding hard-core cartels too abrupt.

#### ***Difficulties in Reaching Plea - Bargains because of the Elevation of the Level of Punishment***

The fact that the level of punishments was elevated and that the prosecution demands jail sentences makes it hard to reach plea - bargains. Moreover, it is the IAA’s view that we have not yet

reached the optimal level of punishment. Therefore, the IAA still aims for a higher level of punishment. Such a view is also an obstacle in reaching plea bargains.

As the level of punishment rises, there are more requests from the accused to reach plea – bargains. But the prosecutors demand considerable actual imprisonment sentences. Therefore, in many cases negotiations do not ripen into plea – bargains. In the last few years the IAA has found itself prosecuting its criminal cases to the end much more frequently than before. This consumes an exceeding amount of effort. Moreover, as the risk for substantial sanctions grows higher, some of the accused put on a much more challenging fight during the trial process.

### ***Leniency Program***

As the level of punishment rose and the enforcement of Antitrust Law became deeper, the Investigation Department of the IAA found it harder to reach clear evidence of cartel. While in the past some of the cartels were active almost in the open, today, when it is clear that such a behavior is forbidden, the Investigation Department of the IAA finds it harder to reach written clear evidence.

To this end, the IAA is in a process of adopting a leniency program that will encourage those involved in cartels to approach the IAA on their own initiative and deliver information that will lead the IAA to detection of cartels and to the prosecution of those involved. In return, the IAA will accord leniency, meaning that whoever meets certain terms and delivers information to the IAA will not be charged criminally for the activity reported.

The IAA believes that a leniency program will have a meaningful influence on cartel enforcement in Israel, but it still cannot evaluate the relation between the level of sanctions imposed in connection with hard-core cartels and the amount of cooperation it receives from entities coming forward and supplying the IAA with information regarding a cartel.

## **4. The Effectiveness of the Various Criminal Sanctions on Individuals**

Considering the fact that until nine years ago the Antitrust Law was not enforced, the IAA has no doubt that the ability to prosecute both corporations and individuals had crucial effect on its ability to widen the recognition of the importance of competition.

The risk hanging over individuals that might find themselves charged with criminal offences, in case their corporation is a party to a cartel, is in itself a most effective tool in deterring from conspiring in cartels.

It is the IAA's experience that imposing fines on executives as a sole sanction is not an effective enough sanction for the following reasons:

- Reimbursement - The Penal Act in Israel prohibits reimbursement of criminal fines imposed on corporations or individuals. Therefore, a fine imposed on an individual must be paid by her and not by the corporation in which she serves or by any insurance company. However, experience shows that in practice it is difficult to enforce such a norm. A corporation might decide to raise the salary of the individual or grant her a special bonus, which will be in effect a way of reimbursement.
- Individuals as Shareholders – In many of the private corporations that are prosecuted for cartel offences, the executives that are being charged are also substantial shareholders in the corporation. It is therefore clear that such executives benefit directly from participating in the

cartel and that the profits of the cartel find their way eventually to their own pocket. In such a case, the level of fines that are established in Israel cannot effectively deter executives from participating in the cartel.

- The Limited Ability of Individuals to Pay Fines – Imposing a fine that will effectively deter executives from participating in cartels is many times impossible for practical reasons. Frequently, there is a lag of several years between the time that the cartel is uncovered and the time the verdict in the criminal case is given. By that time the economic situation of the individual has deteriorated, the profits she has received from the cartel are long gone and there is no pocket deep enough to receive the appropriate fine from. In a recent case regarding a cartel in PVC pipes for electricity, the cartel took place in 1994 and was indicted in 1997. The verdict was given in December 2002, and by that time many of the individuals that participated in the cartel were on the edge of bankruptcy. The court took this into account and imposed fines at a level of approx. 30,000 – 50,000 NIS (i.e. approx. \$6000 – 11,000) on each of the executives involved.

For all these reasons, the IAA was willing to be more lenient when it came to fines but concentrated its efforts on receiving imprisonment punishments in appropriate cases.

It is the policy of the IAA that in the most severe cases of hard-core cartel an imprisonment punishment is the appropriate punishment and that in order to achieve deterrence in such cases, the IAA must insist on imprisonment to be served in jail. In less severe cases of hard-core cartels, imprisonment to be served as community service might be enough of a deterrent.

## **5. Definition of the Criminal Offence and the Discretion of the Prosecution**

The Israeli Antitrust Law defines all restrictive arrangements as criminal offences, unless they receive an approval from the Antitrust Tribunal or are granted an exemption from the General Director of the IAA or are exempted according to a block exemption.

The offence is defined very broadly. Hence, many cases that do not deserve to be prosecuted fall within the definition of the offence. Although the General Director grants approx. 50-80 exemptions to restrictive arrangement per year (approximately 85% of the requests for exemptions are granted), and although block exemptions in a few areas of business were introduced, there is no doubt that many arrangements fall within the formal definition of the criminal offence, without them being hard-core cartels.

As a result of this, the IAA executes its discretion in the cases it decides to prosecute. The policy of the IAA has always been to concentrate its criminal prosecutions on hard-core cartels and to deal with other offences with civil tools.

Not all hard-core cartels are criminally prosecuted. In addition to the main requirement that the offence be a hard-core cartel, the IAA also takes into account other considerations such as the effect the arrangement had on the market; the duration of the offence; the damage caused to the public; and the size of the market involved.

## **6. Conclusion**

The IAA sees the prosecution and punishment of individuals as critical for the effectiveness of criminal deterrence. In the last few years the Israeli courts showed a willingness to impose growing sanctions on individuals. In 2002, imprisonment sanctions were imposed for the first time.



## NOTES

- 1 Imprisonment to be served as community service means imprisonment that is served through work for the benefit of the community (i.e. in hospitals, elderly homes, etc.). The Israeli Prisons Authority is supervising the community service, but the individuals that serve their imprisonment through community services do not enter jail. In cases where the imprisonment sentence is up to six months, the court has discretion to decide that the sentence may be served as community service, provided the accused is capable of such service. If the sentence is higher than 6 months imprisonment, it must be served in jail.



## JAPAN

### 1. Outline of the measures against cartels

The Antimonopoly Act prohibits cartels as “unreasonable restraint of trade” (Section 3 of the Antimonopoly Act). Administrative dispositions shall be imposed upon entrepreneurs who violate Section 3 of the Antimonopoly Act. There are also stipulations on criminal punishments against cartels in the Antimonopoly Act.

Administrative dispositions ordered by the Japan Fair Trade Commission (JFTC) consist of cease-and-desist orders and surcharges, both of which are applicable only to corporations. Surcharges are imposed on corporations who operate cartels that affect the prices of goods or services, and are calculated by multiplying the turnover of the goods and services concerned for the period during which the cartel was in place by a statutory ratio.

Regarding criminal sanctions against cartels, the Antimonopoly Act stipulates that any individual operating a cartel shall be punished by penal servitude of not more than three years and/or by a fine of not more than 5 million yen. In addition, the Antimonopoly Act stipulates that a corporation, whose representative, manager, agent, employee or any other person in the service of the corporation, operated a cartel, shall also be punished by a fine of not more than 500 million yen.

Further, with regard to bid riggings, the Penal Code stipulates that “those who rigged a bid for the purpose of impairing the fair price or obtaining unfair profit” in bids and tenders conducted by the government and other agencies shall be punished by penal servitude of not more than two years or by a fine of not more than 2.5 million yen. (This punishment under the Penal Code is imposed upon individuals and not on corporations.) Punishment for bid rigging under the Penal Code means punishing infringements of legal interest of “fairness in public tenders”, whereas punishment for cartels under the Antimonopoly Act means punishing infringements of legal interest of “fair and free competition”. Their natures are different with each other.

### 2. Procedures concerning criminal prosecutions against cartels

The JFTC is an administrative body and does not have judicial prosecution authority; prosecutors conduct proceedings against individuals and corporations. However, Section 96 of the Antimonopoly Act stipulates that a prosecutor shall prosecute an offense of cartel only after the JFTC’s accusation to the Public Prosecutor General. Since the JFTC is an expert administrative institution concerning the Antimonopoly Act, which offenses under the Antimonopoly Act should be punished depend on the JFTC’s decision.

Further, the JFTC has only administrative investigation authority; the Antimonopoly Act stipulates that this authority shall not be construed as authority granted for criminal investigation. In this regard, some point out that the JFTC should be given the authority to conduct criminal investigations to enable them make accusation more actively. This suggestion is currently under consideration. (In Japan, the National Tax Agency and Securities and Exchange Surveillance Commission are administrative institutions that also have the authority to conduct criminal investigations for violations of the acts concerned.)

As stated above, regarding criminal proceedings against cartels, the JFTC, which has expert knowledge concerning the Antimonopoly Act, has the exclusive authority to make accusations, but only prosecutors have the authority to collect evidence and prosecute against criminal offenses. It is therefore indispensable for both parties to cooperate in order to ensure that accusations and proceedings are conducted smoothly. For this reason, a meeting on accusation is held between both parties in order to exchange views and information of issues concerning individual cases. Further, to strengthen the investigation activities of the JFTC at the stage of conducting an administrative investigation toward accusation, prosecutors are seconded to the investigation department of the JFTC.

### 3. Implementation of the stipulations on criminal sanctions under the Antimonopoly Act

Corporations and individuals who unreasonably restrain trade may be punished. The term “unreasonable restraint of trade” as used in the Antimonopoly Act is defined as “business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its name, together with other entrepreneurs, mutually restricts or conducts business in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in a particular field of trade.” Therefore, the types of conducts in which criminal sanctions may be imposed against are not limited to hard core cartels under the Act. Meanwhile, the types of business activities upon which surcharges may be levied are only cartels of goods or services (including bid riggings, output quotas, etc.), which are hard core cartels.

As stated above, contracts, agreements or any other concerted action restraining competition are subject to criminal sanctions under the provisions of the Antimonopoly Act. With regard to actual implementation, the JFTC published a policy statement on accusation against the violation of the Antimonopoly Act in 1990, which clearly stated cases as followings would be accused.

- (1) Price fixing, output quotas, market allocations, bid riggings, and joint boycotts which restraining competition in any particular field of trade and other violating activities which are also malicious and grave cases that affect many people’s living substantially,
- (2) Among violations by entrepreneurs and industries, repeating violation and entrepreneurs not complying with cease-and-desist orders, those cases in which the JFTC considers that the purpose of the Antimonopoly Act cannot be achieved by its administrative dispositions.

### 4. Criminal cases concerning cartels

Criminal sanctions were imposed against cartels in the following cases. Among these cases, except one, criminal sanctions were imposed upon individuals, with the punishment being penal servitude, although the sentences were suspended.

- Price fixing for petroleum products (accused in 1974)

Corporations	9 companies	1.5–2.5 million yen
Individuals	12 persons	penal servitude of 4–10 months (suspended)

- Price fixing for stretch film for business use (accused in 1991)

Corporations	8 companies	6–8 million yen
Individuals	22 persons	penal servitude of 6–12 months (suspended)

- Bid rigging for adhesive seals ordered by Social Insurance Agency (accused in 1993)

Corporations	4 companies	4 million yen
Individual	No accusation	-

- Bid rigging for electric facility construction work ordered by Japan Sewage Works Agency (accused in 1995)

Corporations	9 companies	40–60 million yen
Individuals (Party who received the order)	18 persons	penal servitude of 10 months (suspended)
Individual (Party who placed the order (aiding and abetting))	1 person	penal servitude of 8 months (suspended)

- Bid rigging for water meters ordered by the Tokyo Metropolitan Government (accused in 1997)

Corporations	25 companies	5–9 million yen
Individuals	34 persons	penal servitude of 6–9 months (suspended)

- Share allocation cartel for ductile iron pipes (accused in 1999)

Corporations	3 companies	30–130 million yen(1)
Individuals	10 persons	penal servitude of 6–10 months (suspended)

(Note) The upper limit of a fine against corporations has been successively increased, from 5 million yen to 100 million yen in January 1993 and 100 million yen to 500 million yen in June 2002.

*(Cases under dispute)*

- Bid rigging for petroleum products such as gasoline ordered by the Central Procurement Office, Japan Defense Agency (accused in 1999)

Corporations	11 companies
Individuals	9 persons

- Bid rigging for water meters ordered by the Tokyo Metropolitan Government (accused in 2003)

Corporations	4 companies
Individuals	5 persons

## 5. Leniency

Regarding measures concerning cartels, there is no system of leniency in Japan for surcharges or criminal punishments, and nor is plea bargaining admissible in any field of criminal prosecution including violations of the Antimonopoly Act. Following a report by OECD which recommends introduction of the

leniency programme, discussions are now taking place in Japan on the pros and cons of introducing a leniency programme for surcharges.

In the case of criminal punishment for violations of the Antimonopoly Act, the leniency programme is not being discussed as it is to be considered separately in the overall framework of criminal procedures<sup>2)</sup> and not just in the context of the Antimonopoly Act. Meanwhile, if there is no leniency in the case of criminal punishments but is leniency in the case of surcharges, the incentive to use the leniency programme would be considerably reduced and so the system may not produce satisfactory results. Discussions are therefore taking place on the pros and cons for the JFTC, which has the exclusive authority of accusation, not to exercise this authority in cases subject to leniency on surcharges, if the leniency programme is introduced.

- (1) This is a fine exceeding the prevailing upper limit for fines as a combined crime resulting from repeated cartel activities.
- (2) This is “to be considered from comprehensive viewpoints” in the “Judicial System Reform Promotion Program” (Cabinet decision in March, 2002).

## NORWAY

### Question 1

Another possible sanction would be confiscating what the defendant has gained from his cartel activity. However, it will frequently be disputed that there have been gains, and it is hard to prove such gains. Barring the cartel member from holding certain jobs in a private company or barring him from performing certain tasks because of his conspiracy may be a more effective sanction, if it can be effectively enforced.

### Question 2

Although the Norwegian Competition Act holds the possibility of imprisonment, this sanction has not yet been imposed. Our experience is limited to fines to individuals, which in a number of cases have been quite significant. Thus we have no experience concerning the effectiveness of various sanctions. However, we have in dealing with cartel members experienced an outspoken and clear fear of imprisonment, and, although our own empirical basis is almost non-existent, we consider imprisonment being the most effective sanction against individuals.

Norwegian law holds no prohibition against reimbursing an individual. We have no proof that employees have been reimbursed, but we suspect this will be the result when individuals have arranged cartels in accordance with the leadership in the company. In larger companies, which are listed on the stock exchange, reimbursement will probably have less significance, since they in many cases will feel obliged to fire the people who have been involved in the cartels.

We doubt prohibitions against reimbursement will be effective, since it will be easy to come around such rules, for example through pay rise or compensation for imaginary tasks. It is hard to expect that investigating such matters will be a top priority for the police.

### Question 3

We consider stiff sanctions, preferably imprisonment, and an effective leniency-system that is easy to apply, to be the crucial elements to promote people to cooperate with competition authorities.

### Question 4

Crucial to cartel members coming forward is foreseeing ability about the sanctions that might be imposed. The described division of powers poses might undermine the purpose of a leniency program, i.e. enticing people to come forward. The dilemma can be solved either by a system where the powers are gathered in one hand, or when the system delivers a quick and effective way of granting leniency from the prosecutors.

### **Question 5**

In Norway there are, strictly speaking, no such binding mechanisms. However, promises made by the NCA to individuals are likely to be respected by both prosecutors and by courts, as long as they are no misuse of powers. Equity strongly supports such a practice. In a number of decisions by lower courts in Norway it seems as if the courts feel bound by what the prosecutors suggest for punishment when it relates to the defendants cooperation. Our experience is also that that the prosecutors have respected the considerations of the NCA on this matter.

### **Question 6**

There might be ways of determining such an “optimal” level of fines, but we think there are too many uncertainties to make this a goal in general. Also, factors such as the likelihood that cartels are detected, or the defendants perception of this likelihood, are sheer guess. A better way would probably be to put considerable energy into examining the defendants’ real ability to pay a fine, and from that perspective measure a fine that is painful enough and deterring.

### **Question 7**

The argument in favor of shorter, rather than lengthy prison sentences is questionable. It makes sense only if a number of conditions are met. Firstly, it presupposes that the convicted person will return to the company after the prison term. Only in this perspective the cost- argument can make sense. This is often not the case. On the contrary, conspirators are often fired. If returning, the argument also presupposes that others cannot carry out the defendant’s tasks effectively in the company, which is also highly disputable. In short, the convicted person must be an outstanding leader who cannot be replaced. Further, the argument presupposes that imprisonment *as such* is the thing that most deters business leaders. It is also questionable. On the contrary, we think the prospect of a longer prison term can be the most deterring to business leaders. Finally, imposing shorter sentences on business leaders is a result that would be hard to console with principles of equality and justice.

According to the Norwegian Competition Act the general statutory term of imprisonment is 3 years. When there are “especially aggravating circumstances” the term is increased to 6 years. The prosecutor is the one to decide, without the possibility of reversal, whether these circumstances exist. The same factors are relevant when the court decides the actual prison term.

### **Question 8**

Norway has had criminal sanctions against individuals as well against corporations for a long time.

### **Question 9**

There are no such differences in terms of sanctions relating to different cartelacts.

### **Question 10**

Considerations about cost-effectiveness have played a role in an ongoing discussion in Norway on sanctions in cartel cases. The NCA produced a report on this in 2000 (“Sanksjonering-er det verd



prisen ?” – “Sanctioning – is it worth the price ?” ), with the aim of introducing more effective sanctions. However, these considerations have played a less important role in the ongoing work on a new Norwegian competition act, this time focusing more on what procedural system is the best to reach stiff sanctions sooner than what has been common so far. This will probably lead to criminal sanctions against corporations being replaced by administrative sanctions imposed by the NCA, whereas criminal sanctions against individuals will probably remain.

### **Question 11**

Problems gathering evidence due to the right against self-incrimination are barely any worse when imposing administrative sanctions than when imposing criminal sanctions. The right against self-incrimination, rooted in international as well as national law, applies in general both by administrative and criminal sanctions.

According to the law in books, the standard of evidence in administrative and criminal matters is different, leaving criminal cases with a higher standard of proof. Whether the law in practice differs depending on the character of the sanction in question, is another question. Probably most courts will apply a standard of proof by administrative sanctions that are close to the one in criminal matters. At least, that is the case in Norway. Thus the character of the sanctions will probably not, or only insignificantly, influence the number of cases brought to a successful end.

### **Question 12**

In Norway, the problem so far has not been to persuade the courts to impose criminal sanctions, since this is the only sanction we have, and there is quite a long tradition for imposing such sanctions in cartel cases. The problem has been the size of the sanctions. The NCA has a number of times stressed this to the prosecutors, and prosecutors to the courts. The sanctions imposed still remain mild. This has many reasons, and it is hard to say that the courts are to blame any more than the others being involved. With a possible revision of the competition act shortly ahead, enabling the NCA to take cases against corporations to court as well as stressing the need for stiffer sanctions, we will see increased possibilities of sharpening the level of sanctions.

### **Question 13**

The question is of no relevance to Norway.

### **Question 14**

In our opinion there are mostly disadvantages of having two separate authorities involved in hard-core cartels. When criminal sanctions are the only sanctions, the system implies double work, i.e. the prosecutor handles the case after it has been prepared and reported by the competition authority. In our opinion, this is unnecessary and time-consuming. Also, the more bodies that are involved in the case and the more case handlers that have responsibility, the greater is the risk of “reducing” it in different ways for no good reason. Control by others, which in its essence is a safety guarantee, is therefore also a risk. Lastly, the prosecutors do not have the same knowledge in this legal field as has the competition authority.

Granting leniency, the problems arising from two different bodies involved in handling the same case can be solved through at least two different systems, either where the competition authority on behalf

of the prosecutor grants leniency, or the prosecutor is involved and grants leniency himself. We assume that effective rules can be worked out for both systems.

**Question 15**

The question has no relevance to Norway.

**Question 16**

There are different limitations concerning the use of evidence in criminal procedures and in civil trials. Further, there are secrecy rules that prohibit the handing over of documents from public bodies to private parties for use in civil trials. Elaborating on these matters will lead too far in this context. So far these limitations have not affected the possibility of pursuing criminal proceedings against individuals, nor do we think it will be important in the future. The bulk of evidence is usually gathered by the competition authority. It is not originated on private hands.

**Question 17**

Human rights law as well as EU-/EEA-law forbids double sentencing, and this rule applies to legal entities as well as to natural persons. In general this principle of power is only applicable within one and the same jurisdiction. However, there are indications that a wider applicability of the principle is being recognized, possibly barring the sanctioning of the same cartel case under community law in more than one jurisdiction. This could forbid one nation from sanctioning cartel members that have already been sanctioned in another member state. By next year both the EFTA-states and ESA will probably be enforcing EEA-law in the EFTA-pillar, and the Commission will do it on behalf of the EU. In this context there might be cases of parallel sanctioning that can be a problem. However, there might also be ways of synchronizing sanctions from different EFTA-states so that the “ne bis idem” principle is still adhered to.

## SWITZERLAND

### Introduction

L'effet préventif des sanctions est d'une importance capitale pour l'efficacité du droit de la concurrence.

Dans la loi actuelle, les cas d'inobservation d'accords amiables et de décisions passées en force donnent avant tout lieu à des sanctions administratives dirigées contre les entreprises concernées. Ce qui s'impose, étant donné qu'en Suisse seules les personnes physiques peuvent faire l'objet de sanctions pénales: selon la doctrine dominante, les entreprises qu'elles soient ou non dotées de la personnalité juridique, n'ont pas la capacité délictuelle (pas de faute subjective – *societas non delinquere potest*).

Par contre, des sanctions pénales directes contre les personnes responsables ne sont prévues ni dans la législation actuelle ni dans la révision de la loi sur les cartels et autres restrictions à la concurrence (LCart), qui entrera en vigueur le 1er avril 2004. Néanmoins, des sanctions pénales indirectes sont possibles (cf. I.A.c.).

### I. The Role of Sanctions of Individuals in Hard Core Cartel Cases

#### A. Deterrence

1. *What sanctions in addition to those mentioned above in paragraph 15 can be imposed on individuals who participate in a hard core cartel?*
2. *What are the experience concerning the effectiveness of various sanctions? Are there ways to assess the effectiveness of sanctions, including combinations of sanctions? How effective are fines imposed on individuals if there is no prohibition against reimbursing an individual? On the other had, can prohibitions against reimbursement be effective?*

Selon la loi en vigueur, la Commission de la concurrence (ci-après Comco) ne peut imposer que trois types de sanctions: des sanctions administratives indirectes, des sanctions administratives directes, des sanctions pénales indirectes.

#### a. *Sanctions administratives indirectes (art. 50 LCart)*

La Comco peut imposer des sanctions administratives dites "indirectes" lorsqu'une entreprise contrevient à son profit à un accord amiable, à une décision entrée en force prononcée par les autorités en matière de concurrence ou à une décision rendue par une instance de recours. La sanction s'élève au triple du gain réalisé du fait de l'inobservation. Lorsque le profit ne peut être calculé ou estimé, le montant pourra aller jusqu'à 10 % du dernier chiffre d'affaires réalisé en Suisse par l'entreprise.

Il s'ensuit que lors de la découverte d'une infraction, la Comco ne peut que constater par une décision la violation de la loi et c'est seulement si l'entreprise ne respecte pas cette décision entrée en force qu'elle peut être sanctionnée. La première infraction est pour ainsi dire "gratuite" en Suisse. Ce type de

sanctions indirectes n'est pas très dissuasif pour les entreprises puisqu'il suffit à l'entreprise de cesser la restriction de concurrence après l'intervention des autorités pour ne pas être sanctionnée et cela même si elle a enfreint la loi de façon grave pendant des années. Cela lui permet, en l'absence de sanctions directes, de conserver le gain réalisé par l'infraction au droit des cartels.

Les autorités de la concurrence n'ont jamais, dans la pratique, imposé de sanctions sur la base de l'art. 50 LCart.

*b. Sanctions administratives directes (art. 51 et 52 LCart)*

Les seules sanctions directes possibles sous la loi actuelle sont limitées puisqu'elles existent dans seulement deux domaines: d'une part dans le domaine des concentrations, par exemple lorsqu'une entreprise ne notifie pas une opération ou ne respecte pas les conditions/charges ou interdictions (art. 51 LCart) et d'autre part en cas de violation de l'obligation de renseigner les autorités (art. 52 LCart). L'amende peut aller jusqu'à 1 million de francs pour les concentrations et 100 000 francs pour la violation de l'obligation de renseigner les autorités.

Les cas de sanctions dans le domaine des concentrations ne sont pas très nombreux. Il y a eu en moyenne 1 cas par année (depuis l'entrée en vigueur de la loi, total de 7 sanctions au titre de l'art. 51).

*c. Sanctions pénales indirectes (art. 54 et 55 LCart)*

La loi prévoit enfin des sanctions pénales indirectes qui sont le pendant des sanctions administratives indirectes mais destinées cette fois-ci aux personnes physiques responsables. Toutefois ces sanctions ne prévoient pas l'emprisonnement. Ces dispositions pénales visent toute personne physique disposant d'un pouvoir décisionnel dans l'entreprise et qui aura elle-même contrevenu intentionnellement à des mesures prises en vue de supprimer la restriction à la concurrence. Sont visés ici les membres des organes au sens du droit civil mais aussi les directeurs et les autres personnes qui conduisent effectivement l'entreprise. Il pourra par exemple s'agir d'un actionnaire qui domine l'entreprise sans y exercer pour autant formellement une fonction dirigeante (organe de fait).

Jusqu'à présent ces dispositions pénales n'ont jamais été utilisées.

*d. Recours civils*

Le droit civil de la concurrence donne certains moyens de se défendre à la personne entravée dans l'accès à la concurrence ou l'exercice de celle-ci par une restriction illicite de la concurrence. En saisissant le juge civil, elle peut ainsi

- prévenir ou faire cesser l'entrave,
- faire constater l'illicéité de la restriction et obtenir la réparation de son dommage ou
- demander la remise du gain indûment réalisé par l'auteur de la restriction.

*e. Conclusion*

Les sanctions possibles sous la loi actuelle doivent permettre aux autorités de la concurrence de faire respecter le pouvoir de décision qui leur a été attribué par la LCart de 1995 mais n'ont pas un effet dissuasif suffisant pour faire respecter avant toute intervention des autorités les dispositions matérielles de la loi, en particulier celles concernant les pratiques les plus préjudiciables pour l'économie comme les cartels "durs" ou les abus de position dominante. C'est pour pallier au manque d'effet préventif du régime actuel de sanctions que la loi est actuellement révisée.

**B. Increased Effectiveness of Investigations**

*3. What are the elements that maximize the effectiveness of sanctions against individual during investigation as an incentive to cooperate with authorities?*

*4. If the authority to implement a leniency program and the authority to prosecute criminal cases are divided, what can be done to limit or eliminate the risk that the discretion of public prosecutors to pursue a case could undermine certainty for defendants that they will not be prosecuted if they come forward first?*

*5. In countries in which plea bargaining does not exist, are there mechanisms that can be developed to assure that the competition authority is able to obtain co-operation from individuals in exchange for a promise of immunity or a lesser sentence if neither prosecutors nor courts are bound by such arrangements?*

La Suisse sera dotée d'une nouvelle loi qui augmentera l'effet préventif de la législation actuelle en introduisant des sanctions directes et le programme de clémence.

*a. Introduction des sanctions directes*

La loi révisée, qui entrera vraisemblablement en vigueur le 1er avril 2004, introduira des sanctions administratives directes pour les personnes morales dès leur première infraction et non pas seulement en cas de récidive. Le nouveau régime de sanctions directes prévoit au nouvel art. 49a al. 1 que

"l'entreprise partie à un accord illicite aux termes de l'art. 5 al. 3 et 4, ou qui se sera livrée à des pratiques illicites aux termes de l'art. 7, sera tenue au paiement d'un montant pouvant aller jusqu'à 10 % du chiffre d'affaires réalisé en Suisse au cours des trois derniers exercices. L'art. 9 al. 3 s'appliquera par analogie. Le montant est calculé en fonction de la durée et de la gravité des pratiques illicites. Le profit présumé résultant des pratiques illicites de l'entreprise est dûment pris en compte pour le calcul de ce montant."

Le nouveau régime prévoit en premier lieu des mesures à l'encontre des cartels rigides, soit des accords horizontaux ou verticaux portant sur le prix, les quantités ou la répartition géographique. Trois comportements seront donc passibles de sanctions directes (amendes) sous le nouveau régime:

- les accords horizontaux "durs" (sur les prix, les quantités et les répartitions de marché) de l'art. 5 al. 3
- les accord verticaux "durs" du nouvel art. 5 al. 4
- les abus de position dominantes de l'art. 7.

Il s'agit là d'infractions à la concurrence ayant des conséquences particulièrement dommageables pour les consommateurs, les entreprises et l'économie dans son ensemble.

Un programme de clémence accompagnera l'introduction des sanctions directes.

Pour les autres types d'accords, l'ancien système des sanctions indirectes restera applicable. L'art. 50 LCart a d'ailleurs été adapté à l'art. 49a al. 1 afin que le mode de calcul soit le même en cas de sanctions directes et indirectes (cf. I.A. a et b).

L'introduction **de sanctions directes pour les personnes physiques** n'est pas pour l'instant d'actualité en Suisse. Le législateur suisse estime qu'il n'est pas nécessaire d'introduire des sanctions directes, ni administratives ni pénales, pour les personnes physiques. A cet égard, le système suisse correspond à la tendance dominante en Europe.

*b. Programme de clémence (leniency programs)*

Le nouveau programme de clémence, qui a pour but d'inciter les membres d'un cartel à rompre la solidarité avec les autres et introduit à l'art. 49a al. 2 de la loi a la teneur suivante:

"Si l'entreprise coopère à la mise au jour et à la suppression de la restriction à la concurrence, il est possible de renoncer, en tout ou en partie, à une sanction."

L'expérience a en effet montré qu'il est quasiment impossible de mettre au jour des cartels "cachés" sans l'aide d'un "insider". En effet, il est possible qu'un cartel dur ne puisse être démantelé que grâce à la dénonciation d'un membre du cartel. Avec le programme de clémence, le membre qui fournira des renseignements aux autorités sera traité plus favorablement.

Le programme de clémence offre les avantages suivants:

- pour les membres qui sont disposés à quitter le cartel, il devient intéressant de le déclarer. Le membre d'un cartel mettra dans la balance les avantages de sa participation au cartel et le risque d'être découvert et de se voir infliger des sanctions. C'est notamment lorsque les autorités en matière de concurrence soupçonnent l'existence d'infractions sur le marché en question que l'option de la coopération devient intéressante;
- l'incitation à coopérer à la découverte de cartels affaiblit la loyauté et la solidarité entre les membres d'un cartel. Une méfiance réciproque et la compétition pour l'avantage lié à la coopération compromettent la création ou le maintien de cartels rigides et contribuent ainsi à l'aspect préventif de la lutte contre les cartels;
- enfin, pouvoir coopérer avec un membre d'un cartel facilite sensiblement le travail des autorités en matière de concurrence. D'une part, la coopération peut contribuer à ce que des cartels qui seraient restés "cachés" soient découverts. D'autre part, l'établissement des faits s'en trouve facilité puisque les informations qui autrement seraient difficiles d'accès sont fournies de première main.

Les modalités d'application de ce programme de clémence vont être précisées dans une ordonnance d'application à venir. Le programme de clémence suisse tiendra compte des expériences européennes et américaines faites en la matière puisqu'il sera accordé une immunité complète au premier membre du cartel à apporter des preuves permettant d'ouvrir une procédure, mais également une réduction aux autres membres qui coopéreront au-delà de leur obligation légale. Pour l'heure, il est presque certain

que l'immunité complète ne pourra pas être accordée à une entreprise ayant joué le rôle de leader dans le cartel.

## II. Is there an "Optimal" Level of Sanctions against Individuals?

*6. Is there a way of determining what an "optimal" level of fines is that can be imposed on individuals in hard core cartels cases?*

*7. What are the opinions concerning the above argument in favor of shorter, rather than lengthy prison sentences? What parameters determine the statutory of imprisonment and the prison terms actually imposed on defendants?*

Il n'est objectivement pas possible de déterminer, en Suisse, le niveau optimal d'amendes qui pourraient être imposées à des individus ayant pris part à des cartels durs. Nous nous limitons ainsi à répéter que la loi actuelle prévoit que des "sanctions pénales indirectes" contre les personnes physiques responsables, et que dans ces cas l'amende peut aller jusqu'à 100 000 francs. Dans le calcul de l'amende les circonstances propres au cas d'espèce viennent jouer le rôle "d'ajustements sur mesure", certaines étant aggravantes, d'autres atténuantes. Parmi ces circonstances pourront être pris en compte notamment la récidive, le rôle joué au sein du cartel (rôle principal ou seulement passif), l'existence de mesures de contrainte sur les autres membres du cartel, la durée de l'infraction, leur gravité, le gain présumé résultant de ces pratiques.

La peine d'emprisonnement n'est pas prévue en droit suisse pour ce type d'infraction. Nous relevons toutefois que selon nous, le seul risque de devoir purger une peine d'emprisonnement, fût-elle très courte, aurait déjà un effet dissuasif important, car les personnes emprisonnées ne seraient pas des "délinquants" au sens commun du terme. Le seul fait, pour des organes d'entreprises, de se voir potentiellement assimilées à des délinquants de droit commun s'ils prennent part à des cartels, devrait les dissuader à y prendre part. En ce sens, des peines de longues durées, outre leur coût disproportionné pour la société, n'auraient aucune raison d'être.

## III. Issues Specifically Related to Criminal Sanctions against Individuals

### A. Concerns Raised in Connection with Criminal Sanctions

*8. In countries that have considered or are considering introducing criminal sanctions against individuals, or have changed their system of criminal sanctions, have there been any discussions concerning the appropriateness of criminal sanctions for cartels and their consistency with social norms? What arguments were raised in this context? If criminal sanctions exist in other "white collar" areas, but not in cartel cases, what explains the differences?*

*9. If differences exist between bid rigging cases and other forms of hard core cartels in terms of sanctions that can be imposed on individuals, what explains those differences?*

*10. Have considerations about the cost-effectiveness of criminal fines such as the ones discussed above played a role in a country's discussion whether to introduce criminal sanctions against individuals?*

*11. Is there any evidence that criminal sanctions actually can decrease the level of anti-cartel enforcement for the reasons stated above, e.g., because of higher standards of evidence and/or the right against self incrimination?*

*12. In some countries, it may be (or may have been) difficult to "persuade" courts to actually impose criminal sanctions and prosecutors to bring more cases. What can be/has been done to "encourage" courts to impose sanctions more frequently and/or to impose tougher sanctions, and/or prosecutors to bring more cases and demand higher sanctions?*

Lors des débats au Parlement suisse en septembre 2002, la question de l'imposition de sanctions directes (amendes) aux personnes physiques a été soulevée. Cette proposition d'imposer une amende pouvant aller jusqu'à 100 000 francs pour les cadres responsables a été rejetée par la majorité du Parlement. La Suisse estime actuellement qu'il n'est pas nécessaire d'introduire des sanctions directes, ni administratives ni pénales, à l'encontre des personnes physiques car, dans la pratique, il est difficile de déterminer, au sein d'une entreprise, les personnes pénalement responsables.

L'efficacité du droit des cartels dépend en premier lieu de son effet préventif, qui peut être induit par la menace de sanctions directes, en augmentant les chances de découvrir un cartel par l'introduction d'un programme de clémence et enfin grâce aux conséquences néfastes pour la réputation de l'entreprises. À notre avis, les seules sanctions directes administratives pour les personnes morales sont suffisantes pour obtenir l'effet préventif espéré. La menace d'être condamné, même seulement administrativement par une autorité, instaure chez les entreprises et leurs responsables un sentiment d'insécurité.

Violer le droit de la concurrence entraînera ainsi un coût économique. Par conséquent, l'entreprise va mettre en balance le profit escompté par la violation de la loi avec les risques encourus en cas de découverte. Ces risques dépendent de la probabilité de la découverte, du montant de l'amende infligée, mais aussi de dommages indirects tels que l'atteinte à l'image. Les expériences faites à l'étranger révèlent que l'intérêt des médias, et donc du public, est nettement plus vif si les entreprises sont sanctionnées directement. Il en découle que le calcul coût/bénéfices risque de pencher en faveur de la collaboration avec les autorités lorsqu'un membre envisage de quitter le cartel ou lorsque les autorités commencent à soupçonner l'existence du cartel.

L'expérience dans le monde a déjà démontré que la menace de sanctions plus "dures" n'est pas forcément plus efficace pour lutter contre les comportements illicites. Rien ne permet de démontrer le contraire. Il suffit en effet de penser aux pays où la peine de mort est appliquée et dans lesquels le taux de criminalité reste néanmoins très élevé. Ce qui est déterminant, pour combattre efficacement les cartels, c'est de tout mettre en oeuvre pour que les autorités compétentes disposent des moyens nécessaires pour les déceler. Jusqu'à présent le principal moyen d'investigation à disposition des autorités de la concurrence suisses consiste en des questionnaires envoyés aux entreprises et en des auditions. L'expérience étrangère montre que des moyens "radicaux", comme la mise sur écoute, la perquisition au siège des entreprises ou au domicile de personnes physiques ainsi que la saisie de documents sont nécessaires afin de mettre au jour des cartels aux méthodes de plus en plus professionnelles. Le projet de révision prévoit donc l'introduction, à l'art. 42 LCart, de précisions sur les conditions d'exercice des perquisitions et saisies de pièces à conviction.

## **B. Definition of a Criminal Offence**

*13. How have countries addressed concerns related to the definition of hard core cartels as a criminal offence? If the general language in an antitrust statues is used to seek criminal sanctions, how can concerns related to over deterrence and necessary legal certainty be addressed?*



Pas d'expérience.

### C. *Allocating Responsibility for Prosecuting a Criminal Case*

14. What are the advantages and disadvantages of having two separate authorities involved in hard core cartel cases where criminal sanctions are being sought? If there are two separate authorities, how can the two coordinate their tasks? In particular, how can the problem of effective cooperation be addressed most effectively to ensure the effectiveness of leniency programs?

Avec l'introduction des sanctions directes en Suisse, la structure des autorités de la concurrence ne sera pas modifiée. Le Secrétariat de la Commission de la concurrence se chargera donc, entre autre, aussi de sanctionner les entreprises responsables.

L'avantage principal d'une structure unique permet à la personne (ou le service) qui a suivi et instruit le cas (case-handler) de clôturer l'affaire dans des délais raisonnables et de la manière la plus appropriée possible. La personne (ou le service) responsable est celle qui connaît le mieux les personnes impliquées dans l'affaire et est donc la mieux placée pour infliger la sanction adéquate. Seule cette personne est à même d'évaluer objectivement et subjectivement, donc valablement, la culpabilité de l'entreprise et de ses responsables.

### D. *Sanctions under Concurrent Criminal and Civil Statutes*

15. What are the factors used to determine whether criminal sanctions should be sought in a specific hard core cartel case? If an authority has the choice between criminal and civil sanctions, when and how can it decide which sanctions it should seek?

16. What limitations exist concerning the use of evidence obtained in a criminal procedure in a civil trial and vice versa? Can such limitations affect criminal proceedings against individuals?

En Suisse, les sanctions pénales et les sanctions administratives sont cumulables. En effet, le principe *ne bis in idem* ne s'applique pas aux rapports entre la sanction administrative et la sanction pénale. Décider de sanctions administratives contre une entreprise concernée n'exclut donc pas que pour les mêmes faits les infractions intentionnelles de personnes physiques responsables entraînent aussi des sanctions pénales.

Plusieurs critères sont utilisés pour tracer la distinction entre l'amende pénale et l'amende administrative: il faut rechercher la nature de la norme, l'autorité chargée d'infliger la sanction et le critère punitif ou préventif de la sanction. Le Tribunal fédéral a posé trois critères de distinction entre la sanction administrative et la sanction pénale, soit la dénomination de la sanction dans la loi en cause, la nature de l'acte illicite, savoir s'il a un caractère pénal ou administratif prépondérant, enfin et surtout l'importance ou quotité de la sanction (ATF 121 I 379, JdT 1997 I 697).

En droit suisse, il est possible d'utiliser, dans une procédure administrative, les preuves recueillies au cours d'une procédure pénale et vice-versa devant la même autorité. Ce n'est que le moyen par lequel dites preuves ont été recueillies qui peut, éventuellement, empêcher leur utilisation en procédure. Cela dit, le Tribunal fédéral ne considère que très restrictivement que certaines preuves recueillies irrégulièrement ne puissent pas être utilisées. En fait, il ne proscrie l'utilisation de telles preuves que si celles-ci n'auraient pas pu être recueillies de manière légale ou si leur récolte a entraîné une atteinte à un intérêt juridique d'une valeur supérieur à celui lié à la recherche de la vérité et à la poursuite des

infractions. En outre, l'utilisation d'une preuve qu'il était impossible de se procurer conformément à la loi demeure inadmissible dans tous les cas, sans qu'il se justifie de procéder à une pesée des intérêts en présence.

**E. International Investigations and Double Jeopardy**

*17. If two or more countries prosecute a cartel under their criminal statutes, could there be concerns about prosecuting the same individual based on the same facts more than once? If so, how could these concerns be addressed?*

Le droit suisse consacre le principe de la territorialité, selon lequel la loi pénale s'applique normalement à tous les actes commis sur le territoire de l'Etat qui l'a édictée. Les extensions de la compétence territoriale des Etats, en vertu par exemple du principe de la personnalité active ou passive, peuvent aboutir à des situations dans lesquelles l'auteur d'une infraction à laquelle le droit pénal suisse s'applique a déjà répondu de cette infraction devant une juridiction étrangère. Dans ce cas, le juge suisse ne renonce pas à juger à nouveau le délinquant en Suisse selon le droit pénal suisse, mais impute la peine subie à l'étranger sur la peine prononcée en Suisse. Cela entraîne parfois des punitions supplémentaires (doubles) qui peuvent paraître choquantes sous l'angle du principe *ne bis in idem*.

**Conclusion**

Les considérations qui précèdent démontrent que la Suisse complète peu à peu l'arsenal législatif dont elle dispose, afin de lutter toujours plus efficacement contre les cartels et autres restrictions à la concurrence.

La Suisse a ainsi pris conscience que, pour combattre des cartels d'envergure européenne, elle devait adapter sa législation à celle des pays qui l'entourent. C'est la raison pour laquelle on peut considérer aujourd'hui que la nouvelle loi sur les cartels est presque totalement eurocompatible à l'exception des aides d'Etats.

## UNITED KINGDOM

### Introduction

The UK has anticipated the recommendations in the Second Cartel Report<sup>1</sup> that OECD member countries should consider sanctions against natural persons and introducing criminal sanctions in cartel cases. Since 20 June 2003, when the criminal provisions in the Enterprise Act 2002 came into effect, the UK has had the power to prosecute and impose criminal sanctions on individuals involved in hard core cartels. The elements of the offence are that an individual dishonestly agrees with one or more other persons at the same level in the supply chain, to make or implement or cause to be made or implemented the necessary arrangements for a hard core cartel.

The questions asked in the OECD paper entitled Sanctions against Individuals, Including Criminal Sanctions, in Prosecuting Cartels and comments thereon are set out below.

### Section I: The Role of Sanctions on Individuals in Hard Core Cartel Cases.

#### A. *Deterrence*

*Q. What sanctions in addition to those mentioned above in paragraph 15 (imprisonment, fines, disqualification from serving as an officer of a public company, loss of licences, community service and publication of offenders) can be imposed on individuals who participate in a hard core cartel?*

Under the Enterprise Act 2002, there are provisions for the imprisonment or fining of individuals found guilty of hard core cartel offences. Lesser penalties, such as suspended sentences, community service or probation would also be available to the court. The Enterprise Act 2002 also has provision for the disqualification of directors.<sup>2</sup> However, cartel activities can be carried on at the level of senior or lower level managers who are not on the Board of the company. Therefore that particular sanction would not act as deterrent at that level of management. There is no 21<sup>st</sup> century equivalent of the stocks (apart from having one's reputation shredded by the Press), which might have been a useful punishment for cartelists. As Margaret Bloom told us at her leaving party in July, in medieval times traders who fixed markets risked losing their ears and other appendages. There do not now seem to be additional sanctions to those listed above that might be available under English law.

*Q. What are the experiences concerning the effectiveness of various sanctions? Are there ways to assess the effectiveness of sanctions, including combinations of sanctions? How effective are fines imposed on individuals if there is no prohibition against reimbursing an individual? On the other hand, can prohibitions against reimbursement be effective?*

So far there has been no experience in the UK of imposing criminal sanctions in hard core cartel cases. The criminal provisions in the Enterprise Act 2002 only came into effect on 20 June 2003 and it is unlikely that a case will be prosecuted under section 188 of this Act for sometime. Any penalties imposed at the end of such a case will be a matter for the court and not the competition authority. On conviction on indictment, the court will be limited under section 190 to imposing a maximum term of imprisonment of five years but there is no statutory limit to the fine. The court will have to follow any general guidance on imposing penalties, for example, first offenders are generally treated more leniently than recidivists.

Assessing the effectiveness of sanctions can only be done over time through studying the rate of hard core cartels within any jurisdiction. The experience within the UK is too short to make any assessment of the impact of the Competition Act 1998 which came into effect on 1 March 2000, and introduced civil sanctions for anti-competitive behaviour including hard core cartels, let alone the recently introduced criminal regime. Since the Competition Act 1998 came into force on 1 March 2000 there have been four cartel cases in which fines have been imposed and two of those cases are under appeal.<sup>3</sup>

There are no provisions in English law that would prevent a third party from paying the fines of an individual. However, if it were a term of a contract of employment that an employee would be reimbursed for any fines that arose as a result of his cartel activities in the company, that term would be unenforceable. It is envisaged that criminal proceedings would precede any civil action by the competition authority (the OFT) and if such payments came to light, any financial penalty imposed on the company could reflect that, including an element to deter other companies from paying such fines. It is difficult to see in English Law how there could be effective sanctions against reimbursement of fines.

## **B. Increase Effectiveness of Investigations**

*Q. What are the elements that maximize the effectiveness of sanctions against individuals during investigations as an incentive to co-operate with authorities?*

The UK is introducing a system of “no-action” letters,<sup>4</sup> which are similar to the leniency programme. The OFT will be able to issue no-action letters which will effectively give immunity from prosecution to individuals in England, Wales or Northern Ireland<sup>5</sup> who co-operate with criminal proceedings under section 188. This scheme is designed to provide an incentive to individuals to co-operate who would otherwise risk imprisonment or fines and a criminal record. This scheme has not yet been tested therefore it is difficult to express an opinion on its effectiveness.

*Q. If the authority to implement a leniency programme and the authority to prosecute criminal cases are divided, what can be done to limit or eliminate the risk that the discretion of public prosecutors to pursue a case could undermine certainty for defendants that they will not be prosecuted if they come forward first?*

The approach adopted in the UK is that there will be close co-operation and consultation in criminal cases between the OFT and the Serious Fraud Office which will be the lead prosecutor. Investigations will be carried out jointly. There will also be exchange of staff between the two offices. The OFT will also have power to prosecute and in such cases there will be no division between the competition and prosecuting authorities. However, it will be the OFT that issues the no-action letters after consultation with the SFO and, if the conditions in them are adhered to, the SFO will not prosecute the individual who is co-operating.

*Q. In countries in which plea bargaining does not exist are there mechanisms that can be developed to assure that the competition authority is able to obtain co-operation from individuals in exchange for a promise of immunity or a lesser sentence if neither prosecutors nor courts are bound by such arrangements?*

Not only is there is no formalised plea bargaining in the UK but a judge should not give an indication in private of what sentence he or she will give.<sup>6</sup> Discussions between the judge and a defendant’s lawyers in private offend against the principle that justice must be administered in open court. The higher courts<sup>7</sup> will uphold clear and unambiguous assurances by a prosecuting authority that it will not prosecute. If the prosecuting authority were to go back on such an assurance, the higher court would consider that the prosecution was an abuse of process. If the OFT issued a no action letter and withdrew it without reasonable cause, thus allowing a prosecution to proceed, the court would object to such

behaviour. It would be useful to consider which countries have overt systems of plea bargaining and which do not. It would also be necessary to consider whether an approach that is similar to that in the UK of abuse of process would be appropriate in jurisdictions that do not have formalised plea bargaining systems as in the USA. Generally, in English law, an early plea of guilty will result in a lesser sentence except in cases where there is a mandatory sentence.

## **Section II: Is there an “Optimal” Level of Sanctions against Individuals?**

*Q. Is there a way of determining what an “optimal” level of fines that can be imposed on individuals in hard core cartel cases?*

*What are the opinions concerning the above argument in favour of shorter, rather than lengthy prison sentences? What parameters determine the statutory term of imprisonment and the prison terms actually imposed on defendants?*

It would be difficult to have an optimal sentence across all jurisdictions represented by the OECD as local sentencing mores must be taken into account. In addition, sentencing cannot be considered *in vacuo*. When sentencing in criminal cases, the courts in the UK take into consideration the seriousness of the offence, whether it is a first offence, whether there has been a guilty plea, whether the offender has cooperated and the background of the offender.

When the maximum sentence of imprisonment for the new cartels offence was under consideration in the UK the following factors were taken into consideration:

- The level of maximum sentences of imprisonment for comparable offences, for example, offences of insider dealing and obtaining property by deception;
- Maximum sentences for comparable offences in other jurisdictions which vary between 3 to 6 years (USA and Japan - 3 years, Canada, Germany (only for bid-rigging) and the Republic of Ireland) - 5 years and Norway - 6 years);
- The need to have available surveillance powers<sup>8</sup> which can be exercised in order to prevent or detect serious crimes or in the interests of the economic well-being of the UK;<sup>9</sup>
- The desirability of sending a strong signal to the courts that hard-core cartels are very serious offences;
- Any sentence will have to be proportionate to the seriousness of the offence.

The penalties that were adopted in the Enterprise Act 2002 were a maximum term of imprisonment of five years and/or unlimited fines. There is also provision for lesser penalties<sup>10</sup> when the case is tried in the magistrates’ court. Accordingly, courts in the UK have the power to impose a wide range of terms of imprisonment. The deterrent effect of imprisonment is outside the competency of the OFT but commonsense would suggest that “white collar” criminals, who are unlikely to make direct financial gains from a cartel, are likely to be deterred from involvement by the threat of imprisonment when the gain accrues to their employer. The deterrent effect of imprisonment might be reduced where a director with close financial interest in the company is involved in a cartel. It might be worth considering the motivation of those involved in the Sothebys/Christies cartel.

### **Section III: Issues Specifically Related to Criminal Sanctions against Individuals**

#### **A. Concerns Raised in Connection with Criminal Sanctions**

*Q. In countries that have considered or are considering introducing criminal sanctions against individuals, or have changed their system of criminal sanctions, have there been any discussions concerning the appropriateness of criminal sanctions for cartels and their consistency with social norms? What arguments were raised in this context? If criminal sanctions exist in other "white collar" areas, but not in cartel cases, what explains the differences?*

Discussion in the UK focussed on arriving at penalties that would act as a sufficient deterrent to those engaged in cartels. The experience in America demonstrated a strong case for introducing criminal penalties, including custodial sentences. White collar crime in the UK attracts custodial sentences and cartel offences are also considered to be white collar crimes. Therefore, criminal sanctions for cartel activities follow existing legislation and practice.

*Q. If differences exist between bid rigging cases and other forms of hard core cartels in terms of sanctions that can be imposed on individuals, what explains those differences?*

In the UK there are no differences in penalties, although bid rigging is likely to be considered to be a very serious type of cartel and therefore it would attract a heavier sentence.

*Q. Have considerations about the cost-effectiveness of criminal fines such as the ones discussed above played a role in a country's discussion whether to introduce criminal sanctions against individuals?*

Although the Government's view was that fines should not be an alternative sanction to custodial sentences because of the possibility of them being paid by employers,<sup>11</sup> it would be most unusual to have an offence that was only subject to the imposition of a custodial sentence. In addition, penalties should be proportionate to the seriousness of the criminal conduct and imprisonment might not always be appropriate. Accordingly, the imposition of fines was included in the Enterprise Act. The question of the cost-effectiveness of fines did not appear to be part of the discussion.

*Q. Is there any evidence that criminal sanctions actually can decrease the level of anti-cartel enforcement for the reasons stated above, e.g., because of higher standards of evidence and/or the right against self incrimination?*

As yet the OFT does not have any evidence pertaining to this question. The experience in the USA would no doubt be most relevant. The OFT will maintain a dual system of enforcement and will use whichever system, criminal under the Enterprise Act 2002 or civil under the Competition Act 1998, that is most appropriate in any particular case. Accordingly, there should be no effect on the level of anti-cartel enforcement as, when the evidence reaches the criminal standard, it could be used to prosecute a criminal case and when the evidence is of a civil standard, that line could be pursued. However, the OFT will need to maintain a balance and not concentrate solely on criminal cases to the detriment of civil cases.

*Q. In some countries, it may be (or may have been) difficult to "persuade" courts to actually impose criminal sanctions and prosecutors to bring more cases. What can be/has been done to "encourage" courts to impose sanctions more frequently and/or to impose tougher sanctions, and/or prosecutors to bring more cases and demand higher sanctions?*

By having a maximum period of imprisonment of five years a strong message is sent to the courts that participation in a cartel is a serious offence. In the UK the prosecution cannot influence the

sentence of the court. The number of criminal prosecutions brought within the UK will depend upon the view of the evidence taken by the SFO in conjunction with the OFT.

## **B. Definition of a Criminal Offence**

*Q. How have countries addressed concerns related to the definition of hard core cartels as a criminal offence? If the general language in an antitrust statute is used to seek criminal sanctions, how can concerns related to over-deterrence and necessary legal certainty be addressed?*

The two main issues in defining the cartel offence in the Enterprise Act 2002 were firstly, whether or not there should be a direct link to Article 81 of the European Community Treaty and the equivalent prohibition in Chapter I of the Competition Act 1998 and second, whether or not the concept of dishonesty should be incorporated into the definition. It was also necessary to find a way of distinguishing between hard-core cartels, as described in the White Paper,<sup>12</sup> and those infringements that were more appropriately dealt with under Chapter I of the Competition Act. After the White Paper was issued, a review of the proposed criminalisation of cartels within the UK was carried out during which there was extensive consultation with government departments.<sup>13</sup> Finally, the definition was considered in Parliament during readings of the Enterprise Bill. The cartel offence is defined in section 188 of the Enterprise Act 2002. An individual is guilty of the offence if he dishonestly agrees with one or more persons to make or implement arrangements to put into effect a hard core cartel that would have an effect within the UK. The elements of hard core cartels are set out in the section. By adopting a different definition from that in existing anti-trust legislation, any possible problems relating to over-deterrence or legal certainty have been avoided. The criminal offence is separate from an infringement under the Competition Act.

## **C. Allocating Responsibility for Prosecuting a Criminal Case**

*Q. What are the advantages and disadvantages of having two separate authorities involved in hard core cartel cases where criminal sanctions are being sought? If there are two separate authorities, how can the two coordinate their tasks? In particular, how can the problem of effective cooperation be addressed most effectively to ensure the effectiveness of leniency programmes?*

There will be two separate authorities involved in hard core cartel cases – the OFT, which has experience of anti-trust law and will continue to carry out investigations and issue infringement decisions under Chapter I of the Competition Act 1998, and the SFO, which has expertise in investigating and prosecuting criminal frauds. They will complement each other. They will work in close cooperation, including the secondment of staff, on investigations and prosecutions. Leniency, in the form of no-action letters, will be dealt with by the OFT but not without consultation with the SFO. These arrangements are considered to be advantageous as the relevant skills will be available from the experienced bodies. The actual number of criminal cases in any year will probably be very small and therefore, to create all the necessary expertise and infrastructure within the OFT would be a more expensive exercise than buying in expertise through cooperation with the SFO. As there have not yet been any criminal cases any disadvantages of the system have not manifested themselves.

## **D. Sanctions under Concurrent Criminal and Civil Statutes**

*Q. What are the factors used to determine whether criminal sanctions should be sought in a specific hard core cartel case? If an authority has the choice between criminal and civil sanctions, when and how can it decide which sanctions it should seek?*

The OFT and the SFO will consider all the circumstances of a case before instituting criminal proceedings, including the possibility of civil action under Chapter I of the Competition Act 1998. The following are some of the likely factors that will be taken into account:

- The nature and seriousness of the suspected activity including its duration, the impact of the activity on the market and any losses to consumers;
- The conduct of the person concerned including whether dishonesty can be identified;
- The nature of the market in question;
- Whether it is in the public interest to pursue criminal proceedings;
- Whether criminal proceedings are likely to have any greater deterrent effect than civil proceedings;
- The quality of the evidence;
- Whether the person had previously been involved through his undertaking in action under Chapter I of the Competition Act

The SFO will only take on cases that meet the following criteria;

- Serious and complex cases where the use of SFO powers might be appropriate;
- Cases involving more than £1 million;
- Cases that are likely to attract national publicity and widespread concern;

There will also have to be evidence of dishonesty. It is envisaged that criminal prosecutions will not be pursued unless the evidence is compelling and it is in the public interest to do so. The OFT will also have power to prosecute.

*Q. What limitations exist concerning the use of evidence obtained in a criminal procedure in a civil trial and vice versa? Can such limitations affect criminal proceedings against individuals?*

The answer to this question will depend entirely on local jurisdictions. The situation in the UK is that the burden of proof in criminal cases ('beyond reasonable doubt') is higher than in civil cases, although procedures under the Competition Act 1998 require evidence to be 'strong and compelling'.<sup>14</sup> Generally, evidence obtained during civil investigations would not be admissible in a criminal prosecution. Evidence obtained during a criminal investigation under the Enterprise Act 2002 can be used to assist a civil investigation under the Competition Act 1998 and in principle vice versa. However, in the latter case, evidence gathered during an investigation under the Competition Act 1998 must be gathered in accordance with the standards required for criminal cases. The OFT intends to use procedures that will allow evidence to be used in either a criminal or a civil case.



**E. International Investigations and Double Jeopardy**

*Q. If two or more countries prosecute a cartel under their criminal statutes, could there be concerns about prosecuting the same individual based on the same facts more than once? If so, how could these concerns be addressed?*

The criminal provisions in the Enterprise Act 2002 are limited to hard core cartel activities within the UK. A similar approach (i.e. limiting criminal prosecutions to hard core cartels within the jurisdiction) in other countries would prevent two or more countries from prosecuting the same individual based on the same facts. Even if the individual was a serial cartelist in different countries, the facts would differ from country to country by reason of the geographic area within which the cartelist was operating. In any event, liaison between prosecuting authorities in different countries in order to decide where cross-border offences should be prosecuted is well established in other areas of criminal law.

Office of Fair Trading

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## NOTES

- 1 Second Report by the OECD Competition Committee on Effective Action Against Hard Core Cartels, DAF/COMP (2003)2.
- 2 Enterprise Act 2002 section 204 provides for disqualification of directors involved in breaches of competition law under the Competition Act 1998.
- 3 Leeds Buses, John Bruce, Hasbro No 2 (under appeal) and Replica Kits (under appeal). The Decisions can be seen on the OFT website.
- 4 See The Cartel Offence, Guidance on the issue of no-action letters for individuals, OFT April 2003.
- 5 The situation in Scotland is different in that the OFT cannot give immunity from prosecution in that jurisdiction but will report any co-operation to the Lord Advocate, the prosecuting authority in Scotland, which he will take into account.
- 6 See the Attorney-General's Guidelines on the Acceptance of Pleas 7 December 2000.
- 7 The Court of Appeal and the House of Lords.
- 8 Regulation of Investigatory Powers Act 2000 ss 27 – 32.
- 9 Police and Criminal Evidence Act 1984, section 24
- 10 Maximum of six months imprisonment and/or a fine, maximum £5,000, on summary conviction.
- 11 White Paper "A World Class Competition Regime" CM5233, July 2001.
- 12 See footnote 10 above.
- 13 Report of the Review of the Proposed Criminalisation of Cartels in the United Kingdom by Sir Anthony Hammond and Roy Penrose, 31 October 2001.
- 14 See Napp Pharmaceutical Holdings and subsidiaries v Director General of Fair Trading [2002] CAT1 at paragraph 109.

## UNITED STATES

The sustained law enforcement effort against cartels is the most important work of the Antitrust Division of the Department of Justice. The term “hard core cartel” is not defined in U.S. law, regulations, or guidelines, but the concept is well-understood. The term is used to refer to the class of offenses likely to be prosecuted criminally by the Department of Justice.<sup>1</sup> As stated in the 1998 United States Sentencing Commission Guidelines,

there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market allocation, can cause serious economic harm. ... The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual anticompetitive effect. The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence.

The maximum penalty for a Sherman Antitrust Act offense for an individual is three years imprisonment and the greatest of \$350,000, twice the pecuniary gain derived from the crime, or twice the pecuniary loss to victims of the crime. The Sentencing Guidelines result in jail sentences for individuals of 6 to 12 months for single-count, “base-level” antitrust violations. However, if the crime involves bid rigging, the base-level sentencing range is 8 to 14 months. The jail sentences are increased based on factors in aggravation, and can go up to 33 months based on volume of commerce affected by the violation alone.

In our view, only a criminal sanction adequately expresses society’s disapproval of naked horizontal agreements. A criminal sanction makes clear that these unambiguously harmful agreements are not merely technical infractions, but are morally wrong and simply will not be tolerated by a civilized society. These are crimes of deceit and fraud that can not be justified by any business rationale or excuse. They are serious crimes that involve theft from consumers -- theft that is more egregious because the victims often don’t even know they have been robbed. There is no reason not to treat these offenses as seriously as any other white collar offense.

Various arguments have been advanced in the context of cartel offenses for punishing individuals. One is that it is individuals who make the decisions and commit the crimes, and therefore, it is more effective to punish individuals. Another is that it may otherwise be difficult for corporations to get their employees to carry out corporate policies of compliance with the antitrust laws. Individual sanctions also provide incentives for middle managers to resist direction from senior management to engage in cartel conduct because it is often the middle manager actively participating in the violation who is most at risk of detection and punishment. As a consequence, deterrence of organizational crime requires punishment of both the organization and its agents.

### **Complementarity of Corporate and Individual Liability**

Sanctions against individuals and corporations are complementary, and there are good reasons to punish both. Three types of individuals can be considered. The first is the entrepreneur. He really is the corporation, so fining this type of individual is indistinguishable from fining the corporation except for the

ability of each to limit financial liability. If only corporations could be fined, entrepreneurs who contemplated price fixing would simply withdraw most of the assets from their corporations. The reverse might be true if only individuals were punished. Thus, in the case of entrepreneurs, both the individual and the corporation would need to be liable for fines. Moreover, making both liable would eliminate any incentive to engage in inefficient transfers of assets. Corporations run by entrepreneurs also are the least likely to be able to pay the optimal deterrent fine; thus, imprisoning entrepreneurs is necessary to achieve a deterrent sanction.

The other two types of individuals both are hired managers. One type fixes prices under orders and the other does so on his own initiative. The latter type obviously must be punished. The corporation has been unable adequately to direct his conduct using its tools, including the threat of dismissal. A more potent weapon is necessary, and imprisonment of individuals probably is needed to provide it. Although it could be argued that the corporation is not responsible directly for the antitrust violation in this case, it too should be punished. Corporations should be given powerful incentives to assure compliance with the antitrust laws, and judicial resources should not be wasted trying to determine whether corporations were aware of their agents' actions.

Punishing the former type of hired manager also is appropriate, because it is desirable to provide an incentive for the managers to resist pressures to fix prices. Their resistance will, at the very least, make price fixing more costly for corporations. Simply fining individuals, however, may not cause them to resist, since the corporation can easily, and is likely to, indemnify them. Thus incarceration is also necessary. Needless to say, it is necessary to punish the corporation as well in this case. It is the corporation that receives the direct benefit from the individual's cartel conduct, and it should be punished to achieve adequate deterrence and to take pressure off executives to commit crimes.

Approaching matters from the other direction, there is an additional reason for punishing corporations as well as individuals. It is difficult if not impossible successfully to prosecute all culpable individuals. Those ultimately responsible for antitrust violations, in the highest levels of management, often escape prosecution because the evidence uncovered is insufficient to tie them to the crimes committed by their subordinates. In addition, many individuals must be given immunity to obtain necessary testimony before grand juries and at trial. Indeed, in some cases, it may be necessary to immunize all individuals in order to obtain sufficient evidence to support charges against the companies involved in the cartel. It is important, therefore, to maintain stiff penalties for corporations as well.

### **Jail as the Most Effective Deterrent**

In the context of the legal and business culture in the United States, we believe it is essential to have criminal penalties against individuals in order to deter hard core cartel behavior. The individual, as well as the corporation, must face significant criminal penalties because organizations commit cartel behavior only through the actions of their executives and employees. If the individual is subject only to a fine, he could escape punishment altogether by having his employer pay the fine. In most cases, it is impracticable, if not impossible, to prevent a company from finding a way to reimburse an employee for any fine paid. Therefore, incarceration is the single greatest deterrent to the commission of antitrust offenses. In addition, imprisonment -- even if it is only for a few months -- is much more of a social stigma and feared consequence for white-collar offenders than for "street" criminals and is thus more of a deterrent to white-collar offenders. Targets of investigations in the U.S. routinely offer to pay substantial fines in lieu of receiving a jail term, a request which we routinely deny. Never has an antitrust target in the U.S. offered to go to jail in lieu of paying a fine. Accordingly, the United States Sentencing Commission, which develops sentencing guidelines for all federal crimes, has determined that the most effective way to

deter individuals from cartel behavior is to impose short prison sentences along with large fines. See above.

In Gary Becker's influential article *Crime and Punishment: An Economic Approach*,<sup>2</sup> he concludes that in a costless, errorless legal system, in which violators are always apprehended and convicted, the optimal penalty is a fine equal to the harm suffered by the victims of the crime. Becker's model may apply to minor transgressions, which society taxes rather than prohibits, such as overtime parking and littering. The model is not applicable to hard core cartel activity, however, and would have to concede that jail was a necessary punishment in some cases, for example where a defendant could not pay a fine. Fines alone simply cannot do the job. Fines large enough to deter most price fixing would be huge, often far greater than the statutory maximum, because the potential gains from price fixing are very large and the likelihood of detection is, regrettably, fairly small. Few individuals or even corporations have the resources needed to pay fines large enough to deter price fixing.

More important than the foregoing is that hard core price fixing, like many other crimes, should not be analyzed within Becker's framework. Central to Becker's model is the notion that efficient offenses exist and should not be deterred. Efficient hard core price fixing, however, is no more likely than efficient embezzlement. Hard core price fixes are intentional conspiracies to steal from consumers, and the negligible probability that the outcome is efficient can safely be ignored. This principle has been recognized in the United States by the adoption of the *per se* rule.

The argument has been made that the marginal deterrent effect on price fixers and other white collar criminals may remain high only for rather short terms of imprisonment and then fall off rapidly. In our experience, however, over the last two years the average term of incarceration has been 18 months, a relatively long sentence, and yet cartel activity continues to be uncovered. Alternative forms of punishment have also proven ineffective. Community service, probation, and restitution often impose little hardship on offenders, and their very availability leads all too often to their substitution for more meaningful sanctions, thus undermining deterrence. There is a serious risk that such penalties will trivialize the offense in the eyes of the business community and the public.

Recognition by society that hard core price fixing, like other types of fraud, should be eliminated rather than simply taxed, like overtime parking, itself is likely to have a substantial deterrent effect. When society taxes conduct, it sends the message that conduct is acceptable as long as the tax is paid. Society does not just tax embezzlement and fraud because it wants to send a clear signal that such conduct is not acceptable. Sending such a signal for hard core price fixing is likely to have a significant effect because business people generally have personal and business reasons to be "honest." Thus, price fixing probably can be deterred to a significant extent simply through public recognition that it is a serious crime. Many honest individuals would elect not to engage in price fixing, even if they knew that their criminal behavior never would become publicly known. In addition, the potential for public exposure as a criminal could greatly enhance the deterrent effect. The latter effect may be much more significant than the former, since ridicule may be more powerful than conscience.

It is one thing to assert that hard core price fixing is a serious crime and quite another for society to view it that way. The best tool for educating society is a prison sentence for antitrust felons that is imposed with some frequency. Perhaps it is still not enough, but it is worth the attempt. At the very least, the use of imprisonment will better communicate to business people exactly what the law is. Prison sentences send a special message not conveyed by fines, and they send it better, because prison sentences for white-collar crimes are much more newsworthy than fines and, thus, will be given more coverage in the media and will be more noted by other business people. Thus, if they accomplish nothing else, prison sentences should reduce ignorance about the law and thereby enhance deterrence.

In order for a country to have laws providing for meaningful sanctions against individuals, and to have those sanctions actually imposed, there must be an appreciation in the country's culture of the pervasiveness of, and the harm posed by, cartel behavior. The culture must appreciate that cartels steal from consumers (individuals and businesses alike), stifle innovation, contribute to inflation, destroy public confidence in the economy, undermine free enterprise systems, and harm those businesses that try to compete lawfully. Vigorous competition advocacy is necessary in order for media groups, consumers, businesses, legislatures, and courts to recognize the need for anti-cartel enforcement against corporations and individuals. In the U.S., Antitrust Division officials routinely meet with purchasing officials, consumer groups, trade associations, and investigative agencies to educate them regarding the signs and effects of cartel behavior. These outreach efforts have increased the ability of these groups to detect and report collusion and hence, increased their demand for anti-cartel enforcement. Such consumer support for anti-cartel enforcement can, in turn, facilitate enactment of meaningful sanctions by legislatures and the imposition of such sanctions by courts.

It has been our experience that the threat of individual criminal liability has helped to uncover hard core cartels by driving a wedge between corporate interests and those of individual executives. Although criminal offenses are harder to prove than civil ones, the enhanced deterrent effect of criminal penalties are well worth the extra burden, and criminal investigations also benefit from some powerful investigative tools, such as the grand jury and the leniency policy.

## NOTES

- 1 Because the FTC does not prosecute criminal violations under the Sherman Act, which is a function of the Department of Justice, when a matter is before the FTC and it determines that the facts may warrant criminal action against the parties involved, the Commission notifies the Antitrust Division and makes available to the Division the files of the investigation. If the Division determines that a matter should be referred to a grand jury, it will request that the FTC transfer the matter. If, on the other hand, the Division decides not to pursue the matter with a grand jury, then the Commission may proceed with its own civil investigation.
- 2 76 J. Pol. Econ. 169 (1968).





## SUMMARY OF THE DISCUSSION

The Chairman opened the discussion by pointing out that the insufficient deterrent effects of corporate sanctions and the incentive sanctions create for individuals to cooperate in cartel investigations were the most commonly used justifications for imposing sanctions on individuals. However, the Chairman observed that the written submissions had not addressed the questions whether sanctions against individuals are more efficient than other sanctions as a deterrent of unlawful conduct and whether the social costs of such sanctions are lower than their benefits. Costs of individual sanctions could include both enforcement costs (such as costs of imprisonment) and costs of higher burden of proof which may make it more difficult to successfully prosecute cartels.

### **Deterrent Effect of Sanctions Against Individuals**

The Chairman asked the United States to explain why cartels continued to exist in the United States, even though the United States submission asserted that the current system of sanctions against individuals was considered an effective deterrent.

The **United States** responded that cartels – as other criminal conduct - will continue to exist because of human nature. It has not been possible to develop convincing empirical data to support the argument that jail sentences sufficiently increase deterrence to offset the additional costs because there was no reliable way to determine the causes of things that have not happened. But there was anecdotal evidence of the effectiveness of sanctions against individuals: Experience in the past has been that cartel members avoided meetings in North America in the mistaken believe that they could avoid U.S. jurisdiction, which indicates that cartel participants at least are aware of the sanctions they could face in the United States. And many defendants have offered DOJ to pay higher fines if they could avoid time in jail, but no defendant has ever offered to spend extra time in jail in return for a reduced financial fine.

**Canada** explained that its views of criminal and other sanctions were based on experience and feedback from various stakeholders. No single sanction is a sufficient deterrent, but it was important that a panoply of sanctions is available to combat cartels. Even the threat of class actions or civil actions can be an effective deterrent.

**Switzerland** explained that during the reform of Swiss cartel law, the Government had been open to new ideas concerning effective measures against cartels. Hearings were held that included presentations by international experts. The hearings and discussions, however, did not provide convincing arguments in favor of individual sanctions. The hearings confirmed that imposing financial sanctions on individuals was mostly ineffective because fines typically were paid by the company. The Parliament was reluctant to provide for penal sanctions against cartel members, as the trend in Switzerland is towards decriminalization of minor offenses, and only serious offenses are subject to criminal fines. A revision of this position would be possible, if there was convincing evidence from other countries that criminal sanctions against individuals were an effective instrument in the fight against cartels.

The law currently provided for the possibility of certain sanctions against individuals, but those sanctions have not been imposed because it was difficult to determine the person within a company who met all the criteria required to establish criminal liability.

The Chairman asked Switzerland to explain a statement in its submission that the experience worldwide demonstrated that severe sanctions against individuals are not effective as a deterrent of unlawful conduct. **Switzerland** responded that this was more a question of social norms and legal culture. In Switzerland, even the most severe offenses such as murder were sanctioned with a maximum 20 year sentence. In those circumstances imposing severe jail sentences on corporate executives would have been considered inappropriate.

The Chairman next turned to the role of sanctions as a means to educate society about the reprehensiveness of cartel conduct and to create a competition culture. He asked Chinese Taipei to report about its experience concerning the introduction of criminal sanctions, as it appeared from the submission that the introduction of criminal sanctions was met with stiff resistance, thus casting doubt on the ability of criminal sanctions to support the creation a competition culture.

**Chinese Taipei** reported that the Fair Trade Act, which was adopted in 1992, introduced criminal sanctions, including jail terms of up to 3 years. However, there was broad resistance against criminal sanctions within the business community, academics, the judicial system, and the FTC itself. Businesses were frequently engaged in cartel conduct. Some FTC Commissioners refused to impose criminal sanctions in white collar cases. Prosecutors and court also resisted. The FTC thus had to review the appropriateness of criminal sanctions.

In 1994, the FTC proposed amendments to the law which introduced the principle of administrative sanctions prior to criminal sanctions. Criminal sanctions would not be imposed on first time offenders, who could be subject only to desist orders by the FTC. Since the amendments became effective, no cartel participant was involved in cartels twice. This could be because administrative sanctions were sufficient to deter cartels, or because offenders had learned how to avoid detection.

**Australia** explained how the author of the Dawson Report as well as the Australian public had been persuaded of the need to introduce criminal sanctions. The ACCC initially had proposed criminal sanctions only for large corporations, but later agreed that criminal sanctions should apply without distinction to all cartels. This move persuaded the author of the Dawson Report to support criminal sanctions. Big business also supported criminal sanctions for cartels, hoping that the Dawson Report would adopt a more lenient position with respect to unilateral conduct.

The proposition to introduce criminal sanctions was broadly accepted for several reasons. First, Australia has developed a competition culture that is shared by government institutions. Second, it was believed that criminal sanctions would provide more effective deterrence. Under the current system, decisions whether to enter into a cartel were based on a purely financial cost/benefit analysis. Such an analysis would have to be substantially adjusted if the risk of time in jail was factored in. Third, there were equity considerations. Even minor offenses against securities regulations could result in jail sentences. There was agreement that participants in a cartel also should be threatened with jail terms.

The Dawson Report highlighted the difficulty of adequately defining what is a "hard core cartel." A working party has been established to find a workable definition. The Dawson Report suggested that criminal sentences should be the exclusive sanction. The ACCC, however, preferred having the option between civil fines and criminal prosecution, where a lower level of proof would be required for civil sanctions. As regards civil penalties, there was agreement that sanctions should go beyond financial penalties. It was important that individuals could be banned from holding office in any company. Australia further reported that in its view a prohibition against indemnifying directors was relatively easy to enforce. Based on its experience concerning similar prohibitions, it appears that the regular auditing process would reveal whether a corporation unlawfully indemnified a director for an individual penalty.

As regards the public reaction to the proposals, Parliament required that the issue of defining a hard core cartel be resolved first. Once this issue was resolved, there will be unanimous support in Parliament for the proposal.

The Chair summarized the first part of the discussion by pointing out that the cultural and legal environment of a country, rather than empirical evidence about the deterrent effects of sanctions against individuals, appears to be the most important factor in determining whether cartel conduct was considered a criminal offence.

### **Optimal level of sanctions**

The Chairman next raised the question whether an optimal level of sanctions can be defined.

**Chinese Taipei** explained that prison sentences of up to three years could be imposed in cartel cases on second time offenders. Many investigations concerned local cartels, frequently with numerous participants. When imposing sanctions, the authorities also have to take into consideration that especially imprisonment may impose disadvantages not only on individuals, but also on their families and communities. These costs can be reduced if shorter prison sentences are imposed. Since shorter prison sentences are an effective deterrent and less costly, they generally are considered sufficient. Typically, courts impose prison sentences of 6 months to one year.

**Norway** stated that in its view the arguments for shorter prison terms were weak. There was no proof that imprisonment as such is a sufficient deterrent. Longer prison sentences are likely a better deterrent. The cost/benefit argument in favor of shorter terms assumes that business leaders contribute to society in a unique way. This assumption, however, is frequently unfounded. In particular in cartel cases, agencies deal with business leaders who have stolen from consumers and weakened the economy. Replacing them for a longer term can be done at acceptable costs for society. Principles of equality and justice also are reasons against shorter prison sentences.

With respect to the courts' reluctance to impose longer sentences, Norway explained that courts tend to be conservative. The competition authority would need many cases to change the attitude of courts. But in the past, the authority was not in a position to bring a sufficient number of cases and in that way to raise awareness of cartel activity.

The **United States** explained that it favored relatively short prison terms, compared to other crimes. Cartels are considered fraud on consumers and other purchasers of goods. But prison sentences for antitrust crimes pale in comparison with sentences for other white collar crimes. For example, an embezzlement scheme causing harm comparable to the harm caused by vitamins cartel could have led to a prison sentence of up to 20 years. For the vitamins cartel, the maximum prison sentences would have been three years. Thus, although the average prison sentence in antitrust cases of 18 months is relatively long, it is relatively short compared to other white collar crimes.

The Chairman followed up by referring to the relatively high costs of keeping individuals in prison. In those circumstances, longer sentences would be justified only if additional costs are outweighed by benefits of additional deterrence that results from longer prison sentences. The **United States** responded that there was very little empirical evidence available concerning the marginal deterrent effect. Moreover, the response likely would be different from society to society, and may also change over time.

**Israel** explained that prison sentences have been imposed only in one case in which five executives were sent to jail. There was no empirical evidence available to study the issue of additional deterrence and costs. But conversations with the business community indicate that jail terms are taken

very seriously and that the imposition of individual sanctions was effective. Israel did not have enough experience to know what length of sanction would be sufficient to deter cartel conduct. Defense attorneys keep comparing their cases to a single case, the “floor tile” case, thus indicating that this case was considered a landmark case. It will be necessary to ensure that other cartel cases result in imprisonment, so that the “floor tile” case does not stand out as an exception and imprisonment becomes a more typical sanction in cartel cases. The length of sentences depended on the size of corporation, the size of the market affected, the period of unlawful conduct, and the level of awareness of cartel participants.

### **Level of proof**

The Chairman introduced the next topic by pointing out that the increased standard of proof might be a downside risk of introducing criminal sanctions. It asked the United Kingdom to explain the elements that must be proved in a criminal cartel case under the new statute, in particular the dishonesty requirement.

The **United Kingdom** first added a comment to the previous discussion concerning the effectiveness of criminal sanctions. The effectiveness of criminal sanctions could be more easily established where police was used to crack down on criminal activity and there was evidence of changes in criminal conduct following such intervention. Such effects are more difficult to prove in cartels where the unlawful effects consist of increased prices. The level of prices is determined by multiple factors, so it would be impossible to use statistical data to establish the effect of criminal enforcement on price levels. In the end, there is a question whether it is held to be self evident that jail time is a better deterrence of corporate executives. There is at least strong anecdotal evidence that criminal sanctions have such deterrent effects.

The definition of the criminal cartel offense was narrower than the civil definition for two reasons: First, the civil definition followed the definition of Article 81 of the Treaty of Rome, which prohibits conduct even if it has only the effect, but not the object, of restricting competition. Such a wide definition would be inappropriate for a criminal offense which under UK law should include the requirement of a proven guilty mind. Second, there was a need to define the criminal offence with greater precision to avoid endless litigation about the exact scope of the offense.

“Dishonesty” was a UK-specific feature that was well-known to prosecutors. It required that prosecutors can prove to a jury that the person who committed the act knew that his act was wrong, and that reasonable people also would have regarded the conduct as wrong. It could be imagined that a jury would be more likely to find dishonesty in cartel cases where top executives were prosecuted. It would be necessary to show that individuals thought that they could financially benefit from cartel conduct

The Chairman pointed out that the important question addressed by the roundtable was whether criminal sanctions could deter cartels, not necessarily whether they lead to lower prices. A large body of literature existed about the deterrent effects of criminal sanctions, and it might be worth examining whether this literature suggested ways in which the effects of criminal sanctions on cartels could be established in a reliable way.

**Canada** explained that the definition of a restrictive agreement in Section 45 of the Competition Act was considered overly broad because it captured a great number of agreements and not only hard core cartels, but also overly narrow because it included an “undue lessening of competition” requirement. The “undue lessening of competition” standard required the showing that the agreement conferred such market power on the parties that they could conduct business independent of market forces. There was no bright line test to determine when “undue lessening of competition” existed. Economic concepts such as market

definition, entry barriers, and price elasticity had to be proven under criminal standards which required proof beyond reasonable doubt. Courts also required that cartel participants knew or should have reasonably known that their agreement would unduly lessen competition. A Government discussion paper has recently been issued to consider reforms. According to the paper, hard core cartels would remain criminal offenses which would be prohibited per se. There would be no need to show the effect of such agreements on competition. All other types of agreements would be reviewed under the substantial lessening of competition standard as a civil offense.

**Israel** stated that its statute provided a very wide definition of a criminal offense, but that the agency used discretion to decide whether to criminally prosecute a cartel. There was not much concern that the wide definition might over-deter. Every business person who had even a slight doubt about the lawfulness of a proposed arrangement could apply for approval or exemption. Thus, the business community is able to rely on a safe harbor, and frequently uses this opportunity. The broad definition of the criminal offense nevertheless creates problems for the prosecution. There is no legal tradition about the exact scope of the criminal offense, and the authority has not issued guidelines. At the same time, it was difficult to come up with a precise, narrower definition of a criminal offense. Thus, there always would be some discretion for the authority to decide whether to criminally prosecute an alleged cartel.

### **Cooperation with Prosecutors**

The Chairman turned next to the question of cooperation between antitrust agencies and criminal prosecutors in bringing criminal cartel cases and in applying leniency programs.

**Israel** explained that the threat of higher sanctions may lessen incentives for defendants to enter into plea bargaining arrangements. If prosecutors propose plea bargaining agreements that include jail sentences, defendants in many cases believe that they have better chances in court because jail terms are rarely imposed. Imprisonment was imposed only in one case. Reaching plea bargaining agreements without jail time would be easier, but it was the competition authority's stated goal to increase the number of cases in which imprisonment is part of the sanction. This might be a transitional problem while the authority is trying to raise the level of fines. Once courts accept the view of the authority and impose jail time more frequently, reaching plea bargaining agreements that include jail time will be easier.

The **United Kingdom** explained that under the Enterprise Act the prosecuting authority is bound by a grant of immunity by the OFT. Clear rules have been published that should ensure that individuals will come forward and seek leniency. The immunity program required continued cooperation by the person seeking leniency, and this may also require cooperation in court by providing evidence. Last, relying purely on testimony by a person who was granted immunity would not be sufficient, but corroborating evidence would be required to obtain a conviction.

### **General Discussion**

The **European Commission** pointed out that no provision existed under EC law to hold individuals responsible for participating in cartels, despite the Commission's cartel-related activity. There were two major reasons for this situation: First, there was divergence among Member State laws and policies concerning sanctions against individuals. Six Member States currently provide for sanctions against individuals. Second, at the moment, and for the foreseeable future, no provisions existed in the Treaty to guarantee protection of individuals through a proper legal process in criminal cases. This situation could change only through an agreement reached by Member States.

The Commission is of the view that sole reliance on corporate sanctions cannot ensure adequate deterrence. Corporate sanctions have an indirect effect on individuals and cause them to be accountable to their stakeholders. However, deterrence has to be addressed in a comprehensive way. The deterrent effect of sanctions against individuals, including jail time, would be appropriate considering the level of harm to competitors and consumers. Ultimately, the EU should be moving toward a system that provides for criminal sanctions, provided there is adequate certainty and protection of the rights of individual.

As of May 2004, national authorities will apply EU law in parallel with national laws. Criminal prosecution will be possible through the parallel application of national laws that provide for criminal sanctions. In this heterogeneous situation, where EU law and national laws can be applied in parallel, several challenges exist. First, the compatibility of leniency schemes and criminal sanctions must be ensured. Differences between leniency programs on a national level can cause significant problems. It can be envisaged that leniency applications could lead to criminal prosecution of employees or ex-employees by national authorities, following information exchanges within the network of competition authorities or cooperation between the Commission and national courts. The Regulation specifically provides that custodial sanctions can be imposed only if the law of a transmitting authority either foresees sanctions of a similar kind or ensures that information is collected under rules that protect the rights of individuals similar to the rules applicable in the jurisdiction of the receiving authority. The rules being developed within the Community therefore emphasize the need to coordinate between authorities that implement leniency programs and those that criminally prosecute cartel participants.

In the Commission's view the culture of competition in the EU is moving towards sanctions against individuals. It must be ensured that the development of consensus in this area is not made more complex by the inefficient interaction between national and Community rules. Last, it will have to be ensured that leniency applications for corporations and for individuals are handled in a parallel way.

**BIAC** emphasized that the business community had an interest in effective anti-cartel enforcement as businesses frequently are victims of cartels. Individual sanctions generally are also supported by the business community. The threat of sanctions also can provide an incentive to cooperate with government authorities.

However, the business community also could become the unintended victim of misdirected enforcement action, and of disproportionate penalties. These concerns existed in particular in a multijurisdictional context. For every clear-cut cartel case, there are many close cases with complex business arrangements that are not clearly unlawful. The risk of sanctions may affect the willingness of individuals to provide evidence. Evidence based on individual testimony might not always be reliable. In a multijurisdictional context, evidence from one jurisdiction could be used elsewhere, thus subjecting an individual to prosecution in multiple jurisdictions. This might significantly reduce the incentive to plead guilty in the first jurisdiction. Even the threat that the first jurisdiction may share information with another jurisdiction may affect the individual's right and ability to defend himself.

The notion of optimal deterrence is a complex issue in the case of individuals. Calculating benefits individual derive from cartels may be difficult. In a multijurisdictional context, short prison terms can become long, and fines may become excessive. **BIAC** suggested that in cases of multiple prosecutions, coordination among jurisdictions would be advisable to avoid unfair and excessive penalties. As to the question of overdeterrence, it was conceivable that collaborative conduct that may be appropriate and lawful may be deterred. Corporate executives may fear the threat of investigations and sanctions even when considering procompetitive arrangements.

**Ireland** commented that while imprisonment was a useful instrument in fighting cartels, it should not be the only instrument available to agencies. Especially in jurisdictions where anti-cartel

enforcement is relatively new and developing, where for example government ministers used to host meetings of cartels, judges are less likely to convict individuals for their participation in cartels. In those circumstances, administrative fines should be part of the agency's portfolio as well. Class action was not considered a preferable alternative, given the negative experience with class actions elsewhere.

As to optimal sentences and the effectiveness of lengthy sentences, there were steeply decreasing returns for longer sentences. On the other hand, the costs of imprisonment increase more than linearly over time, especially because the negative effects on the imprisoned individuals increase. In addition, in a situation where small countries can send people to jail for smaller, national cartels, but no prison sentences can be imposed for larger, European-wide cartels, concerns could be raised about the proportionality of longer prison sentences. The 5-year maximum jail time in Ireland was largely an expedient device to enable the agency to carry out investigations more effectively. Last, Ireland emphasized that timing of sanctions is important. Prison sentences should be imposed swiftly to be effective, and not several years after a cartel has been detected.

**Australia** explained that in its view the current mix of available sanctions was suboptimal. It was very difficult to come up with an objective way to determine the right mix of sanctions that has the most effective deterrent effects and can ensure compliance, given that competition culture, agency practice, but also the role of prosecutors and court are variables that impact the effectiveness of various sanctions. A study on compliance outcomes currently is being undertaken. Preliminary results indicate that the publicity of sanctions had significant deterrent effects.

**New Zealand** agreed that hard core cartels should be seen as a serious offense and that individuals should be subject to significant sanctions. New Zealand followed the developments in Australia with great interest, given the integration of the two economies. However, New Zealand has so far resisted the introduction of criminal sanctions against individuals. First, there was the concern that criminal sanctions could make it more difficult to impose sanctions than under the current system of civil sanctions. Even if criminal sanctions were introduced as an alternative to civil sanctions, the effects in a small economy like New Zealand would be rather limited, given the higher standards of proof and the small number of cases brought by the agency. Pursuing criminal cases could take several years and require significant resources. Moreover, there was the risk that agencies might ultimately not succeed in imposing sanctions, which could create the perception that the law was not effective.

**Mexico** explained that even though criminal sanctions are provide for in the law, it had been difficult to persuade prosecutors to pursue cases. There was a lack of awareness in society that cartels were a reprehensible conduct.

**Germany** explained that administrative fines can be imposed on individuals in cartel cases, but that those sanctions were not very effective because corporations typically would pay fines imposed on individuals. Criminal sanctions would certainly help in this respect. Germany then explained that it is in the process of reforming its law in connection with the EU's competition law reform. Strengthening the rights of third parties was one of the goals of the law reform. In Germany, there was the impression that the fear of treble damages sometimes was the most effective deterrent, more effective even than the risk of going to jail. Germany asked the United States to explain how it viewed the relationship between treble damages and criminal sanctions in terms of deterring cartels.

The **United States** confirmed that the fear of treble damages had a strong deterrent effect, but that it was effective mostly with respect to corporations. Individuals were not exposed to treble damages. Potential jail time had the most effect on individual behavior.

The United States rejected BIAC's point that aggressive anti-cartel enforcement might lead to over deterrence. The Justice Department criminally investigated only cases that were clearly hard core cartels. While it was true that investigations were closed without bringing a criminal case, this was because there was not enough evidence to bring a criminal case and not because the conduct under investigations was ambiguous.

As to prosecution in a multijurisdictional context, the increasing number of countries that provided for criminal penalties against individuals made multiple prosecutions of individuals more likely. In the past, the United States had made arrangements with other jurisdictions which investigated the same cartel to ensure that only one jurisdiction would prosecute an individual and only one would impose jail sentences.

Concerning the cost of criminal sanctions, the United States pointed out that the costs of jail sentences are only a minor cost factor, compared to costs of investigating and prosecuting cartels. In response to a remark by the Chair, the United States confirmed that leniency programs were a useful tool in the prosecution of cartels that made anti-cartel enforcement less costly. However, even in cases with leniency applications, the cost of prosecution remained substantial.

**BIAC** suggested that jurisdictions should consider entering into more MLAT/IAEAA-type bilateral cooperation agreements that allow for cooperation in the securing of evidence in other jurisdictions. Such action could be a wake-up call to corporations and business persons because the risk of investigations would substantially increase and could affect the careers of individuals. Awareness of and compliance with antitrust laws would increase.

The Chair closed the roundtable by pointing out that while individual sanctions were recognized as a useful tool in the fight against cartels, the costs of imposing such sanctions, local competition culture and legal environment, and the size of country also should be taken into account. Otherwise the use of sanctions against individuals could create a backlash. Overall one could observe a tendency toward sanctions against individuals. There was a need to think creatively about the right mix of sanctions.



## RÉSUMÉ DE LA DISCUSSION

Le Président entame la discussion en soulignant que c'est l'argument selon lequel les sanctions prononcées à l'encontre des sociétés ne sont pas suffisamment dissuasives et les sanctions destinées à encourager les personnes physiques à coopérer dans le cadre d'enquêtes sur des ententes ne sont pas suffisamment incitatives qui revient le plus fréquemment pour justifier l'application de sanctions à des personnes physiques. Il fait toutefois observer que les contributions écrites n'ont pas abordé la question de savoir si les sanctions prononcées à l'encontre des personnes physiques sont plus efficaces que d'autres sanctions pour prévenir les comportements illicites, pas plus d'ailleurs que celle de savoir si le coût pour la société de ce type de sanctions est inférieur aux avantages qu'on peut en attendre. Le coût des sanctions à l'encontre des personnes physiques recouvre à la fois le coût des mesures d'application des peines (notamment des peines d'emprisonnement) et le coût inhérent à des obligations plus lourdes en matière de preuve qui compliquent parfois les poursuites dans les affaires d'entente.

### Effet dissuasif des sanctions prononcées à l'encontre des personnes physiques

Le Président invite les États-Unis à expliquer pourquoi il y a encore des ententes dans ce pays bien que celui-ci affirme, dans sa contribution, que le système qui lui permet actuellement de sanctionner des personnes physiques a effectivement un effet dissuasif.

Les **États-Unis** répondent qu'il est impossible d'éliminer totalement les ententes qui – à l'instar de toute autre infraction pénale – résultent de comportements inhérents à la nature humaine. Il ne leur a pas été possible de produire des données factuelles attestant que les peines d'emprisonnement accroissent l'effet dissuasif dans des proportions suffisantes pour compenser le surcoût qu'elles occasionnent et ce, parce qu'il n'y a par définition aucun moyen de déterminer pourquoi telle ou telle situation ne s'est pas produite. Il existe en revanche un certain nombre d'éléments anecdotiques témoignant de l'efficacité des dispositions visant à sanctionner des personnes physiques : on a pu observer dans le passé que les participants à une entente évitaient de se réunir sur le continent nord américain pensant à tort qu'ils pourraient ainsi ne pas tomber sous le coup de la loi américaine, ce qui montre bien qu'ils étaient à tout le moins informés des sanctions auxquelles ils s'exposaient aux États-Unis. Et nombreuses sont les personnes condamnées à des peines de prison qui ont tenté d'échapper à l'incarcération en proposant au ministère de la Justice des États-Unis d'acquitter en contrepartie une amende majorée ; en revanche, aucune d'entre elles n'a jamais proposé d'échanger un allongement de son incarcération contre un allègement de la sanction pécuniaire qui lui était infligée.

Le **Canada** explique que sa conception des sanctions, notamment pénales, se fonde sur l'expérience acquise et les informations recueillies auprès des différentes parties prenantes. Selon lui, on ne peut s'en remettre à un seul type de sanction pour obtenir un effet dissuasif, et il convient de prévoir un arsenal de sanctions pour combattre les ententes. La seule menace d'actions collectives ou de poursuites devant des tribunaux civils peut se révéler efficace.

La **Suisse** indique que, dans le cadre de la réforme de la législation sur les ententes, le gouvernement suisse s'est montré ouvert aux idées nouvelles concernant les mesures à prendre pour combattre efficacement les ententes. Il a engagé des consultations et a notamment entendu des experts internationaux. Ces consultations et ces débats n'ont toutefois pas permis de dégager des arguments convaincants en faveur de l'adoption de sanctions à l'encontre des personnes physiques. Les auditions ont confirmé qu'infliger des sanctions pécuniaires à des personnes physiques est une mesure hautement

inefficace puisque les amendes sont dans les faits acquittées par l'entreprise. Le Parlement s'est montré réticent à adopter des sanctions pénales à l'encontre des participants à une entente au motif que la Suisse a plutôt tendance à dépenaliser les infractions mineures et que seules les infractions graves donnent lieu au paiement d'amendes. Il n'est pas impossible qu'elle revoie sa position si elle s'aperçoit que d'autres pays peuvent faire état d'éléments probants attestant que les sanctions pénales à l'encontre des personnes physiques constituent un instrument efficace de lutte contre les ententes.

La loi prévoit actuellement la possibilité de prendre certaines sanctions à l'encontre des personnes physiques, mais celles-ci ne sont pas appliquées car il est difficile de déterminer quelle est la personne qui, au sein de l'entreprise, satisfait à tous les critères permettant d'établir sa responsabilité pénale.

Le Président invite la Suisse à s'expliquer sur l'affirmation qui figure dans sa contribution selon laquelle l'expérience a prouvé à l'échelle mondiale que l'application de sanctions lourdes à l'encontre des personnes physiques ne permet pas de prévenir efficacement les comportements illicites. La **Suisse** répond qu'il s'agit davantage d'un problème de normes sociales et de culture juridique. En Suisse, même les crimes les plus graves, comme le meurtre, sont punis d'une peine de 20 ans d'emprisonnement au maximum. Dans ces conditions, il paraît inapproprié d'infliger de lourdes peines de prison à des dirigeants d'entreprise.

Le Président aborde ensuite la question du rôle des sanctions en tant que moyen de sensibiliser la société au caractère répréhensible des ententes et de favoriser l'éclosion d'une culture favorable à la concurrence. Il demande au Taipei chinois de rendre compte de ce qui s'est passé dans ce pays depuis qu'il a décidé d'infliger des sanctions pénales à des personnes physiques ; il apparaît en effet dans sa contribution que cette initiative s'est heurtée à une forte résistance qui a jeté le doute sur sa propension à étayer le développement d'une culture favorable à la concurrence.

Le **Taipei chinois** indique que le Fair Trade Act, adopté en 1992, prévoyait des sanctions pénales, y compris des peines de prison pouvant atteindre 3 ans. Néanmoins, ces dispositions ont suscité une vive résistance dans les milieux d'affaires, le monde universitaire, le système judiciaire et même au sein de la Commission d'État de la concurrence. Les ententes entre entreprises étaient monnaie courante, mais certains responsables de la Commission d'État de la concurrence ont refusé d'infliger des sanctions pénales à des cols blancs. Les autorités chargées des poursuites et les tribunaux ont également fait acte d'opposition. La Commission d'État de la concurrence a donc dû revoir sa copie.

En 1994, elle a proposé des amendements à la loi introduisant la notion de sanctions administratives préalables aux sanctions pénales, ces dernières n'étant pas applicables à des délinquants primaires qui ne peuvent faire l'objet que d'une injonction d'avoir à cesser de la part de la Commission d'État de la concurrence. Depuis l'entrée en vigueur de ces amendements, on ne recense aucun cas de récidive chez des personnes convaincues d'avoir participé à une entente, ce qui peut s'expliquer de deux manières : soit les sanctions administratives ont été suffisamment dissuasives, soit les auteurs d'infractions ont appris à éviter d'être découverts.

L'**Australie** expose l'argument qui a persuadé l'auteur du Rapport Dawson, tout comme l'opinion publique australienne, de la nécessité d'adopter des sanctions pénales. L'Australian Competition and Consumer Commission (ACCC) avait dans un premier temps proposé l'adoption de sanctions pénales applicables uniquement aux grandes sociétés, avant d'accepter de les appliquer indifféremment à toutes les ententes. C'est ce changement de cap qui a finalement convaincu l'auteur du Rapport Dawson d'appuyer l'adoption de sanctions pénales. Les grandes entreprises ont également apporté leur soutien au projet de sanctionner pénalement les participants à une entente en espérant que le Rapport Dawson privilégierait une position plus clémente à l'égard des comportements unilatéraux.

La proposition d'adopter des sanctions pénales a suscité une large adhésion et ce, pour plusieurs raisons. La première, c'est que l'Australie a développé une culture de la concurrence qui est partagée par l'ensemble de ses institutions publiques. La deuxième tient au fait que les sanctions pénales sont censées avoir un effet dissuasif plus puissant. Dans le système en vigueur, la décision de conclure une entente est motivée par une analyse coût/avantage répondant à des critères purement financiers. Cette analyse devra être revue en profondeur si le risque d'une condamnation à une peine de prison doit être intégré dans les paramètres à prendre en considération. La troisième raison a trait à des considérations d'équité. Même les infractions mineures à la législation sur les valeurs mobilières sont parfois passibles de peines d'emprisonnement, ce qui a conduit à considérer qu'il devrait être possible de condamner les participants à une entente à des peines comparables.

Le Rapport Dawson a montré combien il est difficile de donner une définition satisfaisante de la notion d'entente injustifiable, mission qui a d'ailleurs été confiée à un groupe de travail créé spécialement à cet effet. Il suggère que les condamnations pénales devraient exclure toute autre sanction. L'ACCC a toutefois préféré avoir la possibilité de choisir entre une procédure pénale et une procédure civile aboutissant le cas échéant au versement d'une amende dans les situations où la quantité de preuves à fournir est moindre pour cette deuxième option. En ce qui concerne les condamnations au civil, il y a eu accord sur le fait qu'il convenait d'aller au-delà des sanctions pécuniaires. Il importe en effet de pouvoir interdire à des personnes physiques d'exercer des fonctions dans une société. L'Australie a par ailleurs indiqué que, selon elle, l'interdiction d'indemniser des administrateurs est une mesure relativement facile à appliquer. Compte tenu des enseignements tirés de l'application d'interdictions similaires, il semble que la procédure ordinaire de vérification des comptes devrait suffire pour déceler si une société a versé, en violation de la législation, des indemnités à un administrateur sanctionné à titre personnel.

Du côté de la représentation publique, le Parlement a demandé que l'on résolve d'abord la question de la définition d'une entente injustifiable en assurant que lorsque ce serait chose faite, il apporterait un soutien unanime à la proposition.

Le Président a résumé la première phase de la discussion en soulignant que c'est le contexte culturel et juridique propre à chaque pays, plus que les données factuelles relatives aux effets dissuasifs des sanctions prononcées à l'encontre des personnes physiques, qui semble être le facteur le plus important pour déterminer si la participation à une entente doit être considérée comme une infraction pénale.

### **Optimisation des sanctions**

Le Président soulève ensuite la question de l'optimisation des sanctions.

Le **Taipei chinois** indique que dans les affaires d'entente, les récidivistes sont passibles de peines d'emprisonnement dont la durée peut atteindre trois ans. Un grand nombre d'enquêtes portent sur des affaires de portée locale dans lesquelles les participants impliqués sont nombreux. Lorsqu'elles appliquent des sanctions, les autorités doivent en outre prendre en considération le fait que les peines de prison en particulier risquent de porter préjudice non seulement aux personnes concernées, mais aussi à leurs familles et à leurs communautés. Ces inconvénients peuvent être limités si l'on réduit la durée de ces peines. Or l'on sait que même plus courtes, les peines d'emprisonnement demeurent un instrument de dissuasion efficace et moins coûteux que d'autres. En règle générale, les tribunaux prononcent des condamnations à des peines de prison dont la durée varie entre six mois et un an.

La **Norvège** déclare que selon elle, les arguments en faveur d'un raccourcissement des peines de prison sont peu convaincants. On ne dispose d'aucune preuve que la prison est en soi une punition suffisamment dissuasive et il est vraisemblable que plus les peines d'emprisonnement sont longues, plus

elles sont dissuasives. L'analyse coût/avantage plaçant en faveur de peines de plus courte durée repose sur le postulat que les responsables d'entreprise apportent à la société une contribution dont elle peut difficilement se passer. Ce postulat est toutefois très souvent démenti par les faits. En particulier dans les affaires d'entente, les autorités doivent se prononcer sur les agissements de dirigeants d'entreprise qui ont lésé des consommateurs et affaibli l'économie et qu'on peut donc remplacer pendant une plus longue période moyennant un coût parfaitement acceptable pour la société. Les principes d'égalité et de justice figurent également au nombre des considérations qui plaident contre l'application de peines d'emprisonnement de courte durée.

Quant à la réticence des tribunaux à infliger des peines plus longues, la Norvège l'explique par leur tendance naturelle au conservatisme. Il faut que les autorités de la concurrence puissent porter un grand nombre d'affaires devant les tribunaux pour parvenir à les faire évoluer. Or elles n'ont pas été en mesure de faire dans le passé, ce qui les a empêchées de sensibiliser les instances judiciaires aux problèmes soulevés par les ententes.

Les **États-Unis** indiquent qu'ils sont favorables à l'application de peines de prison relativement courtes dans les affaires d'entente par rapport aux peines sanctionnant d'autres délits. Les ententes sont considérées comme des abus commis vis-à-vis des consommateurs et d'autres acquéreurs de biens, mais les condamnations à des peines de prison en cas d'infraction à la législation sur les ententes ne souffrent pas la comparaison avec celles sanctionnant d'autres délits commis par des cols blancs. Il rappellent par exemple qu'une opération de détournement de fonds ayant causé un préjudice comparable à celui occasionné par l'entente sur les prix des vitamines aurait pu être sanctionnée par des peines d'emprisonnement pouvant atteindre 20 ans. Dans le cas de l'entente sur les prix des vitamines, la durée des peines d'emprisonnement a été de trois ans au maximum. Même si la durée moyenne des peines d'emprisonnement dans les affaires d'infraction à la législation sur les ententes, à savoir dix-huit mois, paraît plutôt longue dans l'absolu, elle est en réalité relativement courte par comparaison avec les peines appliquées aux autres délinquants en col blanc.

Le Président enchaîne en mentionnant le coût relativement élevé de la détention en prison des délinquants. Dans ces conditions, l'allongement des peines d'emprisonnement ne se justifie que si le surcoût est compensé par des gains, en termes d'effet dissuasif. Les **États-Unis** répondent que l'on ne dispose guère de données factuelles concernant l'effet dissuasif marginal. Par ailleurs, il est probable que la situation à cet égard sera différente selon les sociétés et qu'elle est en outre appelée à évoluer avec le temps.

**Israël** indique n'avoir appliqué des peines de cette nature que dans une seule affaire où cinq dirigeants d'entreprise ont été incarcérés. Il déclare en outre qu'on ne dispose d'aucune donnée d'observation pour apprécier les coûts et les gains, en termes d'effet dissuasif, de ce type de sanction, mais que les échanges qu'il a eus avec des représentants des milieux d'affaires donnent à penser que le risque d'être condamné à des peines de prison est pris très au sérieux et que le fait de sanctionner des personnes physiques porte ses fruits. Israël n'a pas encore suffisamment de recul pour savoir quelle serait la durée de la peine qui permettrait d'éliminer toute tentation de conclure une entente. Les avocats prennent comme seule et unique référence l'affaire d'entente entre fabricants de dalles qui a été portée devant la justice israélienne, ce qui signifie que la décision rendue dans cette affaire a véritablement fait date. Il conviendra de s'assurer que d'autres affaires d'entente donnent lieu à des peines d'emprisonnement pour que celle-ci ne fasse pas figure d'exception et que les condamnations à des peines de prison deviennent plus courantes en pareil cas. La durée des peines dépend de la taille de l'entreprise, de celle du marché concerné, de la durée de la période sur laquelle s'étale l'infraction et de la conscience qu'ont les participants à l'entente de la nature de leurs agissements.

## Exigences en matière de preuve

Le Président aborde le thème suivant en soulignant que le relèvement des exigences en matière de preuve risque d'être perçu comme un risque et un inconvénient inhérents à l'adoption de sanctions pénales. Il invite le Royaume-Uni à expliquer quels sont, en vertu des nouvelles dispositions en vigueur dans ce pays, les éléments de preuve qui doivent être apportés dans une affaire d'entente traitée pénalement, et en particulier comment est appliqué le critère de la mauvaise foi.

Le **Royaume-Uni** ajoute tout d'abord un commentaire sur le point précédent à propos de l'efficacité des sanctions pénales. Selon lui, il serait plus facile de démontrer l'efficacité des sanctions pénales si l'on faisait appel à la police pour réprimer la délinquance et si l'on pouvait mettre en évidence des changements de comportement de la part des délinquants consécutifs aux interventions des services de police. Dans le cas d'ententes, cette relation de cause à effet est beaucoup plus difficile à établir dans la mesure où les actes illicites ont pour conséquence une hausse des prix. Le niveau des prix est déterminé par une multitude de facteurs de sorte qu'il est concrètement impossible d'exploiter des données statistiques pour mettre en évidence les répercussions de l'application d'une sanction pénale sur le niveau des prix. Enfin, il convient de se demander s'il ne va pas de soi qu'une peine de prison est une menace particulièrement dissuasive pour des dirigeants d'entreprise. On dispose à tout le moins de données d'observation probantes démontrant le pouvoir dissuasif des sanctions pénales.

La définition de l'infraction pénale dans une affaire d'entente est plus restrictive que celle retenue en droit civil et ce, pour deux raisons. La première tient au fait que la définition du droit civil reprend celle énoncée à l'article 85 du Traité de Rome, qui interdit toute conduite ayant simplement pour effet, et non seulement pour objet, de restreindre la concurrence. Or une définition aussi large ne pourrait s'appliquer à une infraction pénale qui, selon le droit britannique, suppose une intention délictueuse avérée. La seconde a trait à la nécessité de définir l'infraction pénale avec davantage de précision de façon à éviter d'interminables litiges sur la qualification exacte de l'infraction.

La "mauvaise foi" est une notion spécifique au droit britannique, bien connue des autorités chargées des poursuites. Elle suppose que l'autorité chargée des poursuites puisse prouver au jury que la personne qui a agi savait qu'elle n'aurait pas dû agir ainsi et que toute personne raisonnable aurait jugé de même. On pourrait penser que les jurys vont être davantage tentés de conclure à la mauvaise foi dans des affaires d'entente où les personnes incriminées sont de hauts responsables d'entreprise. Il conviendrait donc d'exiger que soit mis en évidence la fait que ces personnes ont espéré tirer un avantage financier de la conclusion de l'entente.

Le Président souligne que la question importante traitée dans le cadre de la table ronde porte sur l'effet dissuasif des sanctions pénales, et pas nécessairement sur leur capacité d'induire des baisses des prix. Les ouvrages consacrés aux effets dissuasifs des sanctions pénales abondent, et il serait peut-être utile d'étudier s'ils proposent des méthodes permettant d'établir de manière fiable l'efficacité des sanctions pénales dans les affaires d'ententes.

Le **Canada** explique que la définition d'un accord restreignant la concurrence qui figure dans la Section 45 de la Loi sur la concurrence est jugée trop large dans la mesure où elle recouvre de multiples formes d'accord, et non seulement des ententes injustifiables, mais aussi trop étroite en ce sens qu'elle introduit le critère d'une réduction indue de la concurrence. Ce critère est satisfait s'il est prouvé que l'accord conclu confère aux parties un pouvoir leur permettant de faire des affaires sans être soumises aux forces du marché. Mais il n'existe pas de critère clairement défini pour déterminer quand il y a réduction indue de la concurrence. Les critères économiques comme la définition du marché, les barrières à l'entrée et l'élasticité des prix ne répondent en effet pas aux normes en vigueur en matière pénale selon lesquelles la preuve doit exclure tout motif raisonnable de douter. Les tribunaux exigent en outre, pour pouvoir

condamner les participants à une entente, qu'il soit établi que ceux-ci étaient informés ou auraient raisonnablement dû être informés que l'accord en question allait indûment réduire la concurrence. Un document de consultation a récemment été publié dans le but d'introduire des réformes dans ce domaine. Ce document propose que l'on continue de considérer les ententes injustifiables comme des infractions pénales frappées d'interdiction par nature sans qu'il soit nécessaire de prouver leurs effets sur la concurrence. Le critère de la réduction notable de la concurrence serait appliqué à tous les autres types d'accords, considérés comme des infractions au droit civil.

**Israël** déclare que son droit prévoit une définition très large de ce qu'est une infraction pénale, mais qu'il est du ressort de l'organisme compétent de décider s'il y a lieu d'engager des poursuites pénales dans une affaire d'entente. Le risque que la portée de cette définition n'entraîne un excès de dissuasion n'est pas vraiment inquiétant. Tout dirigeant d'entreprise ayant le moindre doute quant à la licéité d'un accord qui lui est proposé peut présenter une demande d'autorisation ou d'exemption. Les entreprises ont donc la possibilité de se prémunir contre le risque d'avoir à répondre d'une infraction pénale et elles l'utilisent fréquemment. La portée de la définition est toutefois source de difficultés au stade de l'action en justice. Il n'existe pas de tradition juridique permettant de définir les contours exacts de la notion d'infraction pénale et les autorités de la concurrence n'ont pas publié de directives en la matière. Quoiqu'il en soit, il est difficile de mettre au point une définition précise et plus étroite de la notion d'infraction pénale et c'est la raison pour laquelle les autorités de la concurrence disposent toujours d'une certaine latitude pour décider s'il y a lieu d'intenter une action pénale dans les affaires d'entente dont elles sont saisies.

### **Coopération avec les autorités chargées des poursuites**

Le Président enchaîne sur la question de la coopération entre les organismes de lutte contre les ententes et les autorités chargées des poursuites pénales dans des affaires d'entente et de l'application de programmes de clémence.

**Israël** explique que la menace de sanctions plus sévères risque de réduire la motivation de la partie défenderesse à s'engager dans un marchandage judiciaire. Si l'accusation propose un accord prévoyant des peines de prison, la partie défenderesse estime dans bien des cas qu'elle aura meilleur compte à s'en remettre à une décision de justice, sachant que les tribunaux infligent rarement des peines d'emprisonnement. On ne connaît en effet qu'une seule affaire ayant conduit à des peines d'emprisonnement. Le marchandage judiciaire serait plus facile sans la menace de telles sanctions, mais le but affiché des autorités de la concurrence est d'accroître le nombre de décisions dans lesquelles la prison fait partie des sanctions infligées. Il s'agit peut-être d'un problème transitoire puisque les autorités de la concurrence s'efforcent à présent de relever le montant des amendes. Une fois que les tribunaux se seront ralliés au point de vue des autorités de la concurrence et infligeront plus volontiers des peines d'emprisonnement, il sera plus facile de procéder à des marchandages judiciaires prévoyant des peines de prison.

Le **Royaume-Uni** explique qu'en vertu de la Loi sur les entreprises en vigueur sur son territoire, l'instance qui engage des poursuites est tenue de respecter l'immunité accordée par l'Office of Fair Trading (OFT). Des règles sans ambiguïté ont été publiées en vue d'encourager les intéressés à se présenter et à demander à bénéficier d'un programme de clémence. L'immunité suppose une coopération soutenue de la part des personnes souhaitant bénéficier de programmes de clémence et, dans certains cas, une coopération avec les instances judiciaires consistant à fournir des preuves. Enfin, il convient de rappeler qu'on ne saurait se contenter du seul témoignage d'une personne bénéficiant de l'immunité, et qu'il est indispensable de produire des preuves à l'appui pour obtenir une condamnation.

## Discussion générale

La **Commission européenne** indique que, bien qu'elle intervienne dans le domaine des ententes, elle ne peut s'appuyer sur aucune disposition du droit communautaire pour mettre en jeu la responsabilité des personnes physiques ayant participé à une entente. On peut trouver deux explications à cet état de fait : en premier lieu, les divergences existant entre les législations respectives des États membres et leurs stratégies en matière de sanctions à l'encontre des personnes physiques ; en second lieu, le fait qu'il n'existe pour le moment dans le Traité aucune disposition visant à protéger, par un dispositif juridique adapté, les personnes physiques dans des affaires pénales, et qu'il ne soit pas prévu d'en adopter dans un avenir prévisible. Cette situation ne peut changer que si les États membres parviennent à se mettre d'accord pour faire évoluer le droit communautaire.

La Commission estime qu'on ne peut s'en remettre uniquement aux sanctions à l'encontre des personnes morales pour obtenir un effet dissuasif suffisant. Les sanctions prononcées à l'encontre des sociétés ont certes indirectement des répercussions sur les personnes physiques et les invitent à se sentir responsables de leurs actes devant les autres parties prenantes à la vie de l'entreprise, mais il convient d'appréhender leur efficacité en termes de prévention dans une optique plus globale. Or il semble indiqué, compte tenu de l'ampleur du préjudice subi par les concurrents et les consommateurs, d'infliger des sanctions aux personnes physiques, notamment des peines d'emprisonnement, pour obtenir un effet dissuasif. L'UE devrait au bout du compte s'orienter vers un système prévoyant des sanctions pénales sous réserve que celui-ci garantisse l'affirmation et une protection suffisante des droits des personnes.

A compter du mois de mai 2004, les instances nationales appliqueront la législation communautaire parallèlement aux dispositions nationales. Il sera donc possible d'engager une procédure pénale parallèle en application du droit national lorsque celui-ci prévoit des sanctions pénales. Dans une situation aussi diversifiée et où le droit communautaire et le droit national de chaque pays peuvent être appliqués simultanément, on se heurte à plusieurs difficultés. Il convient en premier lieu de veiller à la compatibilité des régimes de clémence et des sanctions pénales. Les différences observées entre les régimes de clémence en vigueur dans les différents pays peuvent poser de graves problèmes. On peut imaginer que la présentation d'une demande visant à obtenir le bénéfice d'un programme de clémence conduise les instances nationales à poursuivre pénalement des salariés ou d'anciens salariés à la suite d'échanges de renseignements ayant eu lieu dans le cadre du réseau d'autorités de la concurrence ou de la coopération entre la Commission et les tribunaux nationaux. La réglementation communautaire dispose expressément qu'on ne peut infliger des peines privatives de liberté que si la législation du pays de l'instance qui transmet les informations soit prévoit des sanctions de nature similaire, soit garantit que les renseignements sont recueillis conformément à des règles en matière de protection des droits des personnes analogues à celles applicables dans le pays de l'instance destinataire. Les règles en cours d'élaboration au sein de la Communauté européenne mettent donc l'accent sur la nécessité d'instaurer une coordination entre les instances mettant en œuvre les programmes de clémence et celles qui engagent des poursuites pénales contre les participants à une entente.

Selon la Commission, la conception de la concurrence qui prévaut au sein de l'UE évolue vers l'adoption de sanctions à l'encontre des personnes physiques. Il convient de veiller à ce que des interactions préjudiciables entre les règles en vigueur au niveau national et les règles communautaires ne compromettent pas les chances d'aboutir à un consensus dans ce domaine. Enfin, il y aura lieu de s'assurer que les demandes visant à obtenir le bénéfice d'un programme de clémence sont traitées dans des conditions analogues qu'elles concernent des personnes morales ou physiques.

Le **BIAC** souligne que les milieux d'affaires ont intérêt à ce que la législation sur les ententes soit véritablement appliquée puisque les entreprises sont souvent elles-mêmes victimes de ces pratiques. Les entreprises sont généralement favorables aux sanctions à l'encontre des personnes physiques. La

menace que représentent ces sanctions constitue également pour elles une incitation à coopérer avec les institutions publiques.

Cependant, le BIAC craint que les entreprises ne deviennent aussi les victimes fortuites d'une mauvaise application des dispositions et ne se retrouvent exposées à des peines disproportionnées. Cette inquiétude est particulièrement légitime dans un contexte multijuridictionnel. Pour une affaire d'entente dénuée d'ambiguïté, on en recense beaucoup qui se caractérisent par des montages commerciaux complexes dont on ne peut dire s'ils sont franchement illicites. Le risque d'être sanctionné peut parfois dissuader les personnes concernées d'apporter des éléments de preuve. Les moyens de preuve fondés sur le témoignage d'individus ne sont pas toujours fiables. Dans un contexte multijuridictionnel, les preuves recueillies dans un pays peuvent être utilisées dans d'autres pays, ce qui expose l'individu qui les a produites à des poursuites dans plusieurs pays et risque de réduire notablement sa motivation à plaider coupable auprès de la première juridiction. Le seul risque que la première juridiction ne communique les informations à une autre peut porter atteinte au droit et à la capacité de l'individu de se défendre.

La notion d'optimisation de l'effet dissuasif est complexe dans le cas de personnes physiques. Il est parfois difficile de calculer les avantages qu'un individu peut tirer de la conclusion d'une entente. Dans un contexte multijuridictionnel, les peines de prison de courte durée peuvent devenir des peines longues et les amendes atteindre des montants excessifs. Le BIAC estime que dans les situations où plusieurs procédures sont engagées en parallèle, il est souhaitable d'instaurer une coordination entre les juridictions de façon à éviter les peines iniques ou excessives. Au sujet de la question de l'excès de dissuasion, on peut penser en effet que l'on risque ainsi de dissuader des entreprises de nouer des relations de collaboration qui auraient eu leur utilité et n'auraient pas été contraires à la loi. Même lorsque les accords qu'ils envisagent de conclure sont de nature à stimuler la concurrence, les dirigeants d'entreprise reculent parfois devant le risque d'avoir à se soumettre à une enquête et d'être sanctionnés.

L'**Irlande** déclare que si les peines de prison sont certes un instrument utile au service de la lutte contre les ententes, elles ne devraient pas être le seul dont disposent les organismes compétents en la matière. En particulier dans les pays où l'application de la législation sur les ententes est une discipline relativement récente et encore en devenir et où par exemple il n'était pas rare que des ministres président des réunions débouchant sur la conclusion d'ententes, il est peu probable que les juges condamnent des personnes physiques pour leur participation à une entente. Dans ces conditions, les amendes administratives devraient également faire partie de l'arsenal mis à la disposition des organismes compétents en matière d'entente. Si l'on se fie aux résultats décevants des expériences réalisées dans d'autres pays, les actions collectives n'apparaissent pas comme une meilleure solution.

En ce qui concerne la durée optimale des peines et l'efficacité des peines de longue durée, on observe que la courbe de l'efficacité marque un fléchissement brutal lorsque les peines atteignent une certaine durée. Par ailleurs, les coûts d'incarcération augmentent plus que linéairement avec le temps, en particulier en raison de l'aggravation des effets négatifs de l'incarcération sur les personnes incarcérées. De plus, lorsqu'on constate que de petits pays peuvent envoyer en prison les participants à des ententes de faible portée ne dépassant pas le cadre national, mais qu'il est impossible d'infliger des peines de prison aux participants à des ententes de plus grande envergure conclues à l'échelle de l'Europe, il y a lieu de s'interroger sur la proportionnalité des condamnations à de longues peines de prison. La décision de fixer la durée maximale des peines de prison à cinq ans en Irlande a été pour une large part inspirée par le souci de permettre à l'organisme compétent de mener à bien ses enquêtes dans de meilleures conditions. Enfin, l'Irlande souligne que le moment auquel les sanctions sont prononcées est important. Pour être efficaces, les condamnations à des peines de prison devraient être prononcées rapidement, et non plusieurs années après la découverte de l'entente.



L'**Australie** explique que selon elle, la panoplie des sanctions actuellement applicables n'est pas optimale. Il est très difficile de définir une méthode objective pour déterminer la combinaison de sanctions la plus efficace sur le plan de la dissuasion, et la mieux à même d'imposer le respect de la législation, dans la mesure où la culture de la concurrence, les pratiques des organismes compétents, mais aussi le rôle assigné aux autorités chargées des poursuites et aux tribunaux sont autant de paramètres qui influent sur l'efficacité de ces diverses sanctions. Une étude portant sur les résultats obtenus en matière de respect de la législation est actuellement en cours. Les premiers résultats de cette étude donnent à penser que le simple fait de faire connaître les sanctions applicables a des effets dissuasifs considérables.

La **Nouvelle-Zélande** est d'accord sur le fait que les ententes injustifiables devraient être considérées comme des infractions graves et que les personnes physiques y ayant participé devraient être lourdement sanctionnées. Compte tenu de l'intégration entre les deux économies, elle a suivi avec grand intérêt les évolutions survenues en Australie. Elle a toutefois résisté jusqu'ici à la tentation d'adopter des mesures prévoyant des sanctions pénales à l'encontre des personnes physiques. En premier lieu, elle s'est demandé s'il ne serait pas finalement plus difficile de prononcer des sanctions dans un cadre pénal que d'infliger des sanctions civiles conformément au système en vigueur. Même si l'on n'envisageait les sanctions pénales que comme un substitut aux sanctions civiles, leurs effets sur une économie de petite taille comme celle de la Nouvelle-Zélande seraient assez limités eu égard aux exigences strictes à respecter en matière de preuve et au faible nombre d'affaires mises au jour par l'organisme compétent. Une procédure pénale peut s'étaler sur plusieurs années et exige que l'on dispose de ressources suffisantes. En outre, le risque existe que l'organisme compétent ne parvienne finalement pas à infliger des sanctions, ce qui donnerait à penser que la loi est inefficace.

Le **Mexique** explique que, même si sa législation prévoit des sanctions pénales, il lui semble difficile de persuader les autorités chargées des poursuites d'engager des procédures. Force est de constater que la société mexicaine n'est guère consciente du fait que les ententes constituent une pratique répréhensible.

L'**Allemagne** explique que sur son territoire, il est possible d'infliger des amendes administratives dans des affaires d'entente, mais que ces sanctions ne sont pas très efficaces dans la mesure où ce sont les sociétés qui acquittent les amendes auxquelles sont condamnées les personnes physiques. L'application de sanctions pénales serait certainement fructueuse à cet égard. L'Allemagne indique ensuite qu'elle s'emploie actuellement à réformer sa législation dans le sillage de la réforme du droit communautaire dans le domaine de la concurrence. Renforcer les droits des tierces parties est l'un des objectifs de cette réforme. En Allemagne, on a le sentiment que c'est la crainte inspirée par la règle de dommage triple qui est quelquefois le facteur le plus dissuasif, plus dissuasif même que le risque d'aller en prison. L'Allemagne demande aux États-Unis d'exposer comment ils conçoivent le lien entre la règle du dommage triple et les sanctions pénales.

Les **États-Unis** confirment que la crainte inspirée par la règle de dommage triple a des effets fortement dissuasifs, mais qui sont surtout perceptibles au niveau des entreprises. Les personnes physiques ne sont pas exposées à l'application de la règle de dommage triple et c'est la peur d'être condamnées à la prison qui influe le plus sur leurs comportements.

Les États-Unis réfutent l'argument du BIAC selon lequel une application trop rigoureuse de la législation sur les ententes pourrait conduire à un excès de dissuasion. Le ministère de la Justice ne diligente une enquête que dans les cas où il est manifeste que l'on a affaire à une entente injustifiable. S'il est vrai que certaines enquêtes ont été bouclées sans donner lieu à une procédure pénale, c'est que l'on ne disposait pas dans ces affaires d'éléments de preuve suffisants pour engager une procédure pénale en raison du caractère ambigu des comportements ayant motivé l'enquête.

S'agissant des poursuites engagées dans un contexte multijuridictionnel, il apparaît que l'augmentation du nombre de pays qui prévoient l'application de sanctions pénales à l'encontre des personnes physiques accroît la probabilité que des individus fassent l'objet de procédures multiples. Dans le passé, les États-Unis ont conclu des accords avec d'autres pays enquêtant sur une même affaire d'entente afin de veiller à ce qu'un individu ne puisse être poursuivi et condamné à une peine d'emprisonnement que dans un pays à la fois.

Concernant le coût des sanctions pénales, les États-Unis insistent sur le fait que le coût des condamnations à des peines de prison ne représente qu'un facteur mineur de coût dans les affaires d'entente par comparaison aux coûts des enquêtes et des procédures. En réponse à une observation du Président, les États-Unis confirment que les programmes de clémence ont été un instrument utile dans le cadre des poursuites engagées dans des affaires d'entente et ont contribué à réduire le coût de la mise en œuvre de la législation sur les ententes. Néanmoins, même dans les cas où les coupables demandent à bénéficier d'un programme de clémence, le coût des poursuites judiciaires demeure non négligeable.

Le **BIAC** suggère que les pays étudient la possibilité de conclure des accords de coopération bilatérale s'inspirant des traités d'entraide juridique/de l'International Antitrust Enforcement Assistance Act et prévoyant des possibilités de coopération pour l'obtention de preuves dans d'autres pays. Une telle évolution sonnerait comme un avertissement lancé aux sociétés et aux dirigeants d'entreprise puisqu'elle se traduirait par une aggravation notable du risque d'avoir à subir une enquête et ferait peser une menace sur la carrière des cadres concernés, ce qui serait un moyen de les sensibiliser à la législation sur les ententes et de les inciter à mieux la respecter.

Le Président conclut la discussion en soulignant que si les sanctions à l'encontre des personnes physiques sont perçues comme une arme utile pour combattre les ententes, le coût inhérent à l'application de telles sanctions, la culture de la concurrence et l'environnement juridique qui prévalent au niveau local, ainsi que la taille du pays sont également des facteurs qui méritent d'être pris en considération, faute de quoi l'application de sanctions de cette nature risque de déclencher un choc en retour. Globalement, on voit se dessiner une tendance en faveur de l'adoption de sanctions à l'encontre des personnes physiques, et il se révèle indispensable de mener une réflexion créative sur l'arsenal de sanctions qu'il convient d'adopter.