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Global Forum on Competition

IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Improving International Co-operation in Cartel Investigations held by the Global Forum on Competition in February 2012.

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 le renforcement de la coopération internationale dans les affaires d'ententes qui s'est tenue en février 2012 dans le cadre du Forum Mondial sur 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

From the background paper and the discussion at the roundtable on improving international co-operation in cartel investigations, the following points emerge:

- (1) *The globalisation of business means cartel activity is increasingly international in scope. Investigating international cartels poses many challenges to competition authorities, highlighting the importance of increased co-operation on both procedural and substantive issues.*

The globalisation of business and the consequent rise in the number of cartels with international scope makes co-operation between competition authorities in different jurisdictions imperative to the success of domestic enforcement. The proliferation of competition enforcement around the globe, with ever growing numbers of jurisdictions introducing anti-cartel rules, emphasises the shared interest in fighting international cartels. However, while cartels have gone global, many competition authorities operate predominantly within the framework of their national jurisdiction. Investigating cartels with international scope therefore poses both procedural and substantive challenges. Co-operation between the different authorities involved is required to ensure the successful resolution of these challenges.

To ensure that steps taken by one given jurisdiction do not negatively impact the investigations by other jurisdictions necessitates the co-ordination of investigative steps and strategy. Joint planning of dawn raids has become increasingly important to ensure their effectiveness and prevent the destruction or concealment of information by cartelists. However, due to the physical location of multinational companies involved in a cartel, not all affected jurisdictions have the option of collecting information through dawn raids. This highlights the need for effective mechanisms to facilitate information sharing between the investigating authorities. Roundtable participants also highlighted jurisdictional limitations on procedural steps (such as notification of process or requests for information), which vary according to the relevant domestic rules, and therefore further complicate investigations of international cartels.

In addition to co-operation on procedural issues, authorities dealing with international cartel cases also need to take account of substantive issues in their assessment. Several roundtable participants drew attention to the importance of double jeopardy in fining policy considerations, such as when to include indirect sales that may also be taken into account by other authorities.

- (2) *Multilateral fora, such as the OECD and ICN, provide valuable platforms for discussions on how to improve international co-operation in cartels. On a more localised level, frameworks such as the ECN and UEMOA, focus on co-operation at the regional level, with varying levels of success. Individual countries also negotiate memoranda of understanding or include specific clauses for co-operation in free trade agreements to create channels for communication. Some countries have also implemented national legislation that allows for the voluntary sharing of information. In addition to formalised forms of co-operation, informal contacts and relationships based on trust have been important in facilitating co-operation in individual cases.*

The rising numbers of cartels with international scope has triggered a growth in the frequency and quality of co-operation between agencies from different jurisdictions. Multilateral fora provide valuable platforms for high level discussions between competition authorities worldwide. The 1998 OECD Hard Core Cartel Recommendation urges Member countries to remove all obstacles to effective co-operation and information sharing in their respective investigations, and has resulted in significant achievements in the area of international co-operation. These achievements include close working relationships between certain developed jurisdictions, the increasing use of co-ordinated investigative steps and a growing reliance on confidentiality waivers in cases of simultaneous leniency applications. There has also been an increased exchange of expertise in cartel investigations and frequent use of informal co-operation methods, which despite their limitations, have been found to contribute significantly to more effective enforcement.

In addition to multilateral platforms, international co-operation is further facilitated through a variety of frameworks, both general and competition specific. Countries may rely on formal Mutual Legal Assistance Treaties (MLATs), extradition treaties or letters rogatory, although these are mainly used by jurisdictions with criminal cartel regimes. General, regional and bilateral trade agreements often involve specific competition provisions, which may be used to facilitate co-operation. An example of a well-functioning regional agreement is the European Competition Network (ECN), which has developed mechanisms for the consolidation of enforcement, through case co-ordination, information sharing and case allocation, in addition to the harmonisation of leniency programmes. However, other regional agreements, particularly those in developing countries such as UEMOA, fall short of the level of co-operation envisaged by their signatories due to both political and capacity constraints.

Competition specific instruments encompassing specific co-operation agreements, memorandums of understanding and national law provisions provide further avenues for international co-operation. Bilateral interagency competition agreements have proliferated, and usually include provisions on co-ordination of parallel investigations, exchange of information, consultations or staff exchanges between the authorities. Although they operate under the constraints of domestic law, which may limit the ability to share confidential information without the consent of its originators, they are largely considered a success. Although less concrete than bilateral agreements, memorandums of understanding still provide a tentative first step in establishing a longer-term co-operation framework. Some jurisdictions have also implemented ‘information gateway’ provisions in their national laws that allow for voluntary sharing of information with other jurisdictions.

As a result of the growing number of jurisdictions with leniency policies, parallel applications to different authorities have become more frequent. When leniency applicants apply to more jurisdictions in parallel, they often waive confidentiality of the information provided so as to enable the authorities involved to co-ordinate investigative steps and share information and evidence. Confidentiality waivers are now routinely requested by competition authorities, in particular by those agencies that are more developed, and can have varying scope, ranging from

investigation co-ordination through to information and evidence sharing. However, the business community highlighted the legitimate reluctance of leniency applicants to grant waivers in certain situations where doing so might have negative consequences for them. They urged competition authorities to take these concerns into account.

Informal means of co-operation play a fundamental role in multi-jurisdictional cartel enforcement. This can include the sharing of leads, general discussions about investigative strategy, market information or witness evaluations, all of which can streamline and focus an investigation. Informal co-operation is often based on personal contacts built on trust, established through interactions in conferences, staff exchanges and participation in fora such as the ICN or the OECD. In practice, co-operation in detection and investigation of cartels often involves a mixture of formal and informal co-operation methods between competition authorities. The choice as to which method to use depends on the availability of formal instruments, contacts with and knowledge of the other authorities involved and the specific circumstances in a given case.

- (3) *While significant achievements in the area of international co-operation in cartel cases have been made, many obstacles to more effective co-operation remain. The central problems stem from different legal systems underpinning enforcement and the sheer diversity of competition agencies seeking to work together. There are also risks in multi-jurisdictional enforcement, in particular the disclosure of confidential information. This could undermine the effectiveness of leniency programmes which are enforcers' most effective tools in the fight against cartels.*

Despite significant developments, international co-operation in cartel enforcement continues to face many obstacles limiting its use and effectiveness. In addition, experienced competition authorities are significantly more involved in international co-operation processes than their younger counterparts. The limitations on the sharing of information was highlighted as one the major obstacles to more effective co-operation. Most domestic laws do not permit competition authorities to share confidential information obtained through the use of their investigatory powers with any third party. This includes authorities of other jurisdictions. This limitation is reflected in the fact that the majority of formal co-operation agreements do not allow for the exchange of confidential information. In leniency cases, the rationale for limiting the sharing of information obtained from leniency applicants is to prevent negative effects for the applicants in other jurisdictions' investigations or private damage actions. This would undermine the incentives for firms to co-operate, a concern emphasised by the business community.

The differences between jurisdictions with criminal as opposed to administrative systems of enforcement were also highlighted as potentially limiting co-operation efforts. Criminal jurisdictions can make use of MLATs and other formal forms of co-operation in criminal matters, which are unavailable to jurisdictions based on an administrative system of enforcement. On the other hand, competition authorities from administrative jurisdictions are often able to make more extensive use of informal co-operation methods.

Several participants emphasised the need for greater trust between agencies, which would facilitate more effective co-operation and information sharing. This includes both trust that the information shared will be protected by the receiving authority and trust that the information received would be useful to the receiving authority's investigation. However, trust can be difficult to achieve particularly between agencies that are geographically distant and differ in levels of experience. This highlights the importance of both simple networking events and more large scale roundtable discussions, both of which can foster trust by providing opportunities for agency officials to meet their counterparts in other jurisdictions.

Significant and often scarce resources are required to respond to a request for information from another agency. Therefore, for any individual request, the costs and benefits of transferring information are unevenly distributed. It is more likely that an agency will focus on securing evidence for its own cases. Commitment to a system of co-operation and information sharing over the long term will be necessary to incentivise the use of these resources for others.

Even with effective co-operation, the diversity of competition law frameworks across jurisdictions will ultimately hamper any attempt at global harmonisation of cartel enforcement. Despite having the same evidence and information, competition regulators, judges and other adjudicators involved in the process may come to different decisions. Some regional systems consolidate enforcement by, for example, designating one agency to investigate a case spanning several jurisdictions. However, given the reluctance of countries to surrender sovereignty, this is unlikely to be achieved on a global scale.

- (4) *In other policy areas, such as tax and anti-bribery, significant steps have been taken to overcome the hurdles to effective international co-operation. Some of these approaches could be adopted in the competition field, for example by establishing common jurisdictional rules under the framework of a convention. Some commentators have suggested that a lead agency approach may be an alternative way to overcome certain obstacles to co-operation.*

In view of the limitations of current forms of international co-operation in cartel investigations, there is significant scope for further improvement. This may involve removing obstacles to co-operation, or adopting a more revolutionary approach with adjustments to the basic elements of the current enforcement set up. The challenges associated with international co-operation are not unique to the area of competition. Enforcement bodies in other policy areas such as tax, anti-corruption and money laundering face similar challenges, and some of the tools which have been adopted in these policy areas may provide valuable lessons for the field of competition.

The 1997 OECD Anti-Bribery Convention laid down common jurisdictional rules that greatly facilitate cross-border co-operation. The Convention allows for clear determination of which jurisdiction is competent to investigate, and provides transparent and straightforward rules for resolving jurisdictional conflicts. It also provides common definitions for basic legal concepts, and mandates criminal sanctions, facilitating criminal co-operation.

Adopting a lead agency approach is another method that some commentators have suggested for addressing certain obstacles to co-operation. Designating one authority to investigate a case could bring benefits in terms of reducing the complexity of multi-jurisdictional enforcement by a large number of authorities and could help to punish the cartel for the global effects of its behaviour. One delegation reported that it had initiated the creation of an information sharing network, which encourages the immediate exchange of non-confidential information at the outset of an investigation. Subsequently, and with the proper safeguards in place, deeper information sharing along those same channels of communication could occur more easily.

SYNTHÈSE

Par le Secrétariat

De la note d'information et des débats de la table ronde sur renforcement de la coopération internationale dans les affaires d'ententes, il ressort que :

- (1) *La mondialisation des activités des entreprises fait que les ententes ont, de plus en plus, une dimension internationale. Enquêter sur les ententes internationales pose de nombreux problèmes aux autorités de la concurrence, d'où l'importance d'une coopération accrue, tant sur les questions de procédure que sur les questions de fond.*

Face à la mondialisation des activités des entreprises et à l'augmentation du nombre d'ententes de dimension internationale qui en découle, la coopération entre autorités de la concurrence des différents pays est indispensable à l'efficacité de l'action au plan national. La prolifération des procédures d'application du droit de la concurrence dans le monde, avec des pays toujours plus nombreux qui adoptent des règles en vue de lutter contre les ententes, fait ressortir l'intérêt pour tous de lutter contre les ententes internationales. Cependant, tandis que les ententes prennent une dimension mondiale, de nombreuses autorités de la concurrence opèrent principalement dans le cadre de leur juridiction nationale. Enquêter sur les ententes de dimension internationale pose par conséquent des problèmes, tant du point de vue des procédures que sur le fond. La coopération entre les différentes autorités qui interviennent dans ce domaine est impérative pour arriver à résoudre ces problèmes.

Pour éviter que les mesures prises par un pays donné n'aient une incidence négative sur les enquêtes menées par d'autres pays, il faut coordonner les actions et les stratégies d'enquête. Il devient de plus en plus important de programmer conjointement les perquisitions afin d'en assurer l'efficacité et d'éviter la destruction ou la dissimulation d'informations importantes par les membres de l'entente. Toutefois, compte tenu de la localisation géographique des entreprises multinationales qui participent à une entente, les autorités de tous les pays touchés n'ont pas la possibilité de recueillir des renseignements au moyen de perquisitions, d'où la nécessité d'avoir des mécanismes efficaces pour faciliter l'échange de renseignements entre les autorités qui enquêtent. Les participants à la table ronde ont aussi mis en lumière les limites de compétence pour les différentes étapes de la procédure (telles que la notification de procédure ou les demandes de renseignements), qui varient selon les règles nationales en vigueur et, par conséquent, compliquent encore les enquêtes sur les ententes internationales.

Outre la coopération concernant les questions de procédure, les autorités qui traitent des affaires d'ententes internationales doivent aussi tenir compte de questions de fond dans leur évaluation. Plusieurs participants à la table ronde ont attiré l'attention sur l'importance de la double incrimination dans les considérations relatives à la politique en matière d'amendes, s'agissant, par exemple, de savoir quand tenir compte des ventes indirectes qui peuvent être aussi être prises en compte par les autres autorités.

- (2) *Les forums multilatéraux, tels que l'OCDE et le RIC, offrent de précieuses possibilités de discussions sur la façon d'améliorer la coopération internationale en matière de lutte contre les ententes. A un niveau plus local, des cadres tels que le REC et l'UEMOA assurent une coopération d'une certaine efficacité au niveau régional. Les différents pays négocient aussi des protocoles d'accord ou font figurer des clauses spécifiques de coopération dans les accords de*

libre échange afin de créer des canaux de communication. Certains pays ont aussi mis en œuvre une législation nationale qui prévoit l'échange volontaire de renseignements. En plus des formes officielles de coopération, les relations et les contacts informels fondés sur la confiance contribuent grandement à faciliter la coopération dans les différentes affaires.

Le nombre croissant d'ententes de dimension internationale a accru la fréquence et la qualité de la coopération entre organismes des différents pays. Les forums multilatéraux offrent de précieuses possibilités de discussions à haut niveau entre autorités de la concurrence du monde entier. Dans sa Recommandation de 1998 sur les ententes injustifiables, l'OCDE demande instamment aux pays membres de lever tous les obstacles à une coopération et un échange de renseignements efficaces dans leurs enquêtes respectives, et des résultats appréciables ont ainsi été obtenus dans le domaine de la coopération internationale, notamment l'établissement d'étroites relations de travail entre certains pays développés, le recours croissant à des mesures d'enquête coordonnées et aux renoncements à la confidentialité en cas de requêtes simultanées de mesures de clémence. On a observé aussi une multiplication des échanges de compétences d'expert dans les enquêtes sur les ententes et l'utilisation fréquente de méthodes de coopération informelle qui, malgré leurs limites, contribuent notablement à améliorer l'efficacité de l'application du droit de la concurrence.

Indépendamment des forums multilatéraux, la coopération internationale est encore facilitée par divers cadres, généraux ou spécifiques à la concurrence. Les pays peuvent recourir à des traités d'entraide juridique, à des traités d'extradition ou à des lettres rogatoires, même si ces dernières sont utilisées principalement par les pays ayant un régime pénal en matière d'ententes. Les accords commerciaux bilatéraux, régionaux et généraux comportent souvent des dispositions spécifiques concernant la concurrence, qui peuvent faciliter la coopération. On peut citer comme exemple d'accord régional qui fonctionne bien le Réseau européen de la concurrence (REC), qui a mis en place des mécanismes de renforcement de l'application du droit par la coordination des enquêtes, l'échange de renseignements et la répartition des affaires, en plus de l'harmonisation des programmes de clémence. Cependant, d'autres accords régionaux, en particulier ceux de pays en développement, comme l'UEMOA, n'atteignent pas le niveau de coopération envisagé par les signataires en raison de contraintes politiques et de capacité.

Les instruments spécifiques à la concurrence, au nombre desquels figurent les accords spécifiques de coopération, les protocoles d'accords et les dispositions légales nationales, offrent d'autres moyens de coopération internationale. Les accords bilatéraux de coopération interadministrative ont proliféré, et ils contiennent habituellement des dispositions relatives à la coordination d'enquêtes parallèles, à l'échange d'informations, aux consultations ou aux échanges de personnel entre les autorités. Même si ces instruments sont soumis aux contraintes du droit national, ce qui peut limiter les possibilités d'échange de renseignements confidentiels sans le consentement du pays d'origine, ils sont généralement considérés comme efficaces. Bien que moins concrets que les accords bilatéraux, les protocoles d'accord représentent tout de même une première étape dans l'établissement d'un cadre de coopération à plus long terme. Certains pays ont aussi dans leur législation nationale des dispositions concernant les « passerelles d'information », qui prévoient l'échange volontaire de renseignements avec d'autres pays.

Du fait du nombre grandissant de pays dotés de dispositifs de clémence, les requêtes parallèles adressées auprès de différentes autorités sont devenues plus fréquentes. Lorsque des requêtes sont déposées dans plusieurs pays en même temps, il y a souvent renoncement au droit à la confidentialité des informations communiquées, de façon que les autorités coordonnent leurs enquêtes et échangent des renseignements et des données. Les renoncements au droit à la confidentialité sont maintenant exigés couramment par les autorités de la concurrence, en particulier par les organismes expérimentés et peuvent avoir un champ d'application variable, allant de la coordination des enquêtes à l'échange d'informations et de données. Toutefois, les milieux d'affaires ont souligné la légitime réticence des demandeurs de clémence à accorder des renoncements au droit à la confidentialité dans certains cas où cela pourrait avoir

des conséquences défavorables pour eux. Ils ont demandé instamment aux autorités de la concurrence de prendre ces problèmes en compte.

Les moyens de coopération informels jouent un rôle essentiel dans l'application plurijuridictionnelle du droit en matière d'ententes. Il peut s'agir du partage de pistes d'investigation, de discussions générales sur la stratégie d'enquête, d'informations de marché ou d'évaluations de témoins, autant d'éléments qui peuvent simplifier et focaliser l'enquête. La coopération informelle repose souvent sur des contacts personnels fondés sur la confiance, établis au travers d'interactions lors de conférences, d'échanges de personnel et de la participation à des forums tels que le RIC et l'OCDE. Dans la pratique, la coopération en matière de détection d'ententes et d'enquête fait souvent appel à un mélange de méthodes de coopération formelles et informelles entre autorités de la concurrence. Le choix de la méthode à utiliser dépend de la disponibilité d'instruments formels, des contacts avec les autres autorités et de la connaissance de ces autorités et des circonstances spécifiques d'une affaire donnée.

(3) *S'il y a eu des réalisations importantes en matière de coopération internationale dans des affaires d'entente, l'efficacité de la coopération se heurte encore à de nombreux obstacles. Les problèmes centraux tiennent aux différents systèmes juridiques qui sous-tendent l'application du droit, et à la diversité des autorités de la concurrence qui cherchent à collaborer. L'application plurijuridictionnelle du droit de la concurrence comporte aussi des risques, en particulier le risque de divulgation d'informations confidentielles. Cela pourrait nuire à l'efficacité des programmes de clémence, qui sont les outils les plus efficaces pour lutter contre les ententes.*

En dépit d'évolutions importantes, la coopération internationale en matière d'application du droit de la concurrence dans les affaires d'entente continue de se heurter à de nombreux obstacles qui en limitent l'utilisation et l'efficacité. Par ailleurs, les autorités de la concurrence chevronnées participent bien davantage au processus de coopération internationale que celles qui sont de création plus récente. Les limites de l'échange de renseignements ont été mentionnées comme étant l'un des principaux obstacles à une coopération plus efficace. La plupart des législations nationales n'autorisent pas les autorités de la concurrence à échanger des renseignements confidentiels obtenus grâce à leurs pouvoirs d'enquête avec une tierce partie, notamment les autorités d'autres pays. Du fait de cette limite, la majorité des accords de coopération formelle n'autorisent pas l'échange d'informations confidentielles. En cas de requête de clémence, la limitation de l'échange de renseignements obtenus auprès des demandeurs de clémence est motivée par la volonté d'éviter des effets négatifs pour les demandeurs dans les enquêtes ou les actions privées en dommages et intérêts d'autres pays. Cela dissuaderait les entreprises de coopérer, une préoccupation soulignée par les milieux d'affaires.

Les différences entre les pays dotés de systèmes pénaux et ceux qui ont des systèmes administratifs d'application du droit de la concurrence ont été aussi signalées comme pouvant limiter les efforts de coopération. Les pays à système pénal recourent aux traités d'entraide juridique et à d'autres moyens de coopération formels dans les affaires pénales, des instruments dont ne disposent pas ceux qui sont dotés d'un système administratif. En revanche, les autorités de la concurrence de ces derniers pays ont souvent la possibilité d'utiliser plus généralement des méthodes de coopération informelles.

Plusieurs participants ont souligné la nécessité de renforcer la confiance entre les organismes en charge de la concurrence, ce qui améliorerait l'efficacité de la coopération et de l'échange de renseignements. Il faut avoir l'assurance que les informations échangées seront protégées par l'autorité qui les reçoit et que les informations reçues seront utiles pour l'enquête menée par ladite autorité. La confiance peut cependant être difficile à établir, en particulier entre des autorités qui sont éloignées géographiquement et qui n'ont pas le même niveau d'expérience. Cela fait ressortir l'importance d'organiser des activités de mise en réseau et des tables rondes à plus grande échelle, afin de favoriser la

confiance en offrant aux agents des organismes en question la possibilité de rencontrer leurs homologues d'autres pays.

Pour répondre à une demande de renseignements d'une autre autorité, il faut des ressources considérables et souvent rares. Par conséquent, pour une requête individuelle, les coûts et avantages d'un transfert d'informations sont répartis de façon inégale. Il est probable qu'un organisme cherchera à se procurer des données pour ses propres affaires. Sur le long terme, il faudra participer à un système de coopération et d'échange d'informations afin d'inciter à utiliser ces ressources pour les autres.

Même avec une coopération efficace, la diversité des cadres juridiques d'un pays à l'autre entrave finalement toute tentative d'harmonisation mondiale de l'application du droit de la concurrence dans le domaine des ententes. Tout en disposant des mêmes données et informations, les autorités de la concurrence, les juges et les autres arbitres prenant part au processus peuvent arriver à des décisions différentes. Certains systèmes régionaux consolident l'application, par exemple en désignant un organisme pour enquêter sur une affaire relevant de plusieurs pays. Cependant, compte tenu de la réticence des pays à renoncer à leur souveraineté, cela n'est guère réalisable à l'échelle mondiale.

- (4) *Dans d'autres domaines de l'action publique, comme la lutte contre la corruption, des mesures importantes ont été prises afin de surmonter les obstacles à une coopération internationale efficace. Certaines de ces approches pourraient être adoptées dans le domaine de la concurrence, par exemple en établissant des règles de compétence communes dans le cadre d'une convention. Certains participants ont suggéré qu'un système de chef de file pourrait être un autre moyen de surmonter certains obstacles à la coopération.*

Compte tenu des limites des formes actuelles de coopération internationale dans les enquêtes sur les ententes, les possibilités d'amélioration sont encore grandes. L'on pourrait notamment lever les obstacles à la coopération ou adopter une approche plus révolutionnaire en corrigeant les éléments de base du dispositif existant d'application de la loi. Les difficultés que pose la coopération internationale ne sont pas le propre du domaine de la concurrence. Les organismes chargés de l'application de la loi dans d'autres domaines tels que la fiscalité, la lutte contre la corruption et le blanchiment d'argent rencontrent les mêmes difficultés, et certains des outils qu'ils ont adoptés dans ces domaines pourraient livrer de précieux enseignements pour le domaine de la concurrence.

La Convention anticorruption de 1997 de l'OCDE a énoncé des règles de compétence communes qui facilitent grandement la coopération transfrontière. La Convention permet de déterminer clairement la juridiction compétente pour enquêter et prévoit des règles nettes et transparentes pour résoudre les conflits de compétence. Elle donne aussi des définitions communes des concepts juridiques de base et impose des sanctions pénales, ce qui facilite la coopération en matière pénale.

Adopter un système de chef de file, comme suggéré par certains participants, est un autre moyen d'aborder certains obstacles à la coopération. Le fait de désigner une seule autorité pour enquêter sur une affaire pourrait avoir l'avantage de réduire la complexité de l'application plurijuridictionnelle de la loi par un grand nombre d'autorités et pourrait en outre permettre de sanctionner l'entente pour les effets globaux de son comportement. L'une des délégations a indiqué avoir commencé à créer un réseau d'échange de renseignements, ce qui encourage l'échange immédiat d'informations non confidentielles dès l'ouverture d'une enquête. Par la suite, et une fois les sauvegardes appropriées mises en place, un échange plus profond d'informations suivant ces mêmes canaux de communication pourrait être plus aisé.

BACKGROUND NOTE

*By the Secretariat*¹

1. Introduction

The number of cartels with international dimensions makes co-operation between cartel enforcers in different jurisdictions imperative for domestic enforcement to be truly effective. The introduction of competition law in more jurisdictions highlights the potential for co-operative relationships based on a shared commitment to fight cartels. Success in discovering and prosecuting international cartels will require competition authorities to significantly improve their ability to co-operate. While co-operation between cartel enforcers has become more common, and has delivered significant successes, there seems to be scope for increasing the intensity and improving the quality of co-operation between authorities on cartel investigations.

Co-operation in cartel enforcement is a topic that continues to be widely discussed in many fora and is of considerable interest to competition enforcers and the private sector alike. The OECD has contributed to these discussions and has fostered co-operation through its own instruments and reports, as have others.

On the face of it, there is more co-operation between competition authorities in merger review than cartel investigations because the nature of the proceedings is different. Unlike a cartel case, where parties are investigated for alleged infringements of the law, merger review is an authorisation process. In the latter, the parties have all the incentives to co-operate with the reviewing authorities and to ensure consistent outcomes through effective co-operation between the authorities involved. Conversely, in cartel cases the investigated parties have no interest in the authorities co-operating, which may only result in multiple sanctions, unless they are in leniency/amnesty programmes. Therefore, creating the incentives for co-operation in cartel investigations rests largely with competition authorities.

The purpose of this paper is to build on previous OECD work and to consider country experiences with co-operation, in order to examine developments in light of the existing frameworks for co-operation in cartel cases. The paper is organised around five main parts:

- The first part will review the principle of comity and how it has developed over time, and its application to cartel co-operation.
- The second part will look at the contribution of the OECD instruments through a review of the main findings of the reports on the implementation of the 1998 OECD Hard Core Cartel Recommendation.
- The next section will analyse the instruments used in international co-operation, both competition-specific tools as well as mechanisms of a more general application, and analyse their effectiveness in cartel investigations over the years.

¹ This background paper was prepared by Hilary Jennings with research support from Sarah Long, OECD Competition Division, Secretariat.

- This is followed by an overview of the key challenges, drawing a distinction between challenges common to all jurisdictions, and those of particular relevance for developing and emerging economies.
- The last part of the paper considers the instruments developed in the tax area and how these facilitate international co-operation between tax authorities. It discusses what insights these may offer for cartel enforcement.

A number of points emerge from the paper. These include:

- There are a number of co-operation instruments but none is optimal and not all are available to all jurisdictions.
- There is frequent informal co-operation but formal co-operation on cases is less extensive.
- A number of challenges exist and progress on addressing them requires a combination of political commitment, in the case of legislative change, and innovation.
- Developing and emerging economies face additional hurdles that prevent them from accessing co-operation mechanisms.
- Solutions to the international co-operation challenges faced by enforcement authorities in other policy areas could provide avenues to explore in cross-border cartel enforcement.

2. Comity – a defining principle of international co-operation

Comity is the legal principle whereby a country should take other countries' important interests into account while conducting its law enforcement activities, in return for their doing the same. For over 100 years, public international law has acknowledged comity as a means for tempering the effects of the unilateral assertion of extraterritorial jurisdiction. Comity is therefore a horizontal, sovereign state -to-sovereign state concept, as laid down by the United States Supreme Court in *Hilton v Guyot* in 1895.² It is not the abdication of jurisdiction; instead, it is the exercise of jurisdiction with an accompanying understanding of the impact that the exercise of jurisdiction may have on the law enforcement activities of other countries.³

Jurisdictions apply international comity principles in many substantive areas of law (e.g., tax, insolvency, anti-bribery, environmental regulation) to ensure that complex cross-border enforcement problems are resolved in a manner that balances the policy and enforcement concerns of the states involved.

International co-operation in the competition field employs two types of comity: negative comity and positive comity.

2.1 Negative comity

Negative or traditional comity involves a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests. The OECD's successive

² 159 U.S. 113 (1895), 163-64: "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'

³ The US Supreme Court relied on international comity to restrict the extraterritorial scope of US antitrust law in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

Recommendations on co-operation in competition matters (the most recent in 1995) recommended that in seeking to implement negative or traditional comity a country should:

*(1) notify other countries when its enforcement proceedings may affect their important interests, and (2) give full and sympathetic consideration to ways of fulfilling its enforcement needs without harming those interests.*⁴

2.2 **Positive comity**

Positive comity involves a request by one country that another country undertake enforcement activities in order to remedy allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country. The term “positive comity” appears to have been coined during the negotiation of the 1991 Co-operation Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (“the 1991 EC-US Agreement”).⁵ However, the underlying concept was decades old. Positive comity provisions have been included in the OECD Recommendations on co-operation since 1973, although the term “positive comity” has not been used specifically. The 1995 OECD Recommendation sets out that a country should:

*(1) give full and sympathetic consideration to another country’s request that it open or expand a law enforcement proceeding to remedy conduct in its territory that is substantially and adversely affecting another country’s interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis in considering its legitimate interests.*⁶

There is a difference between positive comity and investigatory assistance, which is distinguished in the OECD’s 1995 Recommendation. Positive comity involves investigating anti-competitive practices and remedying them if possible in order to assist the requesting country. The proceedings are therefore conducted by the requested country. On the other hand, investigatory assistance, such as information sharing or gathering information on behalf of a foreign country involves a request for assistance in the requesting country’s enforcement action. They are similar, but raise different legal and political issues.⁷ An effective and efficient investigation process may often go beyond an either-or model and require a wider range of co-operative activities, with both countries engaging in investigative activities at some point (or points).

The OECD Recommendation does not refer to categories of positive comity, but it is useful to identify several categories:

- *A case-specific positive comity arrangement* is an understanding between a requesting and a requested country concerning a matter the requested country agrees to investigate.
- *Allocative positive comity* is a case-specific positive comity arrangement under which the requesting country undertakes to defer or suspend action during the course of the requested country’s proceeding.
- *Co-operative positive comity* is any case-specific positive comity arrangement that does not constitute allocative positive comity.⁸

⁴ OECD (1995), at I.A1 and I.B.4.b.

⁵ 1991 US/EC Agreement, OJ 1995 L 95/45, corrected at OJ 1995 L 131/38, Article V.

⁶ OECD (1995), at I.B.5.b-c.

⁷ Zanettin (2002), p.183.

⁸ OECD (1999), p.21.

The potential benefits of positive comity will largely depend on the extent to which competition authorities are willing and able to create a co-operative culture in which authorities can justify bringing cases primarily for the benefit of others on the basis of the benefits that they expect to receive from cases brought by others. The benefits include:

- *Improved effectiveness.* By invoking a requested country's laws, positive comity can provide a remedy for illegal conduct that the requesting country cannot remedy itself due to jurisdictional problems.
- *Improved efficiency.* Since positive comity results in an investigation by the country in the best position to gather the necessary facts, it can improve efficiency by reducing investigation costs and the risk of inconsistencies.
- *Reducing the need for sharing confidential information.* Since the proceeding is handled by the competition authority with the best access to the evidence, there is likely to be less need for sharing confidential information.⁹

The OECD's Positive Comity Report in 1999 considered the potential of positive comity in hard core cartel cases where a requesting country acknowledges that it does not have or may lack jurisdiction. Co-operative positive comity could be beneficial as part of a co-ordinated challenge in which, for example, a requested country takes the lead initially with the understanding that roles may shift and that there may be multiple investigations. The report recognised that allocative positive comity has limited potential in hard core cartel cases because injured countries are likely to want to impose their own remedies.¹⁰ Positive comity is also unlikely to be available in most export cartel cases because such cartels are seldom illegal in their home countries.¹¹

Positive comity provisions are now included in many bilateral co-operation agreements between countries. The first wave of co-operation agreements was limited to negative comity principles of avoiding harm to other countries.¹² This changed with the 1991 EC-US Agreement referred to above. It was the first time that positive comity was included in a bilateral agreement on co-operation in antitrust matters.¹³ The principle laid down in Article V of the 1991 EC-US Agreement was further consolidated in the Positive Comity Agreement signed by the European Community and the US in 1998.¹⁴ The United States and Canada entered into a similar agreement in 2004.¹⁵

⁹ OECD (1999), p.22-23.

¹⁰ Ibid, p.15.

¹¹ The challenge of export cartels is discussed below.

¹² Starting with the 1976 Germany –US Antitrust Accord and followed by the 1982 US-Australia Agreement and the 1984 US-Canada Memorandum of Understanding.

¹³ “First generation agreements” are formal bilateral co-operation agreements incorporating the negative comity principle. In contrast, “second generation agreements” incorporate a positive comity principle. “Third generation agreements” refer to antitrust mutual assistance treaties which as a result of domestic law amendments provide for more extensive co-operation.

¹⁴ Agreement Between the European Communities and the Government of the United States of America Regarding the Application of Positive Comity Principles in the Enforcement of their Competition Laws, OJ 1998 L 173.

¹⁵ Agreement Between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws (2004).

Agreements concluded since the 1991 EC-US agreement then have been inspired by the spirit and sometimes wording, of both the OECD Recommendations and the early positive comity agreements, concluded by the US, EU and Canadian authorities.¹⁶ Formal co-operation agreements containing positive comity provisions may commit countries to sympathetic consideration of each other's comity requests, but the countries remain free to make their law enforcement decisions as they choose.

There was an initial enthusiasm for positive comity, which was particularly strong after the signing of the 1998 EC-US Positive Comity Agreement. However, expectations have since been lowered. It is regarded sceptically by academics¹⁷ and appears to have been a little used instrument, despite its potential.

Box 1. Positive comity has been employed infrequently and with limited success

In the 1997 *SABRE/AMADEUS* case. The United States (US) Department of Justice (DoJ) requested that the European Commission investigate under EU competition rules, alleged anti-competitive conduct by a European carrier owned computer reservation system, Amadeus, that was preventing the American Airlines owned SABRE system from competing in certain European countries.¹⁸ As a result the European Commission initiated an investigation and subsequently issued a statement of objections against Air France in March 1998 indicating that the airline had abused its dominant position. Ultimately SABRE reached a settlement guaranteeing it non-discriminatory access to European markets, making the need to render a decision superfluous.¹⁹

While, not a formal request, in the *IRI/AC Nielsen* case, the US DoJustice closed its investigation into AC Nielsen's retail tracking service because AC Nielsen had entered into a settlement with the European Commission that would effectively deal with the DoJ's concerns. Since an investigation had already been launched by the European Commission, there was no point in the DoJ making a formal positive comity request. It was instead decided to allow the European Commission to take the lead.²⁰

The infrequent use made of positive comity also suggests that countries have not been able to apply it in an entirely satisfactory manner. If the few cases to date are not considered to be shining examples of its efficiency, then its limited use may be explained by a perception that positive comity has limited value.²¹ Positive comity is not a principle of national law and it has no legal force. The use of positive comity is therefore discretionary and left to the goodwill of competition authorities. Moreover, despite its voluntary nature some countries may be concerned that positive comity requests might limit their control over the use of their (typically) limited resources and might affect their discretion on prioritising their enforcement activities. The experience of positive comity in bilateral agreements has been somewhat of a damp squib.

¹⁶ Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition Laws and Deceptive Marketing Practices Laws, 3 August 1995, 4 *Trade Reg. Rep.* (CCH); Agreement Between the European Communities and the Government of Canada Regarding the Application of Their Competition Laws, OJ 1999 L 175. The first agreements concluded between more mature competition regimes and newer regimes contained more or less the same provisions. See for example the US-Israel Antitrust Agreement and the US-Brazil Agreement, signed in 1999 and the US-Mexico Agreement in 2000.

¹⁷ Atwood (1992), p. 84.

¹⁸ US DoJ Press Release, *Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting US Airlines Computer Reservations Systems* (28 April 1997).

¹⁹ European Commission 30th Report on Competition Policy (2000).

²⁰ US DoJ Press Release, *Justice Department Closes Investigation into the Way AC Nielsen Contracts its Services for Tracking Retailers* (3 December 1996).

²¹ Marsden (2011), p. 307.

There may be other explanations for the lack of positive comity requests, or at least formal requests:²²

- The expansion of enforcement capacities and the uptake of competition laws worldwide. There may be more domestic enforcement capacity and effectiveness to resolve problems without the need to call on the support of another authority. Alternatively, exporters may have more confidence in the foreign authority's credibility and may be more prepared to make complaints directly rather than going through the process of persuading their national government and competition authority to deputise the foreign competition authority to look into the conduct.
- Disparities between the authorities involved in terms of size or power may be a contributing factor in the stagnation of positive comity. Smaller or less powerful authorities may be less likely to interact frequently or to have a recurring need to rely on one another, in contrast, for example to the similarly placed US and EU authorities who interact and assist one another regularly. In the absence of these factors larger authorities may have lower incentives to respond to the needs of the smaller authorities. Also, smaller jurisdictions simply may not have the resources to help foreign counterparts or it may be politically unpalatable for them to rely on foreign authorities to remedy conduct that is harming their consumers.

2.3 *Enhanced comity*

A proposal that gained traction in the business community at the end of the 1990s and early 2000s, to overcome some of the limitations experienced with negative and positive comity, was the principle of “enhanced comity”. According to the principle of enhanced comity, jurisdiction should be allocated to the state whose competition regime is best equipped to establish an infringement and enforce any sanctions or remedies.

The combination of an increasingly global economy and the proliferation of competition regimes around the world increase the likelihood of cross-border investigations with more authorities devoting resources to the same investigations, as well as the potential for inconsistent or conflicting competition law enforcement. Enhanced comity principles go beyond the existing model of parallel (but co-ordinated) investigations to include, for example, non-binding deference to a jurisdiction with a greater interest to investigate the case on behalf of all interested jurisdictions. Such a system could avoid the imposition of inconsistent remedies and significantly reduce the costs of the co-ordination of multiple proceedings for both the enforcement authorities and the parties involved.

The concept has had limited application, with one notable exception – the European Competition Network.²³ The need to withdraw national sovereignty in favour of another jurisdiction makes enhanced comity a challenging prospect. The concept raises complex questions. What degree of deference to another authority is feasible in multi-jurisdictional investigations? Could an authority with comparatively lesser interest in investigating the conduct defer to those more substantially concerned? How to identify the best-placed authority to take the lead in the investigation? How to ensure that the interest of the other jurisdictions be preserved? Would an integrated or work-sharing approach be possible? Could one or the other authority become the *de facto* lead authority and be responsible for investigating the conduct, possibly with the participation or monitoring by staff from another authority?

²² Ibid, pp. 307, 309-10.

²³ See discussion below at section 4.2.

Box 2. Examples of enhanced comity in other regulatory fields²⁴

Other regulatory fields have adopted enhanced comity principles, for example cross-border insolvencies and environmental regulation.

Cross-border insolvencies. The Model Law on Cross-Border Insolvency, adopted by UNCITRAL in 1997 incorporates a number of enhanced comity mechanisms. These include a requirement, when there are multiple recognised foreign insolvency proceedings and no bankruptcy proceedings pending in the jurisdiction considering the matter, that the courts should grant relief consistent with the recognised proceedings occurring in the country where the debtor's centre of interest is located.

Hazardous waste. The Basel Convention governs the trans-border shipment and disposal of hazardous wastes.²⁵ A party to the Convention can prohibit the importation of hazardous or other wastes for disposal, and other parties to the Convention are required to prohibit export of the prohibited waste to the prohibiting country. The Convention also establishes a notification and consent system for the exportation and importation of waste. Thus, the Basel Convention exemplifies an enhanced comity principle whereby under certain conditions one country should defer to the stronger interests of another country, even if it is against their interests (or the interests of companies domiciled within its borders) to do so.

3. The Development of co-operation in cartel investigations

3.1 The OECD Hard Core Cartel Recommendation

In 1998 the OECD initiated a new era in anti-cartel programmes with the adoption of the Council Recommendation Concerning Effective Action against Hard Core Cartels.²⁶ The 1998 Recommendation condemns hard core cartels as the most egregious violation of competition law. It calls upon member countries to take two sorts of actions – one relating to their individual enforcement programmes and one relating to co-operation:

- First, the Recommendation encourages each Member country to ensure that its competition laws effectively halt and deter hard core cartels. Members are urged to ensure that their sanctions and investigatory powers are adequate and that their exclusions and authorisations of what would otherwise be hard core cartels are both necessary and no broader than necessary to achieve their overriding policy objectives.
- Second, the Recommendation urges each Member to review all obstacles to law enforcement co-operation against hard core cartels. Members are reminded *a)* that they have a common interest in preventing hard core cartels, *b)* that while there should be effective safeguards for confidential information, information sharing with foreign authorities has been beneficial when it has been possible, and *c)* that most countries' laws continue to prevent their competition authorities from such information sharing. The strongest forms of co-operation mentioned in the Recommendation – referred to in this report collectively as “information sharing” – were:
 - gathering confidential or non-confidential information on behalf of a foreign authority, using compulsory process where necessary; and/or

²⁴ For an in-depth discussion of co-operation in the tax/fiscal area see section 7 below.

²⁵ Basel Convention of the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done Mar. 22, 1989, 1673 U.N.T.S. 125.

²⁶ [C\(98\)35/FINAL](#).

- sharing with a foreign competition authority confidential information and/ or non-confidential investigatory information that is contained in an authority's files.²⁷

The Recommendation also includes a positive comity provision, which urges Member countries to seek ways in which their "co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries."

3.2 *The OECD's Hard Core Cartel Reports*

Following the adoption of the Recommendation, the OECD's Competition Committee submitted three reports to the OECD Council on the implementation of the Recommendation. Each of these reports studied developments in international co-operation to highlight the incidence of co-operation among authorities and trends in co-operation efforts.

The first OECD Hard Core Cartel Report in 2000 noted that due primarily to the restrictive laws in most Member countries, competition authorities had far more success in implementing the Recommendation's call for action with respect to their individual enforcement programmes than its call for engaging in co-operative law enforcement.

Two surveys were conducted on international co-operation in cartel investigations and cases, one in 1999 and a second in 2001. In the second, questionnaires were issued both to Member countries and to non-member invitees to the OECD Global Forum on Competition.²⁸

The responses disclosed that there had been relatively little co-operation among national competition authorities in cartel investigations and cases prior to 1999. Most of the responding countries had neither made nor received any requests for co-operation in the period covered by the questionnaire. Of those that did, the most active were the US and Canada. One important reason for there being so few instances of co-operation was that many cartel cases that were prosecuted in the relevant period did not have an international dimension, that is, they occurred in and affected solely one jurisdiction. In other instances, countries had not prosecuted any cartel cases in the period. It was also clear, however, that where co-operation would have been useful it was significantly constrained by the inability of countries to disclose confidential information to foreign authorities.²⁹

²⁷ Many enforcement authorities in other fields, for example tax, are authorised by law to engage in such information sharing whereby the requested assistance satisfies any requirements set forth in the laws of the requested country – for example, a finding that there are adequate safeguards for confidential information and that the co-operation would be consistent with national interests. Although the Recommendation notes the benefits that have resulted from the use of information sharing in appropriate circumstances, it does not call upon all Member countries to authorise this strongest form of co-operation, but rather leaves it to each country to decide what forms of co-operation are suited to its needs and to the common interest in more effective action against hard core cartels.

²⁸ In the 1999 questionnaire countries were asked for information about instances in which they had either requested or responded to requests for information from a foreign competition authority in connection with a cartel investigation. They were also asked for their views on the costs and benefits of international co-operation, and on impediments to such co-operation.

²⁹ OECD (2000).

The responses to the second questionnaire in 2001 described a different situation. There had been more international co-operation in the intervening period. As noted in the Second Cartel Report from 2003³⁰, it was especially strong between a relatively small group of jurisdictions that had developed close working relationships. The most active co-operative relationships in cartel investigations were between:

- the European Commission and EU Member states;
- the United States and Canada;
- the European Commission and the United States and Australia and New Zealand.

Other countries had also engaged in co-operation in one or more cases, including Brazil, Denmark, Estonia, Israel, Italy, Korea, the Netherlands, Spain and the Russian Federation. The Second Report also noted that the number of international co-operation agreements was growing significantly. In most cases co-operation was limited to informal co-operation where authorities informally discuss such matters as investigative strategies, market information and witness evaluations, but do not exchange evidence that is generated by an investigation and is protected by domestic confidentiality laws.

The OECD's Third Cartel Report in 2005³¹ highlighted the use of new investigative strategies, such as co-ordinated simultaneous inspections in several jurisdictions, and confidentiality waivers in cases of simultaneous leniency applications. This report also highlighted the increased exchange of know-how and expertise in cartel enforcement, in particular in the field of investigative techniques. There was a growing network of bilateral co-operation agreements not just between OECD members, but also between OECD members and non-members.

Most of the reported cases of successful co-operation relied on informal co-operation which, despite its limitations, was considered to be contributing significantly to more effective enforcement. The 1995 OECD Co-operation Recommendation continued to provide the framework for exchanges of non-confidential information, especially between OECD members that had not entered into bilateral agreements. The inability to exchange confidential information was highlighted as a serious impediment to cartel investigations. OECD members reported more use being made of international agreements which authorise formal co-operation, where these exist. The Third Cartel report was produced in 2005, a year after the entry into force of the new legal framework in the European Union, which introduced far-reaching co-operation mechanisms within the European Competition Network.³²

3.3 The OECD Best Practices for Formal Information Exchange in Hard Core Cartel Investigations

In light of the laws in many countries preventing competition authorities from exchanging confidential information in cartel investigations, or severely restrict their ability to do so, the OECD's Competition Committee developed Best Practices for the formal exchange of information in cartel investigations in 2005.³³ The Best Practices aim to identify safeguards that countries can consider applying when they authorise competition authorities to exchange confidential information in cartel investigations.

³⁰ OECD (2003).

³¹ OECD (2005).

³² See Section 2.2 below.

³³ OECD Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations, [DAF/COMP\(2005\)25/FINAL](#).

The Best Practices are based on the following principles:

- International treaties or domestic laws authorising a competition authority to exchange confidential information in certain circumstances should provide for safeguards to protect the confidentiality of exchanged information. On the other hand, such safeguards should not apply where competition authorities exchange information that is not subject to domestic law confidentiality restrictions.
- Member countries should generally support information exchanges in cartel investigations. It should, however, always be at the discretion of the requested jurisdiction to provide the requested information in a specific case, or to provide it only subject to conditions, and there should be no obligation to act upon such a request. A country may decline a request for information, for example, because honouring the request would violate domestic law or would be contrary to public policy in the requested jurisdiction. In addition, information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty/leniency programmes.
- When initiating an exchange of information, jurisdictions should act with the necessary flexibility in light of the circumstances of each case. They should consider engaging in initial consultations, for example to assess the ability of the jurisdiction receiving the request for information to maintain the confidentiality of information in the request as well as the confidentiality of information exchanged.
- Appropriate safeguards should apply in the requesting jurisdiction when it is using the exchanged information. In this context, the Best Practices address in particular the use of exchanged information for other public law enforcement purposes, disclosure to third parties, and efforts to avoid unauthorised disclosure.
- Information exchanges should provide safeguards for the rights of parties under the laws of member countries. The Best Practices specifically mention the legal professional privilege and the privilege against self-incrimination. Regarding legal professional privilege, whichever of the levels of protection is higher – that of the requesting or the requested jurisdiction – should be applied. The requesting jurisdiction should ensure that its privilege against self-incrimination is respected when using the exchanged information in criminal proceedings against individuals.
- In light of concerns that prior notice to the source of information can severely disrupt and delay investigations of cartels, the Best Practices advise against giving prior notice to the source of the information, unless required by domestic law or international agreement. Competition authorities may, on the other hand, consider ex-post notice if such notice would not violate a court order, domestic law, or an international agreement, or jeopardise the integrity of an investigation.

The OECD's Hard Core Cartel Recommendation has raised the awareness of governments around the world about the importance of investigating and prosecuting hard core cartels. Since 1998 cartel enforcement has become the key priority for both OECD and non-OECD member competition authorities. In parallel, procedural reforms have introduced leniency programmes and strengthened the investigatory powers of competition authorities worldwide. Deterrence has become a watch word, with many authorities increasing fining levels. Some have introduced individual, criminal or civil, penalties as a means to reinforce their enforcement activities against cartels. Alongside this, there is a sense that international co-operation among enforcers in cartel investigations continues to increase. Fora such as the International Competition Network's (ICN) Cartel Working Group, initiated in 2004, provide a platform for authorities to share expertise regarding the challenges of cartel enforcement. Its annual workshops provide a venue for anti-cartel enforcers from around the world to come together, learn from each other, and develop close working relationships that can serve as the basis for future co-operation.

4. Instruments, incidence and illustrations of co-operation in cartel investigations

International co-operation between competition authorities in cartel investigations takes place in a multiplicity of forms. It can take place at the bilateral, regional, or multilateral levels. It can be based on formal instruments such as a national legal provision or an agreement between jurisdictions or competition authorities. It may be based on a waiver from a provider of evidence. It can be informal, in that it is not based the framework of a specific co-operation instrument, and so normally involves general forms of co-operation, such as technical assistance, or exchanges of public or authority information. The different instruments and tools as well as the various types of co-operation involved in cross-border cartel cases creates a complex web of differing levels of possible engagement between authorities. The drivers for co-operation and the instruments and networks that underpin it are equally distinct across different jurisdictions and groupings of countries. In spite of all of these variables there is agreement between cartel enforcers that international co-operation is a key tool to ensuring that cartel conduct that touches upon several jurisdictions is dealt with effectively and optimally. Means of facilitating international co-operation are therefore actively pursued.

4.1 *Non-competition-specific co-operation instruments*

Some co-operation is facilitated by instruments with broad application across multiple enforcement areas like Mutual Legal Assistance Treaties (MLATs), extradition treaties and letters rogatory (letters of request).

4.1.1 *Mutual Legal Assistance Treaties*

Many countries have entered into MLATs. They are bilateral treaties creating reciprocal international obligations between the signatories and are not specific to competition investigations. An MLAT normally allows the signatories to request various types of assistance from each other, including the use of formal investigative powers and sharing of confidential information. MLATS are therefore potentially powerful tools, but they have traditionally been restricted to criminal matters. MLATs require the underlying offence to be a crime in at least the requesting country's jurisdiction. In most jurisdictions, cartel conduct is not a crime and so MLATs are little used in cartel investigations.

Although a significant number of MLATs exist (the US, for example, has entered into MLATs with approximately 70 countries³⁴), not all MLATs can be used for co-operation in cartel cases. There may be an explicit exclusion for competition matters from the scope of the treaty, as is the case in the Switzerland-US MLAT.³⁵ Some MLATs also require that both jurisdictions treat the conduct under investigation as a crime ("the dual criminality requirement").

When applicable, MLATs are generally the most effective means of cross-border evidence gathering in competition cases. They provide a mechanism for the signatories to obtain a wide variety of legal assistance for criminal matters generally, including the compulsory taking of evidence on oath and the execution of searches of domestic and business premises. Unlike "soft" co-operation agreements, MLATs oblige the parties to assist each other by obtaining evidence located on the requested nation's territory and, it is not permissible for the requested country to refuse its aid unless the offence is political or military, or compliance would jeopardize national security or prejudice its own investigations.

³⁴ See the written contribution by United States to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)46](#).

³⁵ The previous exclusion of competition matters was removed from the 1994 US-UK MLAT in 2001.

Box 3. Co-operation on the basis of a MLAT

The Canada-US MLAT was relied on to co-ordinate investigations into the plastic dinnerware and thermal fax paper cartels.³⁶

In *Plastic Dinnerware*, the US requested Canadian assistance under the MLAT to execute simultaneous search warrants. The Canadian Competition Bureau was involved in the analysis of the documents which revealed that the conspiracy had no effect on the Canadian market. The collected evidence ultimately led to a price-fixing prosecution by the US Department of Justice. It highlights that under an MLAT, assistance can be provided even if the anti-competitive conduct has no effect in the requested country. The information could be jointly shared and analysed without need for the investigated parties to grant confidentiality waivers, because it was ordered by Court subpoenas under the MLAT.

In *Thermal Fax Paper*, the Canadian Bureau notified the US Department of Justice of a price-fixing conspiracy affecting the North American market. On the basis of the MLAT the two authorities were able to share documents obtained by subpoenas and search warrants, share documents obtained from foreign defendants pursuant to plea agreements jointly interview witnesses and jointly analyse documents collected. As a result, Japanese, US, Canadian firms were fined in both the US and Canada, while US and Japanese nationals were fined in the US.

MLATs are not specifically designed for competition law enforcement and therefore have limited use in cross-border cartel cases. Different legal standards may be required by both the requesting and the requested jurisdiction or the availability of certain investigatory methods may differ. For example, the law of some jurisdictions requires that in order to be used in court, evidence gathered pursuant to an MLAT needs to be gathered respecting the rights of defence applied in the requesting jurisdiction. Certain investigatory methods, such as interception of private communications, available to the requesting jurisdiction, may not be available to the requested jurisdiction. Another important characteristic of MLATs is that they operate through the normal criminal justice enforcement and not administrative, channels. The Justice Ministry rather than the competition authority may be the central authority in the administration and exercise of powers under MLATs. This can make the length of proceedings a problem. Legal challenges can also significantly delay the value of any co-operation under MLATs and may serve as a disincentive for relying on MLATs to obtain information.³⁷ MLATs may be difficult for developing and emerging economies to use precisely because of these limitations.³⁸

4.1.2 Extradition Treaties

Extradition treaties also require the underlying conduct to be a crime in both jurisdictions. Given the relatively small number of jurisdictions to have made cartels a criminal offence, the proportion of extradition treaties that can be deployed for cartel cases is even smaller than for MLATs. In 2005 a British national became the first overseas executive from any jurisdiction whose extradition was ordered to the United States. The British House of Lords overturned the extradition order on the cartel charge on the basis that at the time of the alleged offence, price fixing was not a criminal offence in the UK and therefore was

³⁶ *Plastic Dinnerware Price Fixing Probe Nets Indictment, Guilty Plea Agreements*, 66 Antitrust & Trade Reg. Rep (BNA) 661 (1994); *US and Canadian Prosecutors Attack Cartel Behaviour by Fax paper Distributors*, 67 Antitrust & Trade Reg. Rep (BNA) 108 (1994).

³⁷ See for example the arguments put forward in Canada regarding transmission of seized records to the US pursuant to the Canada-US MLAT in *Canada (Commissioner of Competition) v. Falconbridge Ltd.* [2003] O.J. No. 1563 (Ont. C.A.).

³⁸ Although note the US-Brazil MLAT, which has been used in at least one of the SDE's investigations. See the contribution by Brazil to UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy on "Recent experience with international co-operation", (2006).

not an extraditable offence.³⁹ However, the ruling does not seem to preclude extradition applications for price fixing that occurred after price fixing was made a statutory crime in Britain under the 2002 Enterprise Act.⁴⁰ It remains to be seen how the extradition of cartel suspects develops between jurisdictions where cartel conduct is a crime.⁴¹

4.1.3 *Letters rogatory*

Competition authorities can also use letters rogatory in order to obtain assistance from abroad in the absence of an MLAT or executive agreement. This is a formal request whereby one court requests a foreign court to perform a judicial act, such as taking evidence, serving a summons, or other legal notice. The process is usually time-consuming and cumbersome. Some countries insist that the requests be submitted through the diplomatic channel. Nevertheless, there appears to have been some reported use of judicial assistance in international cartel cases, for example in the US investigation into bid rigging for USAID-funded projects where the German justice authorities made 100 police officers available to execute search warrants at multiple locations across Germany.⁴²

4.2 *Regional Trade Agreements which include competition provisions*

Regional agreements can also provide for co-operation on competition matters. There are currently 214 Regional Trade Agreements (RTAs) in force listed on the World Trade Organisation website, of which 98 contain competition provisions.⁴³ In the competition sphere there are a number of well known RTAs including the EU, COMESA,⁴⁴ WAEMU,⁴⁵ CARICOM,⁴⁶ ASEAN,⁴⁷ NAFTA⁴⁸, MERCOSUR,⁴⁹ and the Andean Community.⁵⁰ RTAs are no longer strictly based on geographic location, and they can be agreed bilaterally between individual countries (Free Trade Agreements), between one country and a group of countries (plurilateral agreements), or between regions or blocs of countries (multilateral agreements).

In 2006 a paper was commissioned by the OECD Joint Group on Trade and Competition to examine competition provisions in regional trade agreements.⁵¹ Out of the 86 agreements analysed for the paper, 68% were between developing or emerging economies (South-South), 27% were between developed and developing countries or emerging economies (North-South) and only 5% were between developed countries (North-North). All of the analysed RTAs referred generally to anti-competitive behaviour or practices. However the scope and content of the provisions vary. Some RTAs have very broad and non-

³⁹ Ultimately, following an unsuccessful appeal to the European Court of Human Rights, Mr Norris was extradited to the Eastern District of Pennsylvania, to stand trial for obstruction of the US DoJ's criminal investigation of a cartel among carbon manufacturers, but not for the price-fixing count.

⁴⁰ Norris v Government of the United States of America and others, [2008] UKHL 16.

⁴¹ See Joshua, Camesasca, Jung, (2008) for a discussion of developments in extradition and MLATs.

⁴² Hammond (2002).

⁴³ See World Trade Organisation RTA database.

⁴⁴ Common Market for Eastern and Southern Africa.

⁴⁵ West Africa Economic and Monetary Union.

⁴⁶ The Caribbean Community.

⁴⁷ Association of Southeast Asian Nations.

⁴⁸ North American Free Trade Agreement.

⁴⁹ Mercado Común del Cono Sur (Brazil, Argentina, Paraguay and Uruguay).

⁵⁰ Members include Bolivia, Columbia, Ecuador, Peru and Venezuela.

⁵¹ Solano and Sennekamp (2006).

binding language with no definition of the types of practice considered anti-competitive,⁵² while others mandate the parties to prohibit very specific types of practices within their jurisdiction.⁵³ Most agreements fall somewhere in between the two.⁵⁴

In the course of negotiating FTAs, building in co-operation between the competition authorities in the countries forming a free trade area ensures that one country's antitrust policy (or lack thereof) does not undermine the advantages of the free trade arrangement for the other parties involved. In short, competition law and competition law enforcement co-operation is believed to play an important role in the fulfilment of the objectives of an FTA.⁵⁵ However it is unclear whether provisions in a FTA that contain generally worded obligations in relation to competition law enforcement co-operation are more or less effective than a competition-specific co-operation agreement.

Regional competition agreements, notably those with a functioning competition authority, offer deeper levels of integration and a higher degree of co-operation on competition enforcement than bilateral agreements. They offer scale economies in enforcement, particularly important for developing and emerging economies.⁵⁶

However, despite their potential, the effectiveness of some RTAs is questionable. A study by UNCTAD noted that RTAs are criticised for falling short of the level of co-operation envisaged by many of the signatories, especially developing countries.⁵⁷ Both political and capacity constraints reduce their effectiveness.⁵⁸ Even among regional organisations with regional competition frameworks such as COMESA, UEMOA, CARICOM, MERCOSUR and the Andean Pact there has not been much success in enforcement co-operation. Nevertheless, the UNCTAD study argued that developing countries benefit from concluding RTAs with competition provisions. This is attributed to the knock-on effects of RTAs of propagating competition laws in developing countries and the accompanying capacity building that many RTAs entail, rather than actual co-operation on cases.

One example of a well-functioning regional agreement is the EU and its European Competition Network. This provides a framework for co-operation between the EU member states' competition authorities in cases where Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) are applied. The European Competition Network (ECN) is widely accepted as the model of regional co-operation. It is established under a European Council Regulation⁵⁹ (the "Modernisation Regulation") and is based on a system of parallel competences which allows all national competition authorities (NCAs) to apply the same competition rules.⁶⁰

⁵² Free Trade Agreement between Chile and Central America (1999), Agreement between New Zealand and Singapore on a Closer Economic Partnership (2001), Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (2004).

⁵³ CARICOM.

⁵⁴ For an analysis and taxonomy of competition provisions in bilateral, trade and regional agreements which include competition provisions see, for example: Dabbah (2010); Papadopoulos (2010); Holmes, Müller, Papadopoulos (2005).

⁵⁵ Marsden and Whelan (2005).

⁵⁶ Gal (2011), p 256.

⁵⁷ Alvarez, Clarke and Silva (2005).

⁵⁸ Sokol, (2011) p. 203.

⁵⁹ Council Regulation No 1/2003 of 16 December 2002. See also Commission Notice on co-operation within the Network of Competition Authorities (2004/C 101/03).

⁶⁰ Commission Notice on co-operation within the Network of Competition Authorities, OJ 2004, C 101, 03.

The ECN facilitates case allocation to the authority “well-placed” to deal with the case and ensures a consistent application of the EU’s competition rules. The ECN is an informal network in that it does not take ‘decisions’ and cannot compel its members to act in a certain way. It is, however, expected that the constructive dialogue will help solve most of the issues which may arise. Should a deadlock occur, the Commission retains the power to relieve national competition authorities of their competence by opening proceedings. The Regulation creates a number of co-operation mechanisms for the purpose of case allocation and assistance. National competition authorities (NCAs) should inform each other before or without delay after starting the first formal investigative measure, and make relevant information available to other NCAs.

As regards cartel investigations, it is worth pointing that the ECN enables the NCAs to exchange confidential information, and to use such information as evidence in their respective proceedings, subject to the various information obligations in their country. All NCAs have the power to exchange and use information which has been collected by them for the purpose of applying competition law. Information exchange should take place between the NCAs, as well as between the Commission and an NCA. The possibility to exchange confidential information between EU competition authorities without the consent of the parties is unique to the ECN,⁶¹ and considerably enhances the power of EU competition authorities to deal with cartels. However, it is subject to certain limits, in particular due to the fact that some national jurisdictions within the EU have criminal sanctions for infringements of competition law, while others do not. Furthermore, in order to ensure the good functioning of leniency programmes it is important that information obtained from a leniency applicant cannot be used against that leniency applicant by another authority. Considerable work has been done within the ECN to minimise any negative consequences resulting from the lack of harmonisation of leniency programmes across EU Member States, notably through the development of the ECN Model Leniency Programme.

The Regulation also allows for an NCA to request another NCA to collect information and carry out fact finding measures on its behalf. The NCA acting on behalf of another NCA acts pursuant to its own procedural rules and powers of investigation. The Commission can also request an NCA to carry out an inspection on its behalf. The European Commission also co-operates closely with NCAs in its own investigations, as it requires the assistance of the relevant NCA’s officials to perform investigations or dawn raids in the territory of a Member States. In order to ensure a consistent approach, NCAs must send the Commission a summary of the case and proposed decision before it is adopted, to ensure it does not run counter to the decisions previously adopted by the Commission.

Box 4. ECN co-operation in practice: the Flat Glass cartel

In 2007 the Commission fined four manufacturers of flat glass €486.9 million for their involvement in a cartel which co-ordinated price increases and other commercial conditions. Flat glass is used in the construction sector for windows, glass doors and mirrors, and the companies included Asahi (Japan), Guradian (USA), Pilkington (UK) and Saint-Gobain (France). Between 2004 to 2005 the German, French, Swedish and UK competition authorities all exchanged information related to these companies. The information included customer letters and/or informal complaints regarding parallel price increases. The Commission initiated the investigation on the basis of this market information, which showed the “excellent co-operation” within the ECN and co-ordinated dawn raids were conducted in 2005. Neelie Kroes, Competition Commissioner at the time, commented that the case demonstrated clearly “the benefits of enhanced co-operation between the Commission and National Competition Authorities”.⁶²

⁶¹ With the exception of exchange between the Commission and the EFTA Surveillance Authority under the European Economic Area agreement.

⁶² European Commission Press Release, *Antitrust: Commission Fines Flat Glass Producers € 486.9 million for Price Fixing Cartel*, IP/07/1781, 28 Nov. 2007.

The specificities of the ECN are a common legal framework and the supremacy of EU law, the European enforcement institutions and courts. It can, however, provide a useful guide for regional co-operation. The functioning of the ECN emphasises that key to co-operation is formalising: (i) how to obtain evidence of anti-competitive practices taking place abroad for use in national investigations and courts; and (ii) how to share information with other countries so that they can prosecute the same infringements.

4.3 *Competition-specific bilateral co-operation agreements*

4.3.1 *Bilateral agreements*

Competition-specific bilateral co-operation agreements have proliferated since 1976 when the first one was concluded between the United States and Germany.⁶³ The agreements have evolved from these early incarnations which were either defensive or provided only for vague and general principles of co-operation. More recent agreements, signed since the 1990s, have been inspired by the OECD Recommendations on international co-operation and the principles of positive comity. On the face of it, therefore, these second generation agreements demonstrate greater commitment to strengthening co-operation in the enforcement of competition law at the international level. The agreements between the EU, Canada and the US were the forerunners of a growing network of bilateral agreements with and between younger competition jurisdictions.

The bilateral agreements concluded since the 1991 EU-US Agreement typically contain the same structure as that agreement and contain more or less the same provisions. These agreements provide for notification where either signatory becomes aware that its enforcement activity may affect the interests of the other. They also usually involve provisions on co-ordination of parallel investigations where appropriate and practicable, and include both positive and negative comity principles. Provisions in the agreements to supply information on anti-competitive activities are subject to national confidentiality laws. Thus, they generally provide for case-specific co-operation. Many of these bilateral agreements also allow for consultations, periodic visits and staff exchanges between the authorities.

It is generally agreed that elements of these bilateral agreements have largely been a success. Reports of competition authorities notifying each other of investigations, sharing non-confidential information, and co-ordinating investigations, have become routine. The terms of many of these second generation bilateral agreements appear to show an impressive commitment to co-operation in international enforcement. However, co-operation agreements are more prevalent between developed countries with large multinationals likely to operate in each other's territory. There is, arguably, not the same level of willingness for large developed countries to sign agreements with smaller or developing countries. This reticence may be explained through concern that an agreement will place more demands on the larger, more experienced authority in a jurisdiction "home" to multinationals carrying out anti-competitive practices in these small or developing countries. Vice versa, the number of companies from developing country whose practices have an impact on developed country markets is likely to be less.⁶⁴

Bilateral agreements constitute soft law, as they express a desire to consult and co-operate and do not limit the discretion of the regulatory authorities.⁶⁵ Although these are binding international agreements,

⁶³ Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, 23 June 1976, 4 *Trade Reg. Rep.* (CCH) 13501.

⁶⁴ See Jenny (2002) and (2006).

⁶⁵ Stephan (2005).

signed by governments,⁶⁶ they do not amend domestic laws that prohibit the sharing of confidential business information without the provider's consent, and the agreements specifically allow the requested party to take its own national interests into account in determining whether and to what extent to provide the requested co-operation. The net effect, in the case of parallel investigations, is that authorities can only share confidential information if the source of the information grants a waiver.

4.3.2 *Antitrust Mutual Assistance Agreements*

Antitrust mutual assistance agreements enable greater co-operation than traditional bilateral co-operation agreements. The greater level of co-operation is enabled by domestic laws that permit certain assistance to be provided pursuant to the mutual assistance agreement that otherwise could not be provided, particularly in terms of access to foreign-located evidence and information sharing. There are few examples of third generation agreements in force. The first example is the Co-operation and Co-ordination Agreement between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission signed in 1994, and updated in 2007. However, this did not provide for the exchange of confidential information. The 1999 Antitrust Mutual Enforcement Assistance Agreement was signed between the United States and Australia.⁶⁷ This provided a vehicle for the signatory authorities to request broad assistance in criminal and civil non-merger antitrust matters, including the exercise of compulsory power to obtain testimony and documentary information.⁶⁸

4.3.3 *Memorandums of Understanding*

Non-binding memorandums of understanding (MOUs) between countries amount to a “getting to know you” best endeavours agreement between competition authorities. MOUs do not necessitate a formal international agreement. These executive agreements may memorialise existing working relationships, or they may mark a new level of engagement between competition authorities. The recent signing of the Sino-US MOU was characterised by the then US Department of Justice Assistant Attorney General as “... a reflection of that relationship, and, by establishing a framework for enhanced co-operation among our agencies, the Memorandum of Understanding also allows us to move to the next chapter in our collaboration on competition law and policy matters.”⁶⁹ MOUs provide a tentative first step in the process of establishing a longer-term co-operation framework. Some MOUs go further and are more in line with the bilateral co-operation agreements described above.⁷⁰

4.4 *Provisions in national laws*

Some national laws provide a direct legal basis for co-operation between authorities or jurisdictions, while others provide a mandate to enter into co-operation agreements with other jurisdictions. In either case, jurisdictions with laws directly permitting co-operation also have bilateral co-operation agreements in place with other jurisdictions, suggesting that bilateral agreements have added utility.⁷¹

⁶⁶ Or on a delegation of authority to the competition authority.

⁶⁷ Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, 1999, [1999] ATS 22.

⁶⁸ See Section 4.4 below for a discussion of the limited additional benefits of antitrust mutual assistance agreements.

⁶⁹ Varney (2011).

⁷⁰ See for example the Memorandum of Understanding Between the Commissioner of Competition (Canada) and the Fiscal Nacional Económico (Chile) Regarding the Application of their Competition Laws (2001).

⁷¹ ICN (2007), p.13.

National laws may provide statutory “gateways” for voluntary disclosure to foreign law enforcement authorities of information gathered in the course of the requested country’s own investigations. This would permit the sharing of information relating to criminal or civil investigations of the requesting authority.

The UK’s Enterprise Act permits disclosure to an overseas public authority of information which the Office of Fair Trading (OFT) has obtained under its statutory powers of investigation, in order to facilitate the exercise by the overseas authority of any function relating for the purposes of civil or criminal antitrust cases in those jurisdictions, including cartels.⁷² Currently, when the OFT proposes to disclose information to an overseas authority it has to have regard to certain considerations set out in the Act. The OFT must conduct an assessment in individual cases of the safeguards that exist in the overseas jurisdiction for the handling of the disclosed information. It must also consider whether the disclosure might harm the legitimate business interests of the undertaking or the interests of the individual to which the information relates.⁷³

The UK’s overseas disclosure information gateway has been used, for example by the Australian Competition and Consumer Commission in the *Marine Hose*⁷⁴ cartel investigation, which were described by the ACCC as decisive for its investigation.⁷⁵ Nevertheless, the process can be lengthy and resource intensive (both for the OFT and the overseas authority).⁷⁶

The German Act Against Restraints of Competition provides not only for wide co-operation between the authorities which are members of the European Competition Network, but also extends this co-operation to competition authorities outside the EU. However, the Act restricts the sharing of confidential information without a waiver from the source of the information.⁷⁷

Australia has amended its competition law with the effect that the ACCC is permitted under section 155AAA of the Competition and Consumer Act 2010 to disclose “protected information” to a foreign government body if it decides that such disclosure will enable or assist the body to perform its functions, or exercise its powers, and if it is considered appropriate to disclose the information in the circumstances. This gives the ACCC broad discretionary powers when it comes to sharing protected information with overseas authorities. The Act does not set out what the ACCC should take into consideration in its decision whether to disclose information. However, it is the ACCC’s policy to weigh up certain factors depending

⁷² United Kingdom Enterprise Act, Chapter 40, s243 (2002), the overseas disclosure information gateway.

⁷³ There are a number of important limitations to the disclosure of information to overseas public authorities. First, where the OFT has obtained a statement from an individual under compulsion, it will not ordinarily disclose it to an overseas public authority. Second, where an individual has voluntarily provided information as part of a leniency application, the OFT would not disclose such information to an overseas public authority for purposes of a criminal prosecution unless the individual was to be granted immunity from the requesting authority. Third, the OFT would also not disclose information contained in a corporate leniency application except for purposes of enforcement against a company or individual other than the provider of the information.

⁷⁴ ACCC v Bridgestone Corporation & Ors [2010] FCA 584.

⁷⁵ See Australia’s written contribution to the 2012 Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)36](#).

⁷⁶ The OFT has therefore proposed that amendments could be made to the legislation to allow an up-front assessment of which jurisdictions have sufficient legal safeguards. This would obviate the need to conduct a full assessment of the relevant statutory disclosure conditions each time a disclosure is to be made. OFT (2011), p. 130.

⁷⁷ Section 50(b) German Act Against Restraints of Competition.

on the circumstances. These may include: Australia's relations with other countries; the impact of disclosure on domestic and international cartel programmes, including the ACCC's leniency policy.⁷⁸

Australia's new information gateway has been used by the New Zealand Commerce Commission (NZCC) on a number of occasions. In an investigation into price fixing by air ambulance services the NZCC requested transcripts of confidential interviews of some common witnesses. The ACCC specified conditions on the disclosure of information from the transcripts during the investigation, which the NZCC agreed to in the form of a signed undertaking.⁷⁹

New Zealand is expected to enact a new statute, the Commerce Commission (International Co-operation and Fees) Bill (the "Bill"), which will enable the NZCC to provide investigative assistance to overseas regulators with which it has a co-operation agreement.⁸⁰ This will include carrying out search warrants and enforcing information notices. To ensure appropriate safeguards for reciprocity and confidentiality purposes, the Bill provides that New Zealand would not enter into a co-operation agreement "without reasonable confidence in the other party's provisions for these matters."⁸¹ The Bill will enhance co-operation generally with other jurisdictions, but is expected to be used most often with the ACCC given the close geographic and economic ties between the two countries.⁸²

Instead of directly authorising co-operation with other jurisdictions, the United States introduced legislation to mandate for the conclusion of competition-specific co-operation agreements. The International Antitrust Enforcement Assistance Act (IAEAA) adopted in 1994, allows the US to enter into bilateral "antitrust mutual legal assistance agreements" on the basis of which assistance can be provided to foreign authorities in civil or criminal investigations and information exchanged, which would normally be prohibited by law. In theory, this permits countries to conduct joint, or at least co-ordinated, antitrust investigations without the need to seek waivers from the parties supplying the information. Enabling legislation for the conclusion of third generation agreements recognised that effective international co-operation required greater ability to exchange information with overseas competition authorities.

But the IAEAA requires reciprocal commitments from the foreign jurisdiction involved. This includes equivalent legislation that guarantees sufficient protection to the confidential information that is shared. Only then can the US enter into an expanded co-operation agreement with that jurisdiction. Most countries currently lack the legal framework that would permit them to enter into this type of agreement.⁸³ Perhaps reflecting the limited additional benefits of antitrust mutual assistance treaties, thus far only Australia has taken advantage of the IAEAA. Australia entered into the US-Australia Mutual Assistance Agreement in 1999, and has relied on the agreement to obtain information at least once.⁸⁴

⁷⁸ See Australia's written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)36](#).

⁷⁹ Borrowdale (2011).

⁸⁰ This is intended to mirror the existing Australian Mutual Assistance in Business Regulation Act 1992, which enables bodies like the ACCC to assist foreign regulatory investigations, although it does not allow for information to be released to the foreign authority.

⁸¹ The Bill and explanatory materials are available on the website of New Zealand's Parliamentary Counsel Office.

⁸² See New Zealand's written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)14](#).

⁸³ Swaine (2011) p. 19.

⁸⁴ First (2001). See also Australia's written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)36](#).

4.5 *Co-operation based on confidentiality waivers provided by the leniency applicants*

The ICN states that “[t]he introduction of leniency programmes in more jurisdictions should be singled out as an increasingly important driver of co-operation between agencies, via waivers of confidentiality from immunity/amnesty applicants.”⁸⁵

Today a large number of countries have leniency/amnesty policies in place. Leniency policies induce cartel members to break ranks, report the existence of the cartel and co-operate with the investigation in exchange for immunity from or reduction of any sanctions that may ordinarily be imposed. They represent a very – if not the – most effective current tool in the fight against cartels.

Leniency applications submitted simultaneously to more than one competition authority had increased in number at the time of 2005 OECD Third Cartel Report and that pattern seems unlikely to have diminished. Simultaneous leniency applications often include waivers of confidentiality rights. Such waivers create more opportunities for multi-jurisdiction co-operation by enabling the competition authorities involved to share information they have received via the leniency applications and conduct co-ordinated investigations.⁸⁶ The value of waivers was summed up by Scott Hammond, Deputy Assistant Attorney General US Department of Justice, in a speech in 2003 at a time when an increasing number of jurisdictions were considering adopting leniency policies.

*“Just as it has become the norm that companies will simultaneously seek leniency in the United States, the EC, and Canada (and often in other jurisdictions as well), applicants commonly consent to the sharing of their information between the jurisdictions where they have sought leniency. Thus, we routinely discuss investigative strategies and co-ordinate searches, service of subpoenas, drop-in interviews, and the timing of charges with the EC and Canada in order to avoid the premature disclosure of an investigation and the possible destruction of evidence.”*⁸⁷

The adoption of a leniency policy is a tool that can facilitate co-operation with other countries that have leniency programmes. Without one, applicants have no reason to consent to information sharing with jurisdictions where leniency is not available. ASEAN has explicitly recognised this point in its Regional Guidelines on Competition Policy.⁸⁸ The simple existence of a leniency programme, however, may not be sufficient to incentivise potential applicants to come forward. Jurisdictions need credible cartel enforcement programmes in place in order for leniency policies to be effective.⁸⁹ For example, the lack of fully functioning leniency programmes backed by effective cartel enforcement has been identified as a challenge in achieving successful co-operation to tackle cross-border cartel within Southern Africa.⁹⁰

Waivers of confidentiality by the leniency applicants enable authorities to exchange information quickly and at an early stage which facilitates co-ordination of the initial steps in an investigation. This may avoid the need to use official channels in formal co-operation procedures and the ensuing delay this can entail.

⁸⁵ ICN (2007), p 31.

⁸⁶ OECD (2005), p. 33.

⁸⁷ Hammond (2003).

⁸⁸ ASEAN, *Regional Guidelines on Competition Policy*, 2010, 6.9.5.3.

⁸⁹ The three essential components that must be in place before a jurisdiction can successfully implement a leniency programme: severe sanctions, heightened fear of detection, and transparency in enforcement policies.

⁹⁰ Skata (2011), p.18.

Some competition authorities are considering making leniency conditional on waivers being granted by the applicant precisely because of their usefulness. Even if not formalised in leniency policies, the trend among the more established cartel enforcers is to require waivers and for these to be more expansive, enabling not just the exchange of information but also evidence.

In light of the growing number of leniency programmes around the world there is value in eliminating conflicting requirements between the policies.⁹¹ Competing requirements or crucial inconsistencies in leniency programmes in the relevant jurisdictions may force the applicant to choose whether and where to apply. Similarities in leniency programmes, especially with respect to the requirements placed on leniency applicants, reduce the complications inherent in a multijurisdictional filing and encourage companies to apply in multiple jurisdictions. Pragmatically speaking, by aligning a leniency programme with those of major jurisdictions such as the US and the EU (which are similar in all material aspects) a country may attract more leniency applicants.

Therefore, apart from contributing to the improvement of leniency programmes, convergence of leniency policies brings about a distinct set of benefits for their effective functioning insofar as it reduces complications in reporting global cartels in various jurisdictions. This was recognised in ASEAN's Regional Guidelines on Competition Policy.⁹²

4.6 Informal co-operation

The term “informal co-operation” has come to refer to all co-operation among competition authorities that does not include sharing confidential information or obtaining evidence on behalf of another authority. This type of co-operation is more common than the formal variety, no doubt because it is easier to conduct and it does not confront the legal constraints on the exchange of confidential information that exist in every country.

Despite its limitations, informal co-operation can contribute to more effective enforcement. Conferences, bilateral meetings, and other exchanges of know-how spread both expertise and mutual understanding. Bilateral co-operation agreements can facilitate case-specific co-operation by further clarifying the parties' understanding of each others' systems and expectations. Case specific informal co-operation can include discussion of investigation strategies, market information, witness evaluations, sharing leads and comparing authority approaches to common cases. The information or assistance obtained in these instances can streamline the investigative strategy and help focus an investigation.

Informal co-operation is often underpinned by the personal contacts and trust built through participation in the competition networks, many of which have emerged in recent years. International and regional forums, such as the OECD, UNCTAD, ICN, ASEAN, APEC, African Competition Forum and ICAP, all provide avenues for authorities and staff to get together, share ideas, practices and develop understanding of each other's legal frameworks and institutions. This helps with the creation of “pick-up-the-phone” relationships and institutionalising co-operation between authorities. The provision of capacity building is a means of building technical expertise as well as fostering mutual understanding and future co-operation.

Informal co-operation has been key to progressing a number of cartel investigations. In the *Marine Hose* case, the Australian Competition and Consumer Commission relied on information and documentation provided informally by the US Department of Justice (DOJ), as well as information

⁹¹ See BIAC's written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)57](#).

⁹² See 6.9.8 of the Guidelines.

provided formally by the UK's Office of Fair Trading.⁹³ Brazil's investigation of the *Lysine* cartel was initiated following its staff becoming aware of the US DOJ's investigation during a conference they attended in Washington. The information regarding the prosecution was already public and the US DOJ subsequently provided the Brazilian authorities with document and leads. In the Vitamin cartel, Brazil's investigation was aided by informal leads provided by the Canadian Competition Bureau.⁹⁴ This exchange was attributed to the professional relationships developed between the staffs of the Brazilian and Canadian authorities.

The absence of a formal co-operation agreement does not prevent the exchange of non-confidential information, nor does it prevent the co-ordination of surprise inspections. For example, the Competition Commission of South Africa (CCSA) conducted simultaneous raids in 2007 with the EU and the US Department of Justice on several companies suspected to have been engaging in collusive practices. It was the first time the CCSA had co-ordinated a raid with other competition authorities.⁹⁵

Practice suggests that co-operation in the detection and investigation of cartels often involves a mixture of formal and informal co-operation between competition authorities. The existence of international agreements does not guarantee co-operation, nor does their absence preclude it. The advantage of the complex web of international agreements that exist between governments or their authorities is that it offers a formal framework for co-operation, despite the legal limits. In turn, the conclusion of international agreements signals a willingness and the ability to engage in a constructive dialogue with foreign peers. The challenge for competition authorities from developing countries, in particular, is to identify the right balance between what can be achieved through informal co-operation and what requires more formal mechanisms.

4.7 Recent examples of co-operation in cross-border cartel cases

4.7.1 The Marine Hoses Case

From 1986 to 2007 the producers of marine hose operated a worldwide cartel aimed at price fixing, market sharing, customer allocation, restricting supplies and bid rigging. The companies used private email accounts, private telephone numbers and code names to conceal the cartel. One company acted as the co-ordinator, to which the other companies passed customer information about impending marine hose contracts. One company applied simultaneously for leniency in Japan, the US and the EU, exempting it from any fines and triggering co-ordinated actions among the investigating authorities.

The Marine Hose cartel case demonstrated an unprecedented level of co-operation between the UK, US and EU competition authorities investigating the case. The US Department of Justice used relatively aggressive enforcement techniques, including informants, wiretaps and FBI raids, and obtained court approval to covertly audio and videotape a meeting of the cartelists in a hotel room in Houston, Texas. It was following this meeting in May 2007 that the eight non-US executives involved in the cartel were arrested by the US authorities. At the same time as the US investigation, an eleven month long investigation by the UK's Office of Fair Trading (OFT) was carried out involving onsite searches and interviews. The European Commission also carried out a parallel investigation and conducted surprise co-ordinated inspections in France, Italy and the UK, alongside their counterparts from the national competition authorities.

⁹³ See case example below.

⁹⁴ De Araujo(2002), pp.5, 7.

⁹⁵ See South Africa's written contribution to the 2008 OECD *Roundtable on Cartel Jurisdictional Issues, Including the Effects Doctrine*, [DAF/COMP/WP3/WD\(2008\)92](#) (unpublished) and to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)51](#).

One of the groundbreaking aspects of the Marine Hose case was the plea agreements which allowed the three UK citizens to plead guilty in the US, but then travel back to the UK to be tried, and serve a sentence there. This was the first British criminal prosecution of a cartel by the OFT, and demonstrates the extent of the co-operation between the OFT and the US DOJ.

US,⁹⁶ UK,⁹⁷ EU,⁹⁸ Australian⁹⁹ and Japanese¹⁰⁰ competition authorities all brought proceedings in the cartel case. The Australian Competition and Consumer Commission (ACCC) attributes the successful outcome of its proceedings to the assistance of both the DOJ and OFT, who provided documents that were significantly important to Australia's case. The information required was obtained informally in the case of the US-based information from the DOJ but formally for the UK-based information from the OFT under the relevant sections of the UK Enterprise Act. The ACCC and OFT had also been in close co-operation informally before the formal request was made.¹⁰¹

In Japan, fines were imposed on one of the Japanese companies involved and 'cease and desist orders' were imposed by the Japan Fair Trade Commission on all the other companies involved. The case marked the first time the JFTC had issued cease and desist orders on foreign companies in an international cartel.

4.7.2 *The Air Cargo Case*

Between 2000 and 2006, a number of major international cargo airlines conspired to inflate the price of shipping goods by air. The airlines co-ordinated their action on fuel and security surcharges over the six year period. The contacts on prices between the airlines initially concerned only fuel surcharges, ensuring that worldwide airfreight carriers imposed a flat rate surcharge per kilo for all shipments. The airlines extended the cartel further by introducing a security surcharge and refusing to pay commission on surcharges to freight forwarders (their clients). The refusal to pay a commission ensured the surcharges did not become subject to competition through the granting of discounts to customers. In total 22 airlines were fined for their involvement in the cartel, and prosecutions brought against 21 individuals. Lufthansa and its subsidiary Swiss received full immunity from fines under the EU leniency programme and benefited from leniency/immunity programmes in many other jurisdictions.

On 14 February 2006, competition regulators raided the offices of airlines in countries around the world to investigate if they had been involved in the cartel. The US, EU, Australia, New Zealand, Canada and Korea all initiated proceedings. In the US the DOJ brought prosecutions against 22 airlines, imposed fines of more than USD 1.8 billion, the highest fines imposed in a US antitrust investigation to date, and sentenced 6 executives to imprisonment. In Australia the ACCC brought prosecutions against 15 airlines and imposed fines amounting to AUD 46.5 million. In New Zealand the New Zealand Commerce Commission initiated proceedings against 13 airlines and 7 executives. In Canada the Bureau received guilty pleas from 6 airlines and imposed fines of over CAN17 million. In Korea the KFTC brought prosecutions against 19 airlines, and administered fines of USD18 million. In the European proceedings the EU fined 11 air cargo carriers a total of 799 million Euro, although reductions were given for carriers which co-operated under the EU's leniency programme.

⁹⁶ *U.S. v. Bridgestone Corp.*, Criminal No. H-11-651.

⁹⁷ *R v. Whittle, Allison, and Brammar*, [2008] EWCA Crim. 2560, [2009] Lloyd's Rep. FC 77.

⁹⁸ COMP/39.406 — *Marine Hoses*.

⁹⁹ *ACCC v Bridgestone Corporation & Ors* [2010] FCA 584.

¹⁰⁰ Japan Fair Trade Commission Press Release, *Cease and Desist Order and Surcharge Payment Order against Marine Hose Manufacturers*, 22 February 2008.

¹⁰¹ See Australia's written contribution to the 2012 Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)36](#).

The global enforcement of the Air Cargo cartel demonstrated that a company with worldwide operations can no longer expect a case to be closed after it is settled in one jurisdiction. Instead, companies must reach agreements with all the other jurisdictions in which its conduct may have an effect. The Air Cargo case has highlighted that to the private sector that “enforcement agencies co-operate with one another and admissions, testimony and documents produced to one will be shared across borders.”¹⁰² However it has raised concerns among the business community as to how this information may be used in follow on class actions.

5. Challenges to effective international co-operation in cartel investigations

The increasing number of countries with cartel prohibitions and the consequent need for competition authorities to co-ordinate investigations of cartel conduct with cross-border effects has highlighted the constraints of the current system for international co-operation. Some of these constraints are common to competition authorities in both developed and developing countries; others are more specific to new and less experienced authorities.

5.1 Problems common to all jurisdictions

5.1.1 Exchange of confidential information

One of the most sensitive areas of co-operation concerns the exchange of confidential information and data between competition authorities. A recent ICN Report highlights these shortcomings.¹⁰³ The reasons for these problems can be found in the restrictions on the sharing of confidential information under the respective domestic laws. Most national laws do not permit the sharing of confidential information from a competition authority’s investigation file, nor do they permit an authority to use its compulsory gathering powers on behalf of a foreign competition authority. With the very few exceptions described in the sections above, the majority of instruments and agreements in the antitrust field do not permit the exchange of confidential information.

For example, Turkey found that the absence of a formal co-operation mechanism authorising the exchange of confidential information with the European Commission limited its ability to investigate cartels. In one case, Turkey investigated suspected cartel activity in the gas insulated switchgear industry, which appeared to operate outside Turkey, but affected the Turkish market as well. The same suspected cartel was simultaneously investigated by the European Commission. Despite Turkey's request for co-operation, however, the Commission was unable to exchange any confidential information in the absence of an instrument authorising the exchange of confidential information. The inability to obtain information from abroad significantly impeded Turkey's ability to investigate this cartel.¹⁰⁴

In the *Vitamins*¹⁰⁵ and *Graphite Electrodes*¹⁰⁶ cases, the 2003 OECD Hard Core Cartel report noted that other competition authorities came to know about the cartels and opened investigations when the prosecutions in the EU, United States and Canada became public. In a few cases, informal discussions with the US/EU authorities, and their supply of non-confidential information, helped the other competition authorities.¹⁰⁷ However, many OECD members emphasised that their investigations of these cartels were

¹⁰² Evans and Booth (2010).

¹⁰³ ICN (2007).

¹⁰⁴ OECD (2005), p. 32.

¹⁰⁵ Case COMP/E-1/37.512 – *Vitamins* [10.01.03] OJ L 6/1, see paras 155-157.

¹⁰⁶ Case COMP/E-1/36.490 — *Graphite electrodes* [18.07.01] OJ L 100/1.

¹⁰⁷ For example, Brazil’s informal co-operation with the US in the *Vitamins* case, see above.

hampered by not being able to access information held by foreign competition authorities, but protected under confidentiality restrictions.

In the antitrust context the rationale for limiting authorities' powers to freely exchange confidential information is to avoid reducing the incentives for firms to co-operate under authorities' leniency policies, and therefore the effectiveness of national cartel enforcement programmes as a whole.

Similarly, there is a concern that, once exchanged, confidential information submitted to an authority in one jurisdiction may get into the public domain (e.g. because of the more relaxed rules on access to a competition file in the requesting country) or may simply become discoverable in the receiving jurisdiction. This may expose the source of the information to the risk of private actions and ensuing damages. This risk is particularly high if the information can be used before courts where punitive damages can be awarded to successful plaintiffs, as is the case of treble damages in the US. Such concerns have recently surfaced following the judgement of the Court of Justice of the European Union in the *Pfleiderer* case.¹⁰⁸ The Court concluded that plaintiffs in private actions could, under certain circumstances, have access to the competition authority's file, including evidence submitted under the leniency programme. According to the Court of Justice, it is up to each national court of the EU Member States vested by a damage claim to balance, on a case-by-case basis, the interest of the private litigant to recover damages from anti-competitive conduct versus the legitimate concern over the effectiveness of the leniency programme.

Box 5. *Pfleiderer*: Access to leniency documents and private enforcement of EU competition law

The issues surrounding granting access to leniency documents have been the focus of a recent European case *Pfleiderer v Bundeskartellamt*.¹⁰⁹ In *Pfleiderer*, a customer of the undertakings which had been fined for involvement in a cartel of decorating paper, requested full access to the case file from the Bundeskartellamt. When the Bundeskartellamt refused access to the leniency documents, *Pfleiderer* took the matter to the local German court (Amtsgericht). The Amtsgericht made a reference to Court of Justice of the European Union (ECJ), on the question of whether refusing access to leniency documents was contrary to EU law. In its decision the ECJ recognised that allowing third parties to access leniency documents could compromise leniency programmes. However, this was not a sufficient reason to defeat the well established right for individuals to claim damages for loss caused by anti-competitive conduct.¹¹⁰ In the absence of a binding EU regulation on the subject, it is therefore up to national courts to decide on a case-by-case basis whether documents submitted under leniency programmes should be made public.

Some commentators expressed concern that the judgment heightened the tension between leniency policies and private action, with the risk of "*dire implications for cartel enforcement*."¹¹¹ It is argued that infringing firms' incentives to enter into an amnesty/leniency programme will be critically affected if the evidence they provide can be used against them by private plaintiffs. However, such fears may be overstated. First the increasing size of penalties, the inherently unstable nature of cartels and a general drive towards good corporate governance should continue to encourage companies to enter leniency programmes. Second, there may be indirect ways of seeking these documents, and, in any case, there are unlikely to be many situations in which grounds for action are entirely dependent on 'fringe' documents contained within competition authority case files.¹¹² Following the ECJ's judgment in *Pfleiderer*, the case was sent back to the German courts and on 30 January 2012 the Bundeskartellamt's original decision to refuse access to leniency documents was upheld by the Amtsgericht.¹¹³ The ruling represents an important precedent for Germany, and the Federal Ministry of Economics intends to codify the protection of leniency documents in the amendments to the German competition law which are currently in progress.¹¹⁴

¹⁰⁸ C-360/09, *Pfleiderer AG v. Bundeskartellamt*, judgment of the European Court of Justice of 14 June 2011.

¹⁰⁹ Ibid.

¹¹⁰ Ibid, see paragraphs 26 - 28 of judgment.

¹¹¹ Stephan (2011).

¹¹² Brown (2012).

¹¹³ Bundeskartellamt Press Release, *Decision of Local Court of Bonn Strengthens Leniency Programme*, 30 January 2012.

¹¹⁴ Ibid.

5.1.2 *Different definitions of what constitutes “confidential information”*

There is no common definition of confidential information in the competition field. Differences in how competition authorities or courts define confidential information in cartel cases can represent an obstacle to effective co-operation. Since, as discussed above, many international co-operation instruments do not allow for the exchange of confidential information, in most cases the requested authorities must demonstrate that the information is not confidential before they are allowed to share it with the requesting authority.¹¹⁵ This can be a time consuming process and errors can expose the requested authority to legal liabilities.

Some authorities define information as confidential by the way it is collected (i.e. any information collected during an investigation is confidential). Other authorities consider the nature of the information, whereby information is confidential if its disclosure would harm the commercial interest of the source which provided it (i.e. information related to price, sales, costs, customers and suppliers). In the latter case, it can be difficult to distinguish between what is commercially sensitive or not. If in doubt, the risk of litigation may discourage authorities from disclosing such information to foreign authorities.¹¹⁶

5.1.3 *Civil/administrative versus criminal regimes*

Cartels are criminally prosecuted in some jurisdictions, but not others, and this places additional limitations on the ability of the respective authorities to exchange information and evidence between civil and criminal jurisdictions, and the ability to assist in their respective investigations.

For example, on one occasion the European Commission, the US Department of Justice, the JFTC and the Canadian Competition Bureau mounted co-ordinated actions against a suspected world-wide speciality chemicals cartel. However, the evidence gathered by the EU in its dawn raids was off-limits to the US investigators because of the prohibition and use restrictions imposed by what was then Article 20 of EU Regulation 17/1962, which prevented its use for criminal purposes.¹¹⁷

As discussed above, criminal jurisdictions may be able to use MLATs to obtain foreign-located documents and witness testimony in international cartels investigations. However, this is limited to jurisdictions which both treat cartels as a criminal infringement. The US for example, cannot share confidential information with the EU pursuant to a MLAT because the EU imposes only administrative penalties for competition law violations. There is, consequently, a lack of “dual criminality”.

Criminal sanctions for cartel conduct have been introduced or are currently being considered in a number of countries. This could, potentially, facilitate co-operation and create a “virtual” alliance among jurisdictions that have criminalised cartels. As a previous Assistant Attorney General at the US Department of Justice remarked “[h]aving colleagues in other jurisdictions focused on criminal enforcement also leads to greater success in our own prosecutions here at home, with easier access to evidence and witnesses.”¹¹⁸ That said, this trend towards criminalisation is not yet matched by a comparable criminal enforcement record. Outside of the US, very few jurisdictions have actually prosecuted cartels under their criminal

¹¹⁵ Similar issues arise with regard to information which is considered to be covered by the client-attorney privilege in one jurisdiction but not in other jurisdictions. The OECD Best Practices for Information Exchange provide useful guidance to competition authorities in cases where the rights of defence and legal systems differ (Section IIC “Protection of Legal Professional Privilege”).

¹¹⁶ For a discussion of the definition of confidential information and its implications see ICN (2007), p.26-27.

¹¹⁷ Joshua, Camesasca, Jung (2008), p. 25.

¹¹⁸ Barnett (2006).

provisions, but instead continue to investigate their cartels under their civil/administrative powers. This significantly limits the scope for co-operation on parallel investigations.

For example, many developing and emerging economies have not criminalised cartel conduct. In addition, many of these countries do not have a fully functional civil/administrative cartel programme in place. Pursuing individual sanctions has long been considered the most effective way to deter and punish cartel activity by holding culpable individuals accountable through seeking jail sentences. However, the criminalisation of cartel conduct has some way to evolve in both developed and developing countries before it becomes a means for effective co-operation as opposed to a hurdle.

5.1.4 Other common hurdles

Other common hurdles include:

- Language barriers or shortcomings in the internal organisation of competition authorities that results in a lack of competences to co-operate effectively.
- Practical difficulties in the co-ordination of investigations, for example if investigations are at different stages between the different authorities involved or if difficulties arise due to the different time zones.
- Resource constraints for making or responding to requests, particularly where formal channels are required. Co-operation can be resource intensive, detracting scarce resource from other enforcement activities.¹¹⁹ Resource constraints can also hinder measures to try and address some of the challenges. For example, in the US “taint teams” are used to sift and filter information received before it is passed to the case team to reduce the risk of compromising the integrity of the investigation in the receiving authority, is an investment that may not be available to smaller authorities.

5.2 Challenges of specific relevance to developing and emerging economies

There is relatively little evidence of effective cartel enforcement co-operation between competition authorities in developing countries and between developed and developing country authorities. This, in part, reflects that a number of jurisdictions have only recently adopted competition laws and so have only been enforcing their laws for a relatively short period of time. Some may not have begun to target cartel activity as a priority in their enforcement programmes. It is also true, however, that many developing countries and new competition authorities have not yet developed ongoing bilateral or multilateral relationships with other jurisdictions that could promote co-operation.

¹¹⁹

In a 2012 report to Congress the US Department of Justice noted the difficulties international co-operation entails: “In our enforcement efforts we find parties, potential evidence, and impacts abroad, all of which add complexity, and ultimately cost, to the pursuit of matters. Whether that complexity and cost results from having to collect evidence overseas or from having to undertake extensive inter-governmental negotiations in order to depose a foreign national, it makes for a very different, and generally more difficult investigatory process than would be the case if our efforts were restricted to conduct and individuals in the U.S. . . . Consequently, the Division must spend more for translators and translation software, interpreters, and communications, and Division staff must travel greater distances to reach the people and information required to conduct an investigation effectively and expend more resources to co-ordinate our international enforcement efforts with other countries and international organizations”, US DoJ (2012).

5.2.1 *Institutional and investigatory impediments*

New and less experienced competition regimes need to establish credible competition institutions and develop the necessary instruments and policies to become effective cartel enforcers. Until they do so, they may not have the resources or experience to harness the benefits of greater co-operation in the same manner as more experienced jurisdictions.¹²⁰

Lack of investigatory powers, such as the ability to conduct unannounced dawn raids, impedes the ability of an authority to take part in co-ordinated dawn raids with foreign authorities. A number of countries have amended their laws to align themselves to the standard of more experienced jurisdictions to be considered, in theory, for joint evidence gathering exercises.¹²¹ The lack of fully functional corporate leniency programmes, as discussed above, is also challenge to effective co-operation in the investigation of international cartels.

As with any new authority, human resource capacity is a challenge. It takes time to develop the requisite skills and experience. Even where competition authorities are conferred with strong powers, for example to compel the production of documents and conduct surprise inspections, these may be hampered by inexperience and a lack of institutional capacity.

Competition authorities may make mistakes in their early enforcement efforts. South Africa's first use of its search and seizure powers led to the High Court setting aside the Commission's summons on procedural grounds and also because it had infringed on the rights of the respondents by informing the media about the search and seizure operation and facilitating their access to the premises of the respondents during the raid.¹²²

National courts may impede competition authority efforts if the judiciary has insufficient knowledge or experience of competition law. In Senegal, the National Competition Commission's only cartel decision to date was annulled by the Administrative Tribunal on the basis of a narrow interpretation of cartel conduct as price fixing under the law.¹²³

The priority for many new or young competition authorities will be the building of institutional capacity. Consequently, the focus of international co-operation extended to these authorities has centred, perhaps not unreasonably, on the provision of capacity building and technical assistance.

Proactive enforcement against cartels may not be a new competition authority's first priority. It may be premature, therefore, to expect newer authorities to prioritise international co-operation in competition law enforcement when some are still facing the challenges of establishing their competition authorities, and others are struggling to enforce their own domestic laws.

¹²⁰ UNCTAD (2011), p.33.

¹²¹ For example, Chile and Mexico recently amended their competition laws (in 2009 and 2010 respectively), which improved their investigatory powers, including the ability to conduct surprise inspections.

¹²² *Pretoria Portland Cement Company Ltd. and Another v Competition Commission and Others* (64/2001) [2002] ZASCA 63 (31 May 2002).

¹²³ See Senegal's written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)18](#).

5.2.2 *Lack of trust and confidence in legal systems*

Trust is central to building co-operative relationships between authorities.¹²⁴ In cartel enforcement, trust is an essential ingredient for competition authorities seeking to co-ordinate searches, develop co-ordinated investigative strategies and exchange information.

A lack of trust can be caused by a weak legal framework in the country seeking co-operation, insufficient transparency of the competition authority's procedures and inadequate safeguards for due process. This heightens perceptions that information may be leaked, putting the investigations of foreign authorities at risk and undermining the effectiveness of their cartel enforcement programmes and associated tools. There may be a lack of confidence in the ability of the requested country to provide information of the quality and/or standard necessary for the requesting country to use it in its own investigation. This is a higher risk with newer authorities that have not yet established the necessary safeguards or acquired sufficient experience to handle such requests.

This is a Catch 22 situation. If newer competition authorities do not start to co-operate, they will not develop the expertise and implement the safeguards necessary to handle the responsibilities that co-operation requests entail. A degree of trial and error is arguably a cost inherent in building the experience and capacity required to establish trust and confidence between competition authorities. Otherwise it reinforces the perception that countries with more advanced competition regimes have little incentive to co-operate with countries whose enforcement of competition law was considered inadequate.¹²⁵

Building trust between competition authorities and the business community is also important. Firms need to have confidence that confidentiality waivers will not result in compromised corporate information. Prospective leniency applicants need to have confidence in the operation of authorities' leniency programmes, and to be able to predict with a high degree of certainty how they will be treated if they seek leniency; otherwise, they will not come forward to report cartel activity in the first place.¹²⁶

5.2.3 *Export cartels*

The existence of export cartels presents a particular challenge for improving international co-operation in cartel investigations. Export cartels are cartels based in one jurisdiction but which produce their effects exclusively in another jurisdiction.¹²⁷

Often, these are not prohibited by their "home" jurisdiction, if the competition law only prohibits cartels which have an effect within its own territory. Several countries, including developed and developing countries, maintain explicit exemptions for export cartels, some requiring notification of their activities and a few others requiring official authorisation. If the relevant documents are in the public domain, foreign competition authorities can obtain information about the cartels' existence and membership. However, implicit exclusion of export cartels from domestic antitrust laws effectively cloaks their cartels from foreign authorities.

The explicit or implicit targets of export cartels are often developing countries. Although more developing countries have adopted competition laws in recent years, and the application of the effects

¹²⁴ See for example the written contributions of India ([DAF/COMP/GF/WD\(2012\)52](#)) and South Africa ([DAF/COMP/GF/WD\(2012\)51](#)) to the 2012 OECD Global Forum on Competition.

¹²⁵ WTO (2002), comments from Thailand at p. 4.

¹²⁶ Brandenburger (2010).

¹²⁷ OECD (1993).

doctrine could in theory provide a basis to prosecute export cartels, in practice they are unlikely to do so successfully. The affected jurisdiction may have difficulty obtaining the evidence concerning the cartel if it is located in a different territory.¹²⁸ Export cartel exemptions prevent the competition authorities of the state in which a company is domiciled—and therefore holding the most information about the conduct and having the best access to the companies in question—from assisting those that are harmed by anti-competitive behaviour (the target states).¹²⁹ But even if there were no such exemptions, the application of the effects doctrine would make it difficult for competition authorities to prosecute their own firms for harm done to consumers elsewhere.

International co-operation is held back by challenges that require the attention of developed and developing jurisdictions in different ways. As the former Director General of DG Competition stated: “[o]nce we have overcome these difficulties, significant advantages are likely to arise from such advanced co-operation.”¹³⁰

6. International co-operation in tax cases

The challenges associated with international co-operation are not unique to the area of competition. Enforcement bodies in other policy areas such as tax, anti-corruption and money laundering face similar challenges to competition authorities. Some of the tools which have been adopted in these policy areas to deal with co-operation challenges may provide fertile ground for future discussion on their potential application to cartel enforcement.

This section will analyse the experience in the area of tax. The challenges faced by tax authorities in dealing with international tax cases are analogous to a number of those encountered by competition authorities, in particular with regard to information sharing. The use of open multilateral instruments alongside bilateral agreements, work sharing arrangements and a legal framework for information sharing, are some of the ways in which tax authorities have sought to overcome these challenges.

6.1 *Instruments to facilitate co-operation in cross-border tax cases*

There are several different instruments available for international co-operation in the tax area. These include international treaties, both bilateral and multilateral, EU instruments (for its member countries), and domestic laws.¹³¹

¹²⁸ Positive comity would not necessarily be the solution. If the alleged practice is not an infringement in the jurisdiction where the firms are based, the competition authority there may lack the legal means to investigate.

¹²⁹ Becker (2007).

¹³⁰ Lowe (2006).

¹³¹ Besides the bilateral and multilateral instruments which have been entered into specifically for co-operation on tax matters, information exchange can also take place through other international legal instruments which are not tax-specific, such as MLATs, which are applicable to criminal tax matters.

6.1.1 *Bilateral Tax Treaties*

- *Double taxation agreements.* There are around 3000 double tax treaties in force around the world. These treaties are usually based on the OECD¹³² and/or the UN Model, which often constitute the basis for negotiation between countries.¹³³ A double tax treaty is an agreement between two States to co-ordinate the exercise of their taxing rights, with a view to eliminate or reduce double taxation. Bilateral tax treaties eliminate/reduce double taxation by either allocating exclusive taxing rights to one of the contracting States (residence or source state) or allocation taxing rights to one State and at the same time obliging the other State to grant double taxation relief. Double tax treaties also constitute the legal basis for co-operation between the competent authorities contracting States in order to prevent and be able to respond to tax avoidance and evasion in relation to any taxes whether or not they are within the scope of the treaty. Some double tax treaty also provide for assistance in the collection of taxes.
- *Bilateral information exchange agreements* are concluded where there is no tax system in place in one of the signatory countries. These arrangements often provide for structured exchange programmes specifying the type of information to be exchanged, the use of information in criminal investigations, and the sharing of costs. A number of these are based on the OECD's Model Agreement on Exchange of Information in Tax Cases.
- *Tax information exchange agreements* (TIEAs) are bilateral agreements between two jurisdictions providing a legal basis for administrative co-operation in tax matters. They are often negotiated on the basis of a Model issued by the OECD in 2002¹³⁴ and their number is growing exponentially. They provide for exchange of information on request and, subject to certain conditions, allow for the presence of foreign officials relating to a specific criminal or civil tax investigation or civil tax matters under investigation.

6.1.2 *Multilateral Tax Treaties*

There are a number of multilateral tax treaties which provide for international co-operation in the area, the most relevant of which is the Convention on Mutual Administrative Assistance in Tax Matters as amended in 2010. The Convention expressly provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance

¹³² The OECD Model Tax Convention on Income and Capital (the Model Convention) aims to settle on a uniform basis the most common problems that arise in the field of international juridical double taxation. Member countries, when concluding or revising bilateral conventions should conform with this Model Convention. The worldwide network of tax treaties based upon the Model Convention helps to avoid the danger of double taxation by providing clear consensual rules for taxing income and capital. It also includes specific provisions on international co-operation, namely on information exchange and assistance in the collection of taxes.

¹³³ The two Model Tax Conventions are broadly similar in substance concerning the information exchange provision. There is some difference in language between Article 26 of the United Nations (UN) Model and the OECD Model. In the UN Model the restrictions on information disclosure are not as broad in scope and it contains more explicit language on the implementation procedures for information sharing.

¹³⁴ The Model Agreement on Exchange of Information in Tax Cases (the Model Agreement) is intended to promote international co-operation in tax matters through the exchange of information. The Model Agreement grew out of the work undertaken by the OECD to address harmful tax practices. The lack of effective exchange of information is one of the key criteria in determining harmful tax practices. The Model Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices. The Model Agreement, which was released in April 2002, is not a binding instrument but contains two models for bilateral agreements. A number of bilateral agreements have consequently been based on the Model Agreement.

and evasion. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims. The number of Parties to the Convention is constantly increasing.

The Convention was originally developed jointly by the Council of Europe and the OECD and opened for signature by the member states of both organizations on 25 January 1988. The Convention facilitates international co-operation for an improved operation of national tax laws, while respecting the fundamental rights of taxpayers. It applies to a broad array of taxes, from direct taxes (including capital gains and net wealth taxes) and virtually every form of indirect taxes (but excluding customs duties) levied at both the national and local level. The Convention provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. This co-operation ranges from exchange of information, including automatic exchanges,¹³⁵ to the recovery of foreign tax claims. The Convention provides for tax examinations abroad and simultaneous examination of taxpayers. The latter involves two or more tax authorities co-ordinating their efforts to examine simultaneously and independently, each on its own territory, taxpayers that are closely affiliated (for example, a parent and subsidiary). At each stage of the examination, the information gathered is regularly exchanged.

In April 2009, the G20 called for action “to make it easier for developing countries to secure the benefits of the new co-operative tax environment, including a multilateral approach for the exchange of information.”¹³⁶ In response, the OECD and the Council of Europe developed a Protocol amending the multilateral Convention on Mutual Administrative Assistance in Tax Matters to open it up to all countries and bring it in line with the international standard on exchange of information for tax purposes.

6.1.3 *EU Directives and Regulations*

Within the European Union, there are a number of Directives and Regulations which provide for international co-operation in the tax area. Council Directive 2011/16/EU of 15 February 2011 on administrative co-operation in the field of taxation (which repealed Directive 77/799/EEC) establishes rules and procedures for the co-operation between EU countries with a view to exchanging information relevant to the administration and enforcement of national laws in the field of taxation. It applies to all taxes except value added tax (VAT), customs duties and excise duties covered by other EU legislation on administrative co-operation between EU countries. Specifically, Council Regulation (EC) No 2073/2004 of 16 November 2004 on administrative co-operation in the field of excise duties strengthens co-operation between tax authorities in the matter of excise duties. It lays down rules and procedures enabling the competent authorities of the Member States to co-operate and to exchange with each other, notably by electronic means, any information that may help them to assess excise duties correctly. Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative co-operation and combating fraud in the field of value added tax sets out rules and procedures for co-operation and exchanges of information between European Union (EU) countries’ competent authorities responsible for applying value added tax (VAT).

The EU tax system allows representatives of one member country to be present and gather information during a tax inspection in the territory of another member state. It also includes provisions promoting timely and effective co-operation between national tax administrations.¹³⁷

¹³⁵ Automatic exchange of information (also called routine exchange by some countries) involves the systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc).

¹³⁶ OECD Centre for Tax Policy and Administration website, Exchange of Information section, update January 2012.

¹³⁷ In particular, it requires maximum promptness in the response to a request by explicitly imposing time limits; and encourages countries to exchange audit experiences and reports.

6.1.4 Domestic laws

Some jurisdictions have enacted domestic legislation which allows their tax authorities to exchange information with certain countries on a unilateral basis. Such legislation must generally specify a number of details, for example the countries with which it wishes to be bound, the applicable procedures, conditions, limitations and safeguards. Domestic legislation may in specific circumstances constitute a viable means of filling the gaps in a jurisdiction's treaty network and therefore provide for measures that would otherwise not be available.

Box 6. Operation Green Fees – A case example

Over the last two years, law enforcement and tax authorities around Europe have been fighting the criminal networks involved in an estimated 5 billion Euro worth of damages to European taxpayers, caused by VAT-fraud within the EU Emission Trading System (ETS). In operations during 2010, several hundred offices all over Europe were raided and more than 100 people arrested.

In the latest operation on 17 December 2010, the Italian Guardia di Finanza, as part of the so-called Operation Green Fees, carried out raids on about 150 companies in eight different regions of Italy. These operations occurred just a few weeks after the Italian Power Exchange (G.M.E) halted all trading in carbon credits due to a high volume of abnormal transactions. The potential VAT-loss is estimated to reach 1000 million Euro.

Earlier in 2010 authorities in France, Germany, Spain, United Kingdom and other countries conducted numerous operations against criminal networks involved in carbon credit fraud. The biggest swoop, initiated by Germany, saw more than 2500 officers involved across Europe and in non-EU countries.

Indications of suspicious trading activities were noted in late 2008, when several market platforms saw an unprecedented increase in the volume of trade in European Unit Allowances (EUAs). Market volume peaked in May 2009, with several hundred million EUAs traded in e.g. France and Denmark. At the time the market price of 1 EUA, which equals 1 tonne of carbon dioxide, was around 12.5 Euro. To prevent further losses, a number of EU member states, had to change their taxation rules on these transactions. As a result, the market volume dropped by up to 90%.

Missing trader intra-community fraud (MTIC) is the theft of Value Added Tax (VAT) from a government by organised crime groups who exploit the way VAT is treated within EU member states. Carbon credit fraud is a variation on VAT carousel fraud.

The success of Operation Green Fees was due to the extensive use of international co-operation tools between Italy, other EU members and several countries from Central America to Far East. This took advantage of the different legal bases used for civil and criminal procedures as well as co-operation on intelligence with Tax Administrations, Customs, Financial Intelligence Unit Authorities and police forces.

6.2 Information sharing mechanisms and other forms of co-operation under the OECD instruments

The Convention, the Model Convention and the Model Agreement deal specifically with information exchange in tax cases. Chapter III of the Convention deals with different forms of assistance and its Section I focuses in particular on different forms of information exchanges. Article 26 of the Model Convention provides a framework for information exchange on request, spontaneously and automatically.¹³⁸ Article 5 of the Model Agreement provides for exchange of information on request.¹³⁹ It is important to note that exchange of information under these various texts is mandatory due to the use of

¹³⁸ Article 26, Model Tax Convention on Income and on Capital (2008).

¹³⁹ Article 5, Model Agreement on Exchange of Information on Tax Matters (2002).

the word “shall”. In 2006, the OECD Committee on Fiscal Affairs (CFA) approved a new *Manual on Information Exchange* (the Manual).¹⁴⁰ The Manual provides practical assistance to officials dealing with exchange of information for tax purposes and may also be useful in designing or revising national manuals. It has been developed with the input of both OECD member and non-member countries. The Manual follows a modular approach: it first discusses general and legal aspects of exchange of information and then covers the specific ways of sharing information included in the various OECD instruments discussed above:

- *Exchange of Information on Request*: This situation occurs when one competent authority asks for particular information from another competent authority. Typically, the information requested relates to an examination, inquiry or investigation of a taxpayer’s tax liability for specified tax years.
- *Spontaneous Information Exchange*: Spontaneous exchange of information is the provision of information to another contracting party that is foreseeable relevant to that other party and that has not been previously requested. Because of its nature, spontaneous exchange of information relies on the active participation and co-operation of local tax officials (e.g. tax auditors, etc). Information provided spontaneously is usually effective since it concerns particulars detected and selected by tax officials of the sending country during or after an audit or other type of tax investigation.
- *Automatic (or Routine) Exchange of Information*: Automatic exchange of information (also called routine exchange by some countries) involves the systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc). This information is obtained on a routine basis in the source country (generally through reporting of the payments by the payer (financial institution, employer etc). Benefits of automatic exchange related to the possibility to match the foreign source information received with the recipient tax data base (often using bridging programmes to capture the relevant information) and automatically matched against the income reported by a taxpayer.
- *Industry-wide Exchange of Information*: As international transactions have increased, so too has the need for tax treaty partners to seek assistance from each other by sharing knowledge and expertise on particular industries and special issues of mutual interest. Industry-wide exchanges of information can provide an answer as they entail the exchange of tax information specifically concerning a whole economic sector and not taxpayers in particular. The purpose of such an exchange is to secure comprehensive data on worldwide industry practices and operating patterns, enabling tax inspectors to conduct more knowledgeable and effective examinations of industry taxpayers.

The OECD has developed guidance on other forms of co-operation between tax authorities in different jurisdictions which inevitably include the need to exchange information. These other forms of co-operation include:

- *Simultaneous Tax Examinations*: Arrangement between two or more countries to examine simultaneously and independently, each on its territory, the tax affairs of tax payers in which they have a common or related interest with a view to exchanging any relevant information which they obtain. As a compliance and control tool used by tax administrations, simultaneous tax examinations are effective in cases where international tax avoidance and evasion is suspected.

¹⁴⁰

Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, approved by OECD Committee of Fiscal Affairs on 23 January 2006.

Several countries that have been carrying out simultaneous tax examinations for a number of years report that they are a useful and productive control tool. There is a growing interest in particular in multilateral simultaneous tax examinations given the increasing multilateral dimension of tax evasion schemes and the need for international co-operation between tax administrations. The guidance developed by the OECD includes suggestions to have a tax official from one of the participating countries present during a simultaneous tax examination.

- *Tax Examinations Abroad*: Enables tax administrations, when requested and to the extent allowable by domestic law, to permit authorised tax officials of another country to participate in the conduct of tax examinations carried out by the requested country. This helps dealing with the limitation of standard ways of exchanging information which has traditionally been carried out in writing. Written procedures can often be time-consuming and may not be as effective as other compliance methods when rapid action on the part of the tax administration is required. Participating to tax examinations abroad also enables a tax administration to obtain a clear and detailed understanding of business and other relations between a resident of a country who is the subject of a tax examination and his foreign associates.
- *Joint Audits*: Joint audits are an innovative form of co-operation between countries in the tax area. Bilateral or multilateral joint audits have great potential for transfer pricing audits etc. A joint audit is defined as an arrangement whereby participating countries agree to conduct a co-ordinated audit of one or more related taxable persons (both legal entities and individuals) where the audit focus has a common or complementary interest and/or transaction. Joint audits proved extremely useful to face the unprecedented increase in the mobility of taxpayers and cross-border economic activity. Multinational corporations operate globally; their operations and financial affairs are complex and cross many tax jurisdictions. This environment makes it extremely difficult for any single tax jurisdiction to fully engage with taxpayers operating on a global level.

6.3 *Drivers, challenges and lessons for competition authorities*

The key driver for co-operation between tax enforcers is the principle of residence,¹⁴¹ under which companies and individuals are taxed on their income, wherever in the world it arises, at the rate specified by the jurisdiction in which they reside. Seen from a national perspective, countries seem unlikely to have an incentive to provide information to other jurisdictions because by providing information to foreign tax authorities a country makes itself less attractive to foreign investors. The national interest, therefore, would appear to lie precisely in not providing information, thereby becoming a relatively more attractive location for investors. Against this, however, must be weighed the potential benefits of reciprocity: providing information to others may be the quid pro quo for receiving information from them. The pattern of incentives to provide information is thus potentially complex, as countries will have to weigh diverging interests.¹⁴²

Tax enforcers face a number of obstacles/challenges to information sharing, some of which are identical to those faced by competition authorities and discussed in the first part of this paper. These include (i) double incrimination, (ii) interest test, (iii) bank secrecy restrictions, (iv) general legal restrictions, (v) anonymity, (vi) inability of receiving country to make full use of the information, and (vii) domestic demands given higher priority than overseas information requests.

¹⁴¹ As opposed to the “source principle” according to which taxation occurs in the jurisdiction in which the income arises.

¹⁴² For a review of the literature on the self-interested incentives of countries to provide information to foreign authorities, see Keen and Ligthart (2006).

- A first obstacle is related to the fact that some countries adhere to the principle of double incrimination, meaning they are unable to share information unless the potential offence would also be a tax crime if committed in their own jurisdiction. Where the definitions of tax crimes are similar, this principle will generally not be an impediment to information exchange. Matters are more complicated if countries have different notions of what constitutes a tax crime.
- A further set of difficulties arise when countries apply the interest test, meaning that they are not able to share information on matters in which they do not themselves have a tax interest. Very much like the discussion above on export cartels, if a certain conduct is not considered illegal in the country requested to disclose information, this country will not be able to co-operate with countries where that conduct is illegal.
- Bank secrecy rules may allow the tax authorities access to bank information only in relation to criminal tax matters, not civil tax matters. In addition to bank secrecy restrictions, there may be other kinds of legal restrictions that block access to bank information. For example, access to bank information may not be automatic but necessitates a request in the context of a specific tax audit.
- An obstacle to co-operation may be the fact that financial institutions (which are the source of the information) do not have enough information to associate the details of a particular account or other asset with a particular individual or company, making it difficult for it to respond to a specific request from the tax authority. A further level of complexity is due to the difficulty (or sometimes impossibility) of linking the financial information to the ultimate beneficiary. In the case of legal trusts, for example, the information required for tax purposes may include the settlor, the beneficiary, and the trustee.
- Another set of potential obstacles may arise when the information is exchanged but cannot be used by the recipient, as matching information received to a country's own records is likely to fail if methods of storing and organising the information across countries do not align.
- More "practical" obstacles can arise from tax administrations being greatly stretched and requests from domestic tax administrators are given higher priority than information requests from abroad.

Despite these obstacles, the sharing of taxpayer-specific information between national tax authorities has emerged as the central issue on the international tax policy agenda. Countries and international organisations have devised tools to foster cross-border co-operation. Some of these initiatives may provide insights to other enforcement areas facing similar challenges, including competition policy.

First, the tax experience illustrates the importance of open multilateral instruments alongside bilateral instruments. The availability of multilateral co-operation frameworks ensures that jurisdictions which do not have the resources to engage in negotiating a network of bilateral agreements can still access multilateral co-operation, and it facilitates co-ordinated efforts in examining cross-border cases.

Second, the effectiveness of the enforcement action on cases with a cross-border impact can be strengthened by so-called "work sharing arrangements". The experiences with joint audits, tax examinations abroad and simultaneous examination of tax payers are highlighted as important aspects of multilateral co-operation.

Finally, the variety of types of information sharing mechanisms shows the value of developing a legal framework at the multilateral level to formalise and categorise information exchange, with ensuing duties and obligations between authorities.

7. Conclusion

This paper highlights the successes and shortcomings in international co-operation in cartel cases. Co-operation appears to have increased steadily over the years, and takes place in a variety of ways through a range of different formal and informal mechanisms at the bilateral and multilateral levels. The OECD's instruments have contributed to fostering a climate of co-operation.

Nevertheless, the challenges discussed highlight that important barriers remain at different levels (i) between experienced authorities; (ii) between the more experienced authorities and the newer authorities in developing and emerging economies; and (iii) among the newer authorities in developing countries. The current co-operation methods and instruments are all useful up to a point, but none adequately addresses the various limitations to competition authorities working together and exchanging confidential information. Given the limits that continue to beleaguer effective co-operation between cartel enforcers in OECD member countries, the additional challenge is to establish the conditions, incentives and tools that will also bring the newer authorities in developing countries into the international cartel enforcers' network.

Some of the recommendations for improving international co-operation that were made more than a decade ago by the U.S. International Competition Policy Advisory Committee (ICPAC)¹⁴³ may be worth revisiting. ICPAC recommended "work sharing" in relation to multi-jurisdictional investigations.¹⁴⁴ This could range from joint teams on investigations to *de facto* lead authorities if some jurisdictions were prepared to relinquish control of cases significantly to permit such advanced co-operation. This concept, a form of enhanced comity, has been raised on several occasions, notably by the business community, and the debate continues. It has already been successfully applied to international co-operation efforts between tax authorities.

Discussions have also covered the costs and benefits of moving from a patchwork of bilateral co-operation agreements to a multilateral platform, noting that regional multilateral platforms are already in place with varying degrees of success. Multilateral agreements in other policy areas have underpinned the significant progress made in international co-operation between enforcement bodies and facilitated the co-ordination of different legal systems.

More specific solutions have also been considered. These include:

- *Liberalising laws to enable information sharing.* Restrictions on information sharing by competition authorities are broader than those applicable to some other areas of law and broader than necessary to protect confidential information. Truly effective action against cartels will require additional countries to adopt laws that permit competition authorities to share confidential information in appropriate cases and subject to adequate protections.
- *A common definition of confidential information.* A common understanding of what confidential information is for the purposes of co-operation between competition authorities could be developed. Improvements could also be made in understanding what constitutes "agency information" as opposed to confidential information to facilitate exchange of the former. Competition authorities are normally permitted, but not required by law, to limit access to internal information such as the nature or status of their investigations, their investigation theories, or their preliminary conclusions

¹⁴³ ICPAC was an independent advisory committee of legal, economic and business experts established by the US Department of Justice in 1997 to consider international competition issues.

¹⁴⁴ ICPAC (2000).

- *Removing inconsistencies across leniency policies.* More work could be done to eliminate conflicting requirements between leniency programmes to encourage leniency applicants to come forward. Greater consistency would improve the attractiveness of applying for leniency in a wider number of jurisdictions, thus enhancing the potential for more waivers of confidentiality to be granted enabling co-operation between the authorities.
- *Practical tools to improve capacity and understanding.* The ICN, for example, has projects underway to facilitate experience sharing on co-operation, develop tools to facilitate authority contacts, identify matters suitable for co-operation and produce charts summarising authority information sharing mechanisms.

The global impact of cartels makes international co-operation a necessity rather than a nice-to-have. The impediments to international co-operation must be addressed before its benefits can be realised by a wider number of competition authorities. The intensity and quality of co-operation needs to be improved before formal case co-operation becomes routine, and as successful as informal co-operation between enforcers in cartel investigations.

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NOTE DE RÉFÉRENCE

*Par le Secrétariat*¹

1. Introduction

La dimension internationale de nombreuses ententes rend impérative la coopération entre les autorités de la concurrence des différentes juridictions pour que leur action soit véritablement efficace au plan national. L'adoption d'une législation de la concurrence par un nombre croissant de pays renforce les possibilités de relations de coopération fondées sur une détermination commune à lutter contre les ententes. Pour pouvoir mettre en évidence et démanteler les ententes internationales, les autorités de la concurrence vont devoir améliorer considérablement leur capacité de coopération. La coopération entre ces autorités est désormais plus fréquente et a été récompensée par des avancées significatives ; elle peut toutefois être encore intensifiée et améliorée.

La coopération dans l'application du droit de la concurrence est une question toujours largement débattue dans de nombreuses institutions et qui revêt un intérêt considérable aussi bien pour les autorités de la concurrence que pour le secteur privé. L'OCDE apporte sa contribution à ces débats et favorise la coopération au travers de ses propres instruments et études, à l'instar d'autres institutions.

A priori, les autorités de la concurrence coopèrent davantage dans le contrôle des fusions que dans les enquêtes sur les ententes, car les procédures sont par nature différentes. Alors que dans le cas des ententes, on enquête sur d'éventuelles infractions au droit, le contrôle des fusions est une procédure d'autorisation. Dans le cadre de cette procédure, les parties ont tout intérêt à collaborer avec les services chargés du contrôle pour aboutir à des décisions cohérentes grâce à une coopération efficace entre les autorités concernées. A l'inverse, dans le cas des ententes, les parties qui font l'objet d'une enquête n'ont aucun intérêt à ce que les autorités coopèrent, car cela ne peut déboucher que sur des sanctions multiples, en l'absence de programmes de clémence ou d'amnistie. Il incombe donc principalement aux autorités de la concurrence de créer les incitations voulues pour établir des liens de coopération dans le cadre des enquêtes sur des ententes.

Ce document a pour objet de tirer parti des travaux déjà accomplis par l'OCDE et de passer en revue l'expérience des pays en matière de coopération, afin d'examiner les évolutions à la lumière des cadres existants de coopération dans les affaires d'entente. Il s'organise en cinq grands volets :

- Le premier chapitre étudie le principe de la courtoisie internationale, la façon dont il s'est développé avec le temps et son application à la coopération dans la lutte contre les ententes ;
- Le deuxième examine la contribution des instruments de l'OCDE à travers une analyse des principales conclusions des rapports sur la mise en œuvre de la recommandation de 1998 de l'OCDE sur les ententes injustifiables ;
- Le chapitre suivant analyse les instruments de la coopération internationale, tant ceux propres au domaine de la concurrence que les mécanismes d'application plus générale, et évalue leur efficacité dans les enquêtes sur les ententes au fil des années ;

¹

Ce rapport a été rédigé par Hilary Jennings, avec un soutien pour les recherches de Sarah Long, de la Division de la concurrence du Secrétariat de l'OCDE.

- Il est suivi d'une présentation des principaux enjeux, établissant une distinction entre ceux communs à l'ensemble des juridictions et ceux particulièrement pertinents pour les économies en développement et les économies émergentes ;
- Enfin, le dernier chapitre passe en revue les instruments élaborés dans le domaine de la fiscalité et la façon dont ils facilitent la coopération internationale entre autorités fiscales. Il s'interroge sur leurs apports éventuels à la lutte contre les ententes.

Cette analyse met en évidence plusieurs points, et notamment :

- Un certain nombre d'instruments de coopération existent, mais aucun n'est optimal et tous ne sont pas disponibles dans toutes les juridictions ;
- La coopération informelle est fréquente, mais la coopération officielle sur des cas d'espèce est moins courante ;
- Un certain nombre de problèmes exigent à la fois un engagement politique, dans l'éventualité d'une modification de la législation, et un effort d'innovation ;
- Les économies en développement et les économies émergentes sont confrontées à des obstacles supplémentaires qui les empêchent d'accéder aux mécanismes de coopération ;
- Les solutions apportées aux problèmes de la coopération internationale par les autorités de contrôle dans d'autres domaines de l'action publique pourraient fournir des pistes à explorer pour la lutte internationale contre les ententes.

2. La courtoisie, principe fondateur de la coopération internationale

La courtoisie est le principe de droit en vertu duquel un pays doit prendre en compte, dans l'application des lois, les intérêts importants des autres pays, escomptant un traitement similaire en retour. Depuis plus d'un siècle, le droit public international reconnaît dans le principe de courtoisie un moyen de tempérer les effets de l'affirmation unilatérale de la compétence extraterritoriale. La courtoisie internationale est par conséquent un concept horizontal d'État souverain à État souverain, tel que défini par la Cour suprême des États-Unis dans l'affaire *Hilton c. Guyot* en 1895.² Il ne s'agit pas de renoncer à une compétence, mais plutôt de l'exercer en étant conscient de son incidence potentielle sur les efforts déployés par d'autres pays pour faire appliquer leur législation.³

Les juridictions appliquent les principes de la courtoisie internationale dans de nombreux domaines fondamentaux du droit (fiscalité, faillite, corruption, réglementation environnementale, etc.) afin que les problèmes complexes d'application extraterritoriale du droit trouvent une solution qui ménage les considérations des États concernés en matière de politique publique et d'application du droit. Dans le domaine de la concurrence, la coopération internationale s'appuie sur deux types de courtoisie : la courtoisie passive et la courtoisie active.

² 159 U.S. 113 (1895), 163-64 : La « courtoisie », au sens juridique, n'est ni une obligation absolue ni une simple forme de politesse et de bonne volonté, mais la reconnaissance qu'un État accorde sur son territoire aux actes législatifs, exécutifs ou judiciaires d'un autre État, en tenant dûment compte des devoirs et des convenances au niveau international, ainsi que des droits de ses propres ressortissants, ou d'autres personnes qui sont sous la protection de ses lois. »

³ La Cour suprême des États-Unis s'est appuyée sur la courtoisie internationale pour limiter le champ d'application extraterritoriale des règles américaines de la concurrence dans l'affaire *F. Hoffman-LaRoche Ltd. c. Empagran S.A.*, 542 U.S. 155 (2004).

2.1 *La courtoisie passive*

La courtoisie passive ou courtoisie internationale traditionnelle concerne les efforts que déploie un pays pour éviter que ses lois et les mesures qu'il prend pour les faire appliquer ne portent préjudice aux intérêts importants d'un autre pays. Les recommandations successives de l'OCDE sur la coopération dans le domaine de la concurrence (dont la plus récente date de 1995) stipulent que, pour faire preuve de courtoisie passive ou traditionnelle, un pays s'oblige à :

*i) notifier aux autres pays que ses procédures d'application des réglementations peuvent affecter certains de leurs intérêts importants et ii) considérer attentivement et avec bienveillance les moyens de répondre à ses besoins d'application des réglementations en question sans porter préjudice à ces intérêts.*⁴

2.2 *La courtoisie active*

La courtoisie active implique qu'un pays requiert d'un autre pays qu'il prenne des mesures d'application afin de corriger un comportement potentiellement anticoncurrentiel qui affecte considérablement les intérêts du pays requérant. Le terme « courtoisie active » semble avoir été forgé lors de la négociation de l'accord de coopération de 1991 entre le Gouvernement des États-Unis d'Amérique et la Commission des Communautés européennes concernant l'application de leurs règles de concurrence (ci-après « accord CE/EU de 1991 »).⁵ Le concept sous-jacent existait toutefois déjà depuis quelques décennies. Des dispositions de courtoisie active figurent dans les recommandations de l'OCDE sur la coopération depuis 1973, bien que le terme de « courtoisie active » n'ait pas été employé. La recommandation de l'OCDE de 1995 stipule qu'un pays doit :

*1) considérer attentivement et avec bienveillance la demande formulée par un autre pays afin qu'il engage ou élargisse une procédure d'application des réglementations pour remédier à une pratique illicite se produisant sur son territoire et portant gravement préjudice aux intérêts d'un autre pays et 2) prendre toute mesure correctrice qui lui paraît appropriée, sur une base volontaire et compte tenu de ses intérêts légitimes.*⁶

Il existe une différence entre la courtoisie positive et l'aide à l'enquête, comme le précise la recommandation de l'OCDE de 1995. La courtoisie active implique d'enquêter sur les pratiques anticoncurrentielles et d'y remédier, si possible, afin d'assister le pays requérant. L'action est donc conduite par l'État requis. En revanche, l'aide à l'enquête, comme le partage ou la collecte d'informations pour le compte d'un pays étranger, implique une demande d'entraide dans le cadre de la procédure d'application de la loi du pays requérant. Il s'agit de concepts similaires, mais qui ne soulèvent pas les mêmes questions juridiques et politiques.⁷ Une procédure d'investigation efficace et efficiente peut souvent exiger de s'affranchir d'un modèle dichotomique au profit d'une palette plus étendue d'activités de coopération, les deux pays réalisant des investigations à un moment donné (ou à des moments donnés).

La recommandation de l'OCDE ne distingue pas plusieurs formes de courtoisie active, mais il peut être utile d'établir les distinctions suivantes :

- *Un accord ad hoc d'exercice de la courtoisie active* est un accord entre un pays requérant et un pays requis concernant une question sur laquelle le pays requis accepte de mener une enquête.

⁴ OCDE (1995), at I.A1 et I.B.4.b.

⁵ Accord CE/EU de 1991, JO 1995 L 95/45, corrigé au JO 1995 L 131/38, Article V.

⁶ OCDE (1995), at I.B.5.b-c.

⁷ Zanettin (2002), p.183.

- *Un accord d'exercice de la courtoisie active partagée* est un accord ad hoc d'exercice de la courtoisie active par lequel le pays requérant s'engage à ajourner ou suspendre toute action tant que la procédure du pays requis est en cours.
- *Un accord d'exercice de la courtoisie active coopérative* est un accord ad hoc d'exercice de la courtoisie active qui ne constitue pas un cas de courtoisie active partagée.⁸

Les avantages potentiels de la courtoisie active dépendent en grande partie de la volonté et de la capacité des autorités de la concurrence de créer une culture de la coopération les fondant à porter à l'attention une affaire intéressant au premier chef d'autres autorités dans la perspective de tirer parti des avantages des enquêtes que mèneront d'autres autorités, dont certains sont énumérés ici :

- *Plus grande efficacité.* Puisque la courtoisie active suppose l'application du droit du pays requis, elle peut être un moyen de remédier à une pratique illicite auquel le pays requérant ne peut lui-même remédier en raison de problèmes de compétence.
- *Plus grande efficacité.* Puisque la courtoisie active aboutit à une enquête de la part du pays qui est le mieux à même de rassembler les faits nécessaires, elle peut améliorer l'efficacité en réduisant les coûts de l'enquête et le risque d'incohérences.
- *Moindre nécessité d'échanger des informations confidentielles ou autres.* Puisque la procédure est aux mains de l'autorité de la concurrence qui peut avoir accès dans les meilleures conditions à la plupart des faits, les autorités qui coopèrent auront probablement moins besoin d'échanger des informations confidentielles.⁹

Le rapport consacré par l'OCDE en 1999 à la courtoisie active examine les possibilités qu'elle offre dans les affaires d'ententes injustifiables lorsque le pays requérant reconnaît que sa compétence est insuffisante ou pourrait l'être. La courtoisie active coopérative peut être fructueuse dans le cadre d'une action coordonnée, le pays requis assumant par exemple le rôle pilote dans la phase initiale, étant entendu que les rôles peuvent se modifier et que des enquêtes multiples pourront devoir être menées. Mais dans ces affaires, la courtoisie active partagée paraît offrir peu de possibilités, parce que le pays requérant voudra probablement imposer ses propres mesures correctrices.¹⁰ Il est en outre peu probable que l'on puisse avoir recours à la courtoisie active dans la plupart des ententes à l'exportation car celles-ci sont rarement illicites dans le pays d'origine.¹¹

Les clauses de courtoisie active figurent désormais dans bon nombre d'accords de coopération bilatéraux entre pays. La première vague d'accords de coopération se limitait aux principes de courtoisie passive consistant à éviter de porter préjudice à d'autres pays.¹² Cette situation a changé avec l'accord CE/UE de 1991 mentionné plus haut. Pour la première fois, une clause de courtoisie active a été insérée dans un accord bilatéral de coopération antitrust.¹³ L'accord de 1998 entre les Communautés européennes

⁸ OCDE (1999), p.21.

⁹ OCDE (1999), p.22-23.

¹⁰ Ibid, p.15.

¹¹ La question des ententes à l'exportation est étudiée plus loin.

¹² En commençant par l'accord d'application du droit de la concurrence de 1976 entre l'Allemagne et les États-Unis, suivi de l'accord de 1982 entre les États-Unis et le Canada et le protocole d'accord de 1984 entre les États-Unis et le Canada.

¹³ Les « accords de première génération » sont des accords bilatéraux formels de coopération incorporant le principe de courtoisie passive. En revanche, les « accords de deuxième génération » incorporent un principe de courtoisie active. On entend par « accords de troisième génération » des traités d'entraide dans

et le Gouvernement des États-Unis concernant la mise en œuvre des principes de courtoisie active dans l'application de leurs règles de concurrence a renforcé le principe énoncé à l'article V de leur accord de 1991.¹⁴ Les États-Unis ont conclu un accord similaire avec le Canada en 2004.¹⁵

Les accords conclus depuis l'accord CE/UE de 1991 s'inspirent de l'esprit des recommandations de l'OCDE et des premiers accords de courtoisie active entre les États-Unis, la CE et les autorités canadiennes, et en ont parfois repris la formulation.¹⁶ Les accords formels de coopération contenant des clauses de courtoisie active peuvent engager les pays à examiner avec bienveillance leurs requêtes réciproques, mais ils restent libres de prendre les mesures d'application de leur choix.

La courtoisie active a immédiatement suscité l'enthousiasme, en particulier dans le sillage de la signature de l'accord CE/UE de 1998. Les attentes sont toutefois retombées depuis. Les experts¹⁷ considèrent cet instrument avec scepticisme et il semble que l'on en ait peu fait usage, malgré le potentiel offert.

Box 1. La courtoisie active a été rarement utilisée et avec un succès limité

Dans l'affaire Sabre/Amadeus de 1997, le département de la Justice des États-Unis a demandé à la Commission européenne d'enquêter dans le cadre des règles de concurrence européennes sur le comportement supposé anticoncurrentiel d'Amadeus, un système de réservation informatisé mis en place par une compagnie aérienne européenne, qui faisait obstruction à la concurrence du système Sabre, d'American Airlines, dans certains pays d'Europe.¹⁸ La Commission européenne a donc réalisé une enquête à la suite de laquelle elle a adressé, en mars 1998, une communication des griefs à Air France, indiquant que la compagnie aérienne avait abusé de sa position dominante. Finalement, Sabre est parvenu à règlement lui garantissant un accès non discriminatoire aux marchés européens, rendant superflue la nécessité d'une décision.¹⁹

Sans qu'il y ait une requête officielle, dans l'affaire *IRI/AC Nielsen*, le département de la Justice des États-Unis a clos son enquête sur le service de suivi de la consommation d'AC Nielsen après la conclusion d'une convention entre le cabinet d'études de marché et la Commission européenne qui répondait à ses préoccupations. Dans la mesure où la Commission européenne avait déjà commencé à enquêter, il n'était pas nécessaire que le département adresse une requête officielle de courtoisie active. Il a été décidé, plutôt, de laisser la Commission européenne prendre l'initiative.²⁰

l'application du droit de la concurrence qui autorisent une coopération plus étendue, à travers l'amendement des législations nationales.

¹⁴ Accord entre les Communautés européennes et le Gouvernement des États-Unis concernant la mise en œuvre des principes de courtoisie active dans l'application de leurs règles de concurrence, JO1998 L 173.

¹⁵ Accord entre le Gouvernement des États-Unis et le Gouvernement du Canada concernant l'exercice des principes de courtoisie active dans l'application de leurs règles de concurrence (2001).

¹⁶ Accord entre le Gouvernement des États-Unis et le Gouvernement du Canada concernant l'application de leurs règles de concurrence et de leurs législations sur les pratiques commerciales déloyales, 3 août 1995, 4 *Trade Reg. Rep.* (CCH) ; accord entre les Communautés européennes et le Gouvernement du Canada concernant l'application de leurs règles de concurrence, JO 1999 L 175. Les premiers accords conclus entre des régimes de la concurrence plus avancés et des régimes plus récents contiennent plus ou moins les mêmes dispositions. cf. par exemple les accords signés en 1999 entre les États-Unis et Israël et entre les États-Unis et le Brésil, et l'accord de 2000 entre les États-Unis et le Mexique.

¹⁷ Atwood (1992), p. 84.

¹⁸ Communiqué de presse du département de la Justice des États-Unis, *Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting US Airlines Computer Reservations Systems* (28 avril 1997).

¹⁹ Trentième rapport de la Commission européenne sur la politique de concurrence (2000).

²⁰ Communiqué de presse du département de la Justice des États-Unis, *Closes Investigation into the Way AC Nielsen Contracts its Services for Tracking Retailers* (3 décembre 1996).

L'usage peu fréquent de la courtoisie active semble indiquer que les pays n'ont pas été en mesure d'y recourir de façon entièrement satisfaisante. Les quelques cas enregistrés à ce jour n'illustrant pas de façon particulièrement probante l'efficacité de cet instrument, la faible adhésion qu'il suscite s'explique sans doute par un intérêt perçu comme limité.²¹ La courtoisie active n'est pas un principe de droit international et n'a pas force de loi. Elle est donc laissée à l'appréciation et au bon vouloir des autorités de la concurrence. En outre, malgré le caractère volontaire des requêtes de courtoisie active, certains pays peuvent craindre une limitation à la fois de leur contrôle sur l'utilisation de ressources (généralement) rares et de leur marge de manœuvre dans la hiérarchisation de leurs mesures d'application. Dans les accords bilatéraux, les expériences de courtoisie active semblent avoir plutôt fait long feu.

L'absence de requêtes (officielles en tout cas) de courtoisie active peut avoir d'autres explications :²²

- Le développement des capacités d'exécution et l'adoption de législations de la concurrence dans le monde entier. Le renforcement des moyens nationaux de mise en œuvre et l'amélioration de leur efficacité dans la résolution des problèmes ont peut-être rendu inutile l'appui d'une autre autorité. Par ailleurs, les exportateurs peuvent juger plus crédible l'autorité étrangère et être plus enclins à déposer directement leurs plaintes plutôt que de devoir persuader leur administration nationale et leur autorité de la concurrence de diligenter l'autorité étrangère pour enquêter ;
- Les disparités entre les autorités concernées en termes de taille ou de pouvoir peuvent contribuer à la stagnation de la courtoisie active. Les autorités plus petites ou moins puissantes peuvent interagir moins fréquemment ou avoir moins besoin de s'interpeller mutuellement que, par exemple des autorités de poids comparable, comme celles des États-Unis et de l'Union européenne, qui interagissent et s'entraident régulièrement. En dehors de ces facteurs, les autorités de plus grande taille sont sans doute moins portées à répondre aux besoins des autorités plus petites. En outre, les juridictions de moindre importance peuvent tout simplement ne pas disposer de ressources suffisantes pour aider leurs homologues étrangères ou il pourrait être mal vu, politiquement, qu'elles s'appuient sur des autorités étrangères pour corriger un comportement qui porte préjudice à leurs propres consommateurs.

2.3 *Courtoisie renforcée*

Une proposition bien accueillie par les entreprises à la fin des années 90 et au début des années 2000 pour remédier aux limites de la courtoisie passive et de la courtoisie active est celle du principe de « courtoisie renforcée ». En vertu de ce principe, la compétence doit revenir à l'État le mieux équipé pour prouver l'infraction et faire appliquer les sanctions ou les mesures correctrices.

La mondialisation conjuguée à la multiplication des régimes de la concurrence à travers le monde accroît la probabilité d'enquêtes internationales auxquelles davantage d'autorités consacreront des ressources. Elle accentue aussi le risque d'incohérences ou de conflits dans l'application du droit de la concurrence. Le principe de courtoisie renforcée va au-delà du modèle existant d'enquêtes parallèles (mais coordonnées) pour privilégier le renvoi non contraignant vers une juridiction qui a davantage intérêt à enquêter sur l'affaire en cause que toutes les juridictions concernées. Ce système permet d'éviter l'imposition de mesures correctrices incohérentes et réduit sensiblement le coût de la coordination de procédures multiples tant pour les autorités d'exécution que pour les parties concernées.

Le concept de courtoisie renforcée a eu des applications limitées, à l'exception notable du Réseau européen de la concurrence.²³ La nécessité de substituer à la souveraineté nationale la compétence d'une

²¹ Marsden (2011), p. 307.

²² Ibid, pp. 307, 309-10.

autre juridiction complique la donne. Le concept soulève des questions complexes. Dans quelle mesure les enquêtes plurijuridictionnelles peuvent-elles être renvoyées à une autre autorité ? Une autorité dont l'intérêt à enquêter sur le comportement reproché serait relativement moindre pourrait-elle s'effacer au profit d'autorités plus impliquées ? Comment identifier l'autorité la mieux placée pour piloter l'enquête ? Comment s'assurer que l'intérêt des autres juridictions est préservé ? Une approche intégrée ou de partage des tâches serait-elle envisageable ? L'une ou l'autre autorité pourrait-elle devenir l'autorité chef de file de facto et assumer la responsabilité de la procédure d'investigation, éventuellement avec la participation ou sous la surveillance de collaborateurs d'une autre autorité ?

Box 2. Exemples de courtoisie renforcée dans d'autres domaines de la réglementation²⁴

Les principes de courtoisie renforcée ont été adoptés dans d'autres domaines de la réglementation comme les faillites internationales et l'environnement.

Les faillites internationales. La loi type de la Commission des Nations Unies pour le droit commercial international (CNUDCI) sur l'insolvabilité internationale, adoptée en 1997, incorpore plusieurs mécanismes de courtoisie renforcée. Lorsque plusieurs procédures étrangères sont ouvertes à l'encontre du même débiteur, mais aucune dans la juridiction saisie de la question, la loi prévoit notamment que les tribunaux accordent des réparations compatibles avec les procédures reconnues dans le pays où se situe le centre des intérêts principaux du débiteur.

Déchets dangereux. La Convention de Bâle régit les mouvements transfrontaliers de déchets dangereux et leur élimination.²⁵ Un pays signataire de la Convention peut interdire l'importation de déchets dangereux ou non en vue de leur élimination et les autres signataires sont tenus d'interdire l'exportation des déchets interdits vers le pays qui l'interdit. La Convention établit en outre un système de notification et de consentement pour l'exportation et l'importation des déchets. La Convention de Bâle constitue par conséquent un exemple du principe de courtoisie renforcée, en vertu duquel dans certaines circonstances, un pays reconnaît la primauté des intérêts d'un autre pays, même au détriment de ses propres intérêts (ou de l'intérêt des entreprises domiciliées sur son territoire).

3. Le développement de la coopération dans les enquêtes sur les ententes

3.1 La recommandation de l'OCDE sur les ententes injustifiables

L'adoption par le Conseil de l'OCDE, en 1998, de la recommandation concernant une action efficace contre les ententes injustifiables marque le début d'une ère nouvelle dans la lutte contre les ententes.²⁶ La recommandation de 1998 condamne les ententes injustifiables comme l'infraction la plus grave au droit de la concurrence. Elle enjoint les pays membres à prendre deux types de mesures, l'une ayant trait à leurs programmes d'application individuels et l'autre relevant de la coopération :

- Tout d'abord, la recommandation encourage les pays membres à faire en sorte que leur législation de la concurrence mette fin aux ententes injustifiables et aie un effet dissuasif à l'égard de ces ententes. Les pays membres sont invités à s'assurer que leurs sanctions sont efficaces et que leurs instances d'exécution sont dotées de pouvoirs d'enquête suffisants, et que toute exclusion ou autorisation de ce qui constituerait sinon une entente injustifiable est nécessaire et ne va pas au-delà de ce qui est indispensable pour réaliser leurs objectifs primordiaux ;

²³ cf. section 4.2 ci-après.

²⁴ Pour une discussion approfondie de la coopération dans le domaine de la fiscalité, cf. section 7 ci-après.

²⁵ Convention de Bâle sur le contrôle des mouvements transfrontaliers de déchets dangereux et de leur élimination, 22 mars 1989, 1673 U.N.T.S. 125.

²⁶ [C\(98\)35/FINAL](#).

- Ensuite, la recommandation prie les pays membres d'examiner tous les obstacles à une coopération efficace pour la mise en œuvre des législations contre les ententes injustifiables. Il leur est rappelé a) qu'ils ont un intérêt commun à empêcher les ententes injustifiables, b) que tout en s'assurant qu'il existe des sauvegardes efficaces pour les informations confidentielles, le partage des informations avec les autorités étrangères a été bénéfique lorsqu'il a été possible et c) que les législations de la plupart des pays continuent d'interdire à leurs autorités de la concurrence ce partage d'informations. Les formes de coopération les plus avancées mentionnées dans la recommandation (désignées ici collectivement par l'expression « partage des informations ») sont :
 - la collecte d'informations, confidentielles ou non, pour le compte d'autorités étrangères, si nécessaire par voie de contrainte, et (ou)
 - le partage, avec les autorités étrangères chargées de la concurrence, d'informations, confidentielles ou non, en la possession de l'autorité de la concurrence.²⁷

La recommandation contient également une clause de courtoisie active, qui invite instamment les pays membres à « rechercher les moyens susceptibles d'améliorer la coopération en appliquant les principes de courtoisie positive aux demandes visant à ce que l'autre pays remédie à un comportement anticoncurrentiel préjudiciable pour les deux pays ».

3.2 *Les rapports de l'OCDE sur les ententes injustifiables*

Suite à l'adoption de la recommandation, le Comité de la concurrence de l'OCDE a soumis au Conseil trois rapports sur la mise en œuvre des dispositions en question. Chacun de ces rapports étudie les avancées de la coopération internationale, soulignant l'incidence de la coopération entre autorités et les tendances qui se dégagent des efforts de coopération.

Le premier rapport de l'OCDE sur les ententes injustifiables (2000) note que, notamment à cause de lois restrictives appliquées dans la plupart des pays membres, les autorités de la concurrence ont jusqu'à présent remporté beaucoup plus de succès dans la mise en œuvre de la partie de la recommandation concernant leurs programmes nationaux d'exécution que dans celle relative à la coopération dans l'application de la loi.

Deux études ont été réalisées sur la coopération internationale dans les investigations et affaires d'ententes, la première en 1999 et la seconde, en 2001. Pour la seconde, des questionnaires ont été adressés à la fois aux pays membres et aux invités non membres au Forum mondial sur la concurrence de l'OCDE.²⁸

²⁷

De nombreuses autorités chargées de l'application du droit dans d'autres domaines, comme la fiscalité, par exemple, peuvent légalement partager ces informations lorsque l'assistance requise répond aux conditions fixées par le droit du pays requis, comme lorsque les informations confidentielles sont protégées par des garanties adéquates et que la coopération ne va pas à l'encontre des intérêts nationaux. Même si la recommandation note les avantages qui ont découlé de l'utilisation d'informations partagées dans des circonstances appropriées, elle ne plaide pas pour l'emploi de cette forme de coopération la plus étroite entre pays membres, mais laisse à chaque pays la décision de la forme de coopération qui convient le mieux à ses besoins et à l'intérêt commun d'une action plus efficace contre les ententes injustifiables.

²⁸

Dans le questionnaire de 1999, il a été demandé aux pays de fournir des informations sur leur expérience en tant que pays requis ou requérant concernant la communication d'informations à une autorité étrangère de la concurrence dans le cadre d'une enquête sur une entente. Il leur a également été demandé de donner leur opinion sur les coûts et avantages de la coopération internationale et sur les obstacles à cette coopération.

Les réponses montrent qu'il y a eu relativement peu de coopération entre autorités nationales de la concurrence dans les investigations et affaires d'ententes avant 1999. La plupart des pays interrogés n'ont ni émis ni reçu des demandes de coopération pendant la période couverte par le questionnaire. Parmi les autres, les plus actifs ont été les États-Unis et le Canada. Ce nombre si faible de cas de coopération s'explique notamment par le fait qu'un grand nombre d'affaires d'ententes ayant fait l'objet de poursuites pendant la période concernée n'avaient aucune dimension internationale, c'est-à-dire survenaient dans un seul ressort juridictionnel et n'affectaient que ce seul ressort. D'autres pays ont signalé qu'ils n'avaient poursuivi aucune entente pendant la période de référence. Cependant, il est également apparu que lorsqu'une coopération aurait été utile, elle s'est heurtée à un obstacle significatif, à savoir l'incapacité des pays à divulguer des informations confidentielles à des autorités étrangères.²⁹

Les réponses au second questionnaire, de 2001, décrivent une situation différente. On note davantage de coopération internationale durant la période sous revue. Comme indiqué dans le deuxième rapport sur les ententes³⁰, de 2003, la coopération internationale a été particulièrement active entre un nombre relativement réduit de juridictions qui ont tissé des relations de travail étroites. Les relations de coopération les plus actives dans le domaine des enquêtes sur les ententes ont été entretenues entre :

- la Commission européenne et les États membres de l'UE,
- les États-Unis et le Canada,
- la Commission européenne et les États-Unis, et l'Australie et la Nouvelle-Zélande.

D'autres pays ont également coopéré dans une ou plusieurs affaires, notamment le Brésil, la Corée, le Danemark, l'Espagne, l'Estonie, Israël, l'Italie, les Pays-Bas et la Fédération de Russie. Le deuxième rapport note également que le nombre des accords de coopération internationale augmente considérablement. Dans la plupart des cas, la coopération se limite à une coopération informelle, les autorités s'entretenant de façon informelle de questions comme les stratégies d'enquête, les informations sur le marché et les évaluations de témoins, mais sans échanger les preuves mises à jour par l'enquête et protégées par les lois nationales sur la confidentialité.

Le troisième rapport de l'OCDE sur les ententes (2005)³¹ met en évidence l'emploi de nouvelles stratégies d'enquête, comme les inspections coordonnées dans plusieurs pays et les renoncements à confidentialité en cas de requêtes simultanées de mesures clémence. Le rapport souligne également l'échange accru de savoir-faire et d'expertise dans la lutte contre les ententes, en particulier dans le domaine des techniques d'enquête. On observe le développement d'un réseau d'accords de coopération bilatéraux non seulement entre pays membres de l'OCDE, mais aussi entre pays membres et non membres.

La plupart des cas signalés de coopération fructueuse correspondent à une coopération informelle perçue, en dépit de ses limites, comme ayant considérablement contribué à améliorer l'efficacité de l'application. La recommandation de l'OCDE de 1995 sur la coopération continue de fournir le cadre des échanges d'informations non confidentielles, en particulier entre pays membres de l'OCDE qui n'ont pas conclu d'accords bilatéraux. L'incapacité d'échanger des informations confidentielles ressort comme un obstacle important à l'investigation des ententes. Les pays membres font état d'une utilisation croissante des accords internationaux autorisant la coopération formelle, lorsqu'ils existent. Le troisième rapport sur les ententes date de 2005, soit un an après l'entrée en vigueur du nouveau cadre juridique de l'Union

²⁹ OCDE (2000).

³⁰ OCDE (2003).

³¹ OCDE (2005).

européenne qui a introduit de puissants mécanismes de coopération au sein du Réseau européen de la concurrence.³²

3.3 *Pratiques exemplaires en matière d'échanges d'informations dans le cadre d'enquêtes sur des ententes injustifiables*

Les lois de nombreux pays interdisant aux autorités de la concurrence ou limitant considérablement leur capacité d'échanger des informations confidentielles dans le cadre d'enquêtes sur les ententes, le Comité de la concurrence de l'OCDE a élaboré en 2005 des Pratiques exemplaires en matière d'échanges d'informations dans le cadre d'enquêtes sur des ententes injustifiables.³³ Ces pratiques exemplaires visent à identifier les sauvegardes que les pays peuvent utiliser lorsqu'ils autorisent les autorités de la concurrence à échanger des informations confidentielles dans le cadre d'enquêtes sur des ententes.

Les pratiques en question sont fondées sur les principes suivants :

- Les conventions internationales ou les législations nationales autorisant une autorité de la concurrence à échanger des informations confidentielles dans certaines circonstances devraient protéger la confidentialité des informations échangées. En revanche, ces sauvegardes ne devraient pas s'appliquer lorsque les autorités de la concurrence échangent des informations qui ne sont pas soumises à des restrictions en matière de confidentialité prévues en droit interne.
- Les pays Membres devraient d'une façon générale appuyer les échanges d'informations dans le cadre d'enquêtes concernant des ententes. Toutefois, la fourniture des informations demandées dans un cas d'espèce devrait toujours être laissée à l'appréciation de la juridiction requise, ou bien celle-ci devrait pouvoir l'assortir de conditions. Il ne devrait pas y avoir obligation de donner suite à une demande. Un pays pourra rejeter la demande si, par exemple, l'exécution de cette demande est contraire à son droit interne ou à son ordre public. En outre, les échanges d'informations ne devraient pas nuire à une enquête concernant une entente injustifiable, et notamment à l'efficacité d'un programme d'amnistie ou de clémence.
- Pour engager un échange d'informations, les autorités devraient agir avec la souplesse qu'exige chaque cas d'espèce. Elles devraient envisager d'entamer au départ des consultations, par exemple pour évaluer dans quelle mesure la juridiction requise sera à même de préserver la confidentialité des informations contenues dans la demande et celle des informations échangées.
- Des garanties adéquates devraient être appliquées dans la juridiction requérante pour l'utilisation des informations échangées. Dans ce contexte, les pratiques exemplaires traitent en particulier de l'utilisation des informations échangées à d'autres fins d'application du droit par les pouvoirs publics, de la divulgation à des tiers et des efforts déployés pour éviter une divulgation non autorisée.
- Les échanges d'informations devraient protéger les droits des parties en vertu des législations des pays membres. Les pratiques exemplaires mentionnent expressément le secret professionnel applicable à certaines professions juridiques et le privilège de ne pas témoigner contre soi-même. S'agissant du secret professionnel applicable à certaines professions juridiques, c'est le niveau de protection le plus élevé qui prime, que ce soit celui prévu par la juridiction requérante ou par la juridiction requise. La juridiction requérante doit veiller à ce que son privilège relatif au droit de ne pas témoigner contre soi-même est respecté lors de l'utilisation des informations échangées dans le cadre de poursuites pénales à l'encontre de personnes physiques.

³² cf. section 2.2 ci-après.

³³ OCDE, Pratiques exemplaires en matière d'échanges d'informations entre autorités de la concurrence dans le cadre d'enquêtes sur des ententes injustifiables, [DAF/COMP\(2005\)25/FINAL](#).

- A la lumière des craintes qu'une notification préalable de l'échange à la source des informations ne puisse gravement perturber et retarder les enquêtes sur les ententes, les pratiques exemplaires recommandent de ne pas aviser au préalable la source des informations, sauf disposition contraire du droit interne ou d'accords internationaux. Les autorités de la concurrence peuvent en revanche envisager une notification a posteriori si elle n'est pas contraire à une décision de justice, au droit interne ou à une convention internationale ou si elle ne compromet pas l'intégrité d'une enquête.

La recommandation de l'OCDE sur les ententes injustifiables a fait prendre davantage conscience aux pouvoirs publics à travers le monde de l'importance d'enquêter sur les ententes injustifiables et d'engager des poursuites à leur encontre. Depuis 1998, la répression des ententes est devenue une priorité majeure des autorités de la concurrence tant des pays membres de l'OCDE que des pays non membres. Parallèlement, les réformes de la procédure ont introduit les programmes de clémence et renforcé les pouvoirs d'investigation des autorités de la concurrence partout dans le monde. La dissuasion est devenue un maître mot et un grand nombre d'autorités ont relevé le montant des amendes. Certaines ont introduit des sanctions personnelles, pénales ou civiles, pour renforcer leur arsenal de moyens dans la lutte contre les ententes. Dans le même temps, il semble que la coopération internationale continue de s'accroître entre les autorités chargées d'enquêter sur les ententes. Les autorités trouvent au sein d'institutions comme le groupe de travail sur les ententes du Réseau international de la concurrence (RIC), créé en 2004, un lieu où partager leurs compétences face aux défis qui se posent dans la lutte contre les ententes. Des ateliers annuels permettent aux autorités de tous les pays chargées de réprimer les ententes de se rencontrer, d'enrichir mutuellement leurs connaissances et de tisser des relations de travail étroites qui pourront constituer le fondement d'une coopération future.

4. Instruments, incidence et illustration de la coopération dans les enquêtes sur les ententes

La coopération entre autorités de la concurrence dans les enquêtes sur les ententes peut revêtir de multiples formes. Elle peut intervenir à un niveau bilatéral, régional ou multilatéral. Elle peut se fonder sur des instruments formels comme une disposition du droit interne ou un accord entre juridictions ou autorités de la concurrence. Elle peut découler du renoncement à la confidentialité par un apporteur de preuves. Elle peut être informelle, au sens où elle ne s'appuie pas sur un instrument spécifique de coopération et où elle prend une forme plus générale, comme l'assistance technique ou le partage d'informations à caractère public ou recueillies par une autorité. Les différents instruments et outils, ainsi que les divers types de coopération utilisés dans les affaires d'ententes internationales créent une configuration complexe de niveaux d'engagement possibles entre les autorités. Les éléments moteurs de la coopération et les instruments et réseaux qui la sous-tendent diffèrent aussi selon les juridictions et les groupes de pays. Malgré toutes ces variables, les autorités chargées de réprimer les ententes s'accordent à penser que la coopération internationale est un outil clé pour renforcer l'efficacité et optimiser la lutte contre les ententes qui affectent plusieurs juridictions. Elles cherchent par conséquent activement à se doter de moyens pour mettre en œuvre la coopération internationale.

4.1 Les instruments de la coopération non spécifiques au domaine de la concurrence

Les instruments à visée plus large couvrant divers domaines d'application, comme les traités d'entraide juridique, les traités d'extradition et les commissions rogatoires (lettres rogatoires), peuvent servir de fondement à la coopération, dans une certaine mesure.

4.1.1 Les traités d'entraide juridique

De nombreux pays ont conclu des traités d'entraide juridique. Il s'agit de traités bilatéraux créant des obligations internationales réciproques entre les signataires et qui ne portent pas spécifiquement sur les enquêtes en droit de la concurrence. Un traité d'entraide juridique permet habituellement aux signataires de solliciter les uns des autres diverses formes d'entraide, y compris l'utilisation de pouvoirs d'investigation

formels et le partage d'informations confidentielles. Ces traités peuvent donc être des outils puissants, mais leur utilisation s'est traditionnellement limitée aux affaires pénales. Les traités d'entraide juridique exigent que le délit concerné soit un crime au moins dans la juridiction du pays requérant. Dans la plupart des juridictions, les ententes ne sont pas des crimes et ces traités sont par conséquent peu utilisés dans les enquêtes sur les ententes.

Bien qu'il en existe un nombre significatif (les États-Unis ont par exemple conclu des traités d'entraide juridique avec quelque 70 pays³⁴), tous ne permettent pas une coopération dans les affaires d'ententes. Leur champ d'application peut exclure explicitement les affaires de concurrence, comme dans le cas du traité entre la Suisse et les États-Unis.³⁵ Certains traités d'entraide juridique exigent que les deux juridictions traitent le comportement concerné comme un crime (« exigence de double incrimination »).

Lorsqu'ils sont applicables, les traités d'entraide juridique sont généralement le moyen le plus efficace pour réunir des preuves à l'étranger concernant des infractions au droit de la concurrence. Ils constituent un mécanisme par lequel les signataires peuvent généralement obtenir une aide juridique sous des formes très diverses dans le cadre d'affaires pénales, y compris l'obtention de témoignages sous serment et l'exécution de perquisitions dans les locaux à usage d'habitation ou d'entreprises. Contrairement aux accords de coopération non contraignants, les traités d'entraide juridique obligent les parties à s'assister mutuellement pour obtenir des preuves situées sur le territoire de l'État requis, celui-ci n'ayant pas la possibilité de refuser son aide à moins qu'il s'agisse d'un délit politique ou militaire, ou qu'en obtempérant il compromette sa sécurité nationale ou ses propres investigations.

Box 3. Coopération en vertu d'un accord d'entraide juridique

Le traité d'entraide juridique entre le Canada et les États-Unis a permis la coordination des investigations sur les ententes dans la vaisselle en plastique et dans le papier thermosensible pour télécopieurs.³⁶

Dans l'enquête sur la *vaisselle en plastique*, les États-Unis ont requis l'assistance du Canada sous l'empire du traité d'entraide juridique en vue de l'exécution simultanée de mandats de perquisition. Le Bureau canadien de la concurrence a participé à l'analyse des documents qui a établi que l'entente n'affectait pas le marché canadien. Les preuves réunies ont finalement permis au ministère américain de la justice d'intenter des poursuites pour fixation de prix. Il en ressort clairement qu'en vertu d'un traité d'entraide juridique, le pays requis peut apporter son aide même si le comportement anticoncurrentiel est sans effet sur son territoire. Les deux parties chargées d'enquêter ont pu partager et analyser les informations conjointement sans être astreintes à des renoncements à la confidentialité, grâce aux citations émises par les tribunaux dans le cadre du traité d'entraide juridique.

Dans l'enquête sur le *papier thermosensible pour télécopieurs*, le Bureau canadien a informé le ministère américain de la justice d'une entente de fixation de prix affectant le marché nord-américain. En se fondant sur le traité d'entraide juridique, les deux autorités ont pu partager des documents obtenus grâce aux citations à témoigner et mandats de perquisition ordonnés par les tribunaux, partager des documents obtenus d'accusés étrangers dans le cadre de plaidoyers négociés, interroger conjointement des témoins et analyser ensemble les documents réunis. En conséquence, des amendes ont été imposées à des entreprises japonaises, américaines et canadiennes aux États-Unis et au Canada, et à des ressortissants américains et japonais aux États-Unis.

³⁴ cf. contribution écrite des États-Unis au Forum mondial sur la concurrence de 2012, [DAF/COMP/GF/WD\(2012\)46](#).

³⁵ L'exclusion concernant les affaires de concurrence a été éliminée en 2001 du traité d'entraide juridique de 1994 entre les États-Unis et le Royaume-Uni.

³⁶ *Plastic Dinnerware Price Fixing Probe Nets Indictment, Guilty Plea Agreements*, 66 Antitrust & Trade Reg. Rep. (BNA) 661 (1994); *US and Canadian Prosecutors Attack Cartel Behaviour by Fax paper Distributors*, 67 Antitrust & Trade Reg. Rep. (BNA) 108 (1994).

Les traités d'entraide juridique ne sont pas spécialement conçus pour l'application du droit de la concurrence et leur emploi est par conséquent limité dans les affaires d'ententes internationales. La juridiction requérante et la juridiction requise peuvent exiger des normes juridiques différentes ou bien les méthodes d'investigation à leur disposition peuvent être différentes. Le droit de certaines juridictions peut par exemple prévoir que pour pouvoir être produites dans le cadre d'un procès, les preuves réunies en application d'un traité d'entraide juridique doivent l'avoir été dans le respect des droits de la défense de la juridiction requérante. Certaines méthodes d'investigation, comme l'interception de communications privées, utilisables dans la juridiction requérante, peuvent ne pas l'être dans la juridiction requise. Autre caractéristique importante des traités d'entraide juridique, ils opèrent par le canal habituel de la justice pénale et non par la voie administrative. Dans le cadre d'un traité d'entraide juridique, l'autorité centrale chargée de l'administration et de l'exercice des pouvoirs peut être le ministère de la Justice plutôt que l'autorité de la concurrence. De ce fait, la lenteur des procédures peut se révéler problématique. Les enjeux juridiques peuvent aussi retarder considérablement la valeur de toute coopération dans le cadre de traités d'entraide juridique et dissuader les autorités de les utiliser pour obtenir des informations.³⁷ En raison précisément de ces limites, ils peuvent être difficiles d'emploi pour les économies en développement et les économies émergentes.³⁸

4.1.2 Les traités d'extradition

Les traités d'extradition exigent également que le délit concerné soit un crime dans les deux juridictions. Compte tenu du nombre relativement limité de juridictions dans lesquelles les ententes constituent des délits de droit pénal, la proportion des traités d'extradition pouvant servir dans le cadre d'affaires d'ententes est encore plus réduite que dans le cas des traités d'entraide juridique. En 2005, un ressortissant britannique a été le premier responsable d'entreprise relevant d'une juridiction étrangère à être extradé vers les États-Unis. La Chambre des Lords a annulé l'ordonnance d'extradition prononcée dans le cadre d'une accusation d'entente car au moment des faits reprochés, la fixation de prix n'était pas un délit de droit pénal au Royaume-Uni et n'exposait donc pas son auteur à une extradition.³⁹ Cette décision ne semble toutefois pas interdire l'application de l'extradition dans le cas de fixation des prix intervenant postérieurement à la loi d'entreprise britannique de 2002 qui a inscrit le délit de fixation des prix en droit pénal.⁴⁰ Il sera intéressant d'observer si les extraditions de personnes suspectées d'ententes se développent entre juridictions qui considèrent les ententes comme des délits de droit pénal.⁴¹

³⁷ On trouvera des exemples d'arguments présentés au Canada pour la transmission aux États-Unis de documents saisis en application du traité d'entraide juridique entre le Canada et les États-Unis dans *Canada (Commissioner of Competition) v. Falconbridge Ltd.* [2003] O.J. No. 1563 (Ont. C.A.).

³⁸ Remarquons toutefois que le traité d'entraide juridique entre les États-Unis et le Brésil a été utilisé au moins une fois dans le cadre d'une enquête de la SDE. cf. contribution du Brésil à la septième session du groupe intergouvernemental d'experts du droit et de la politique de la concurrence de la CNUCED sur les « récentes expériences de coopération internationale », (2006).

³⁹ Finalement, après un appel rejeté par la Cour européenne des droits de l'homme, M. Norris a été extradé vers le district est de Pennsylvanie pour y être jugé pour obstruction à une enquête pénale du département de la Justice des États-Unis sur une entente entre fabricants de carbone, mais pas pour l'accusation de fixation des prix.

⁴⁰ *Norris c. Gouvernement des États-Unis d'Amérique et autres*, [2008] UKHL 16.

⁴¹ cf. Joshua, Camesasca, Jung, (2008) pour une discussion sur les extraditions et les traités d'entraide juridique.

4.1.3 *Commissions rogatoires*

Les autorités de la concurrence peuvent également recourir à des commissions rogatoires pour obtenir l'assistance d'une autorité étrangère en l'absence de traité ou d'accord d'entraide juridique. La commission rogatoire est une requête officielle par laquelle un tribunal demande à un tribunal étranger de réaliser un acte de justice, l'écoute d'un témoignage, la signification d'une assignation ou la remise de toute autre notification de justice. C'est une procédure généralement lourde et laborieuse. Certains pays insistent pour que les requêtes transitent par la voie diplomatique. Il semble toutefois que l'assistance juridique ait été parfois utilisée dans les affaires d'ententes internationales, comme par exemple, pour l'enquête des États-Unis sur la manipulation d'appels d'offres pour des projets financés par USAID, dans le cadre de laquelle la justice allemande a diligenté 100 officiers de police pour l'exécution de mandats de perquisitions dans plusieurs villes en Allemagne.⁴²

4.2 *Accords commerciaux régionaux comprenant des dispositions de droit de la concurrence*

Les accords régionaux peuvent également prévoir des dispositions concernant la coopération en matière de droit de la concurrence. Le site Internet de l'OMC dénombre 214 Accords commerciaux régionaux (ACR) en vigueur, dont 98 contiennent des clauses de concurrence.⁴³ Dans le domaine de la concurrence, certains ACR sont bien connus, comme l'UE, le COMESA,⁴⁴ l'UEMOA,⁴⁵ la CARICOM,⁴⁶ l'ASEAN,⁴⁷ l'ALENA⁴⁸, le MERCOSUR⁴⁹ et la Communauté andine.⁵⁰ Les accords commerciaux régionaux se fondent plus strictement sur des considérations géographiques et ils peuvent se conclure bilatéralement entre pays (accords de libre-échange), entre un pays et un groupe de pays (accords plurilatéraux) ou entre régions ou blocs de pays (accords multilatéraux).

Une étude sur les clauses de concurrence des accords commerciaux régionaux a été réalisée en 2006 à la demande du Groupe conjoint de l'OCDE sur les échanges et la concurrence.⁵¹ Elle couvre 86 accords, dont 68 % conclus entre économies en développement et économies émergentes (Sud-Sud), 27 % entre pays développés et pays en développement ou économies émergentes (Nord-Sud) et 5 % seulement entre pays développés (Nord-Nord). Tous les accords de coopération régionaux faisaient référence de façon générale aux comportements ou pratiques anticoncurrentiels. Le champ d'application et le contenu des dispositions varient toutefois. Certains accords sont rédigés en termes très larges et non contraignants, sans définition des types de pratiques considérées comme anticoncurrentielles,⁵² tandis que d'autres obligent les

⁴² Hammond (2002).

⁴³ cf. base de données de l'OMC sur les ACR.

⁴⁴ Marché commun de l'Afrique orientale et australe.

⁴⁵ Union économique et monétaire ouest-africaine.

⁴⁶ La Communauté des Caraïbes.

⁴⁷ Association des nations de l'Asie du Sud-Est.

⁴⁸ Accord de libre-échange nord-américain.

⁴⁹ Mercado Común del Cono Sur (Brésil, Argentine, Paraguay et Uruguay).

⁵⁰ Les pays membres sont la Bolivie, la Colombie, l'Équateur, le Pérou et le Venezuela.

⁵¹ Solano et Sennekamp (2006).

⁵² Accord de libre-échange entre le Chili et l'Amérique centrale (1999), Accord sur un partenariat économique plus étroit entre la Nouvelle-Zélande et Singapour (2001), Accord entre le Japon et les États-Unis du Mexique pour le renforcement du partenariat économique (2004).

parties à interdire des types de pratiques très spécifiques au sein de leur juridiction.⁵³ La plupart des accords sont à mi-chemin entre les deux.⁵⁴

Dans le cadre de la négociation des accords commerciaux régionaux, la coopération entre autorités de la concurrence des pays de la zone de libre-échange permet d'éviter que la politique de concurrence d'un pays (ou l'absence de politique de la concurrence dans le pays) n'annule les avantages de l'accord de libre-échange pour les autres parties. Il semblerait, pour résumer, que la coopération dans l'élaboration et l'application du droit de la concurrence joue un rôle important pour la réalisation des objectifs de ces accords.⁵⁵ Il reste toutefois à déterminer si les dispositions qui imposent des obligations générales de coopération dans l'application du droit de la concurrence sont plus ou moins efficaces que les accords de coopération spécifiques dans le domaine de la concurrence.

Les accords régionaux permettent une intégration plus poussée et une coopération plus étroite que les accords bilatéraux dans l'application du droit de la concurrence, en particulier avec l'appui d'une autorité de la concurrence fonctionnant efficacement. Ils engendrent dans l'application du droit des économies d'échelle particulièrement importantes pour les économies en développement et les économies émergentes.⁵⁶

Toutefois, malgré leur potentiel, l'efficacité de certains accords de coopération régionaux peut être mise en doute. Une étude de la CNUCED révèle que ces accords ne débouchent pas toujours sur un niveau de coopération conforme aux attentes de nombreux signataires et en particulier à celles des pays en développement.⁵⁷ Des considérations politiques et des contraintes de capacité limitent leur efficacité.⁵⁸ Même au sein d'organisations régionales dotées de cadres régionaux pour la coopération, comme le COMESA, l'UEMOA, la CARICOM, le MERCOSUR et la Communauté andine, la coopération n'a pas été couronnée de succès dans l'application du droit. L'étude de la CNUCED conclut toutefois que les pays en développement ont intérêt à conclure des accords régionaux contenant des clauses de coopération dans le domaine du droit de la concurrence. L'impact bénéfique de ces accords tient à l'effet de domino de la propagation du droit de la concurrence dans les pays en développement et au développement des capacités qui les accompagnent souvent, plutôt qu'à une coopération effective dans le cadre d'affaires particulières.

Le Réseau européen de la concurrence (REC) de l'UE constitue un bon exemple d'un accord régional efficace. Ce réseau sert de cadre à la coopération entre les autorités de la concurrence des États membres de l'UE lorsque les articles 101 et 102 du Traité sur le fonctionnement de l'Union européenne s'appliquent. Le REC est un modèle reconnu de coopération régionale. Créé en vertu d'un règlement du Conseil de l'Union européenne⁵⁹ (ci-après « le règlement de modernisation »), il se fonde sur un système de

⁵³ CARICOM.

⁵⁴ Pour une analyse et une taxonomie des dispositions des accords bilatéraux, commerciaux et régionaux contenant des clauses de droit de la concurrence, cf. par exemple : Dabbah (2010) ; Papadopoulos (2010) ; Holmes, Müller, Papadopoulos (2005).

⁵⁵ Marsden et Whelan (2005).

⁵⁶ Gal (2011), p 256.

⁵⁷ Alvarez, Clarke et Silva (2005).

⁵⁸ Sokol, (2011) p. 203.

⁵⁹ Règlement du Conseil No 1/2003 du 16 décembre 2002. cf. également la communication de la Commission relative à la coopération au sein du réseau des autorités de concurrence (2004/C 101/03).

compétences parallèles qui permet à toutes les autorités nationales de la concurrence d'appliquer les mêmes règles.⁶⁰

Le REC permet d'attribuer la compétence à l'autorité la mieux placée et assure une application cohérente des règles de concurrence de l'UE. Il s'agit d'un réseau informel au sens où il ne prend pas de « décisions » et où il n'a pas de pouvoir contraignant sur ses membres. Un dialogue constructif doit en revanche aider à trouver une solution à la plupart des questions pouvant se poser. En cas de blocage, la Commission se réserve le droit de se substituer aux autorités nationales et d'ouvrir une procédure. Le règlement institue plusieurs mécanismes de coopération pour les besoins de la répartition des affaires et de l'entraide. Les autorités nationales de la concurrence sont tenues de s'informer mutuellement avant que ne commence l'investigation officielle, ou sans tarder une fois qu'elle a commencé, et de mettre les informations pertinentes à la disposition des autres autorités.

S'agissant des enquêtes sur les ententes, il convient de souligner que le REC autorise les autorités nationales de la concurrence à partager des informations confidentielles et à les utiliser en tant que preuves dans leurs procédures respectives, sous réserve des diverses obligations d'information en vigueur dans leur pays. Toutes les autorités sont habilitées à partager et utiliser les informations qu'elles ont recueillies aux fins de l'application du droit de la concurrence. Les informations doivent être partagées entre les autorités nationales de la concurrence ainsi qu'entre la Commission et une autorité nationale de la concurrence. La possibilité de partager des informations confidentielles entre autorités de la concurrence de l'UE sans l'autorisation des parties, qui est l'apanage du REC,⁶¹ renforce considérablement le pouvoir des autorités de la concurrence de l'UE face aux ententes. Elle est toutefois soumise à certaines restrictions, notamment du fait que les juridictions nationales au sein de l'UE ne punissent pas toutes de sanctions pénales les infractions au droit de la concurrence. En outre, afin de garantir le bon fonctionnement des programmes de clémence, il est important que les informations obtenues d'un candidat à une mesure de clémence ne soient pas utilisées à son encontre par une autre autorité. Des efforts considérables ont été déployés au sein du REC pour minimiser tout effet négatif dû à l'absence d'harmonisation des programmes de clémence des différents États membres de l'UE, en particulier au travers de l'élaboration d'un programme modèle de clémence.

Le règlement autorise en outre une autorité nationale de la concurrence à demander à une autre autorité de collecter des informations et d'effectuer des enquêtes pour son compte. L'autorité agissant pour le compte d'une autre se conforme à ses propres règles de procédures et pouvoirs d'investigation. La Commission peut également demander à une autorité nationale de réaliser une inspection pour son compte. La Commission européenne coopère aussi étroitement avec les autorités nationales dans ses propres enquêtes, lorsqu'elle a besoin de leurs concours pour enquêter ou perquisitionner sur le territoire des États membres. Afin de garantir une cohérence d'approche, les autorités nationales de la concurrence doivent envoyer à la Commission une synthèse du dossier et de la décision envisagée avant son adoption, pour s'assurer qu'elle n'est pas contraire aux décisions antérieures de la Commission.

⁶⁰ Communication de la Commission relative à la coopération au sein du réseau des autorités de concurrence, JO 2004, C 101, 03.

⁶¹ A l'exception des échanges entre la Commission et l'autorité de surveillance de l'AELE en application de l'accord de l'Espace économique européen.

Box 4. Mise en pratique de la coopération au sein du REC : l'entente dans le verre plat

En 2007, la Commission a infligé 486,9 millions d'euros d'amendes à quatre fabricants de verre plat qui s'étaient entendus pour fixer les prix et d'autres conditions commerciales. Le verre plat est employé dans le secteur du bâtiment pour les fenêtres, les portes vitrées et les miroirs. Les fabricants en cause étaient Asahi (Japon), Guradian (États-Unis), Pilkington (Royaume-Uni) et Saint-Gobain (France). Entre 2004 et 2005, les autorités de la concurrence allemande, française, suédoise et britannique ont toutes partagé des informations sur ces sociétés. Il s'agissait notamment de lettres de clients et (ou) de plaintes non officielles relatives à des hausses de prix parallèles. La Commission a démarré son enquête sur la base de ces informations de marché, témoignant de l'«excellente coopération» existant au sein du REC, et des perquisitions coordonnées ont eu lieu en 2005. Neelie Kroes, qui était alors commissaire à la concurrence, a souligné que cette affaire mettait clairement en évidence «les avantages d'une coopération accrue entre la Commission et les autorités nationales chargées de la concurrence.»⁶²

Les spécificités du REC sont un cadre juridique commun et la suprématie du droit de l'UE, des institutions européennes chargées de l'application du droit et des tribunaux. Il peut toutefois constituer un modèle utile pour la coopération régionale. Le fonctionnement du REC montre qu'il est impératif pour la coopération de formaliser : i) la façon d'obtenir les preuves des pratiques anticoncurrentielles se déroulant à l'étranger pour qu'elles puissent être utilisées dans les procédures nationales et devant les tribunaux nationaux, et ii) le mode de partage des informations avec d'autres pays afin qu'ils puissent poursuivre les mêmes infractions.

4.3 Accords bilatéraux de coopération dans le domaine de la concurrence

4.3.1 Accords bilatéraux

Les accords bilatéraux de coopération dans le domaine de la concurrence se sont multipliés depuis 1976, année où a été signée la première convention de ce type entre les États-Unis et l'Allemagne.⁶³ Ils sont issus des premières conventions à caractère défensif ou qui ne prévoyaient que de vagues principes généraux de coopération. Les nouvelles moutures, conclues depuis les années 90, s'inspirent des recommandations de l'OCDE sur la coopération internationale et les principes de la courtoisie active. Ces accords de deuxième génération démontrent donc a priori un engagement plus poussé à renforcer la coopération dans l'application du droit de la concurrence au niveau international. Les accords conclus entre l'UE, le Canada et les États-Unis ont été les précurseurs d'un réseau de plus en plus étendu d'accords bilatéraux avec et entre juridictions plus récentes en matière de droit de la concurrence.

Les accords bilatéraux conclus depuis l'accord de 1991 entre l'UE et les États-Unis ont généralement reprennent généralement la même structure que cet accord et contiennent des dispositions plus ou moins semblables. Ils prévoient une notification lorsque l'un ou l'autre des signataires estime que ses mesures d'application sont susceptibles d'affecter les intérêts de l'autre. Ils contiennent en outre habituellement des dispositions pour la coordination des enquêtes parallèles, lorsqu'une telle coordination est appropriée et réalisable, ainsi que des principes de courtoisie active et passive. Leurs clauses prévoyant la communication d'informations sur les activités anticoncurrentielles sont soumises aux lois nationales de confidentialité. Elles prévoient par conséquent généralement une coopération au cas par cas. La plupart de ces accords bilatéraux permettent également les consultations, les visites régulières et les échanges de personnel entre les autorités.

⁶² Communiqué de presse de la Commission européenne, *Ententes : la Commission inflige des amendes d'un montant de 486,9 millions d'euros aux producteurs de verre plat pour avoir participé à une entente portant sur la fixation des prix*, IP/07/1781, 28 novembre 2007.

⁶³ Accord entre le Gouvernement des États-Unis et le Gouvernement de la République fédérale d'Allemagne concernant leur coopération mutuelle relative aux pratiques commerciales déloyales, 23 juin 1976, 4 *Trade Reg. Rep.* (CCH) 13501.

On s'accorde généralement à penser que certaines dispositions de ces accords ont plutôt été une réussite. On ne compte plus le nombre de fois où les autorités de la concurrence se sont mutuellement avisées de leurs investigations, ont partagé des informations non confidentielles et ont coordonné leurs enquêtes. Les dispositions de bon nombre de ces accords bilatéraux de deuxième génération semblent démontrer un engagement remarquable à coopérer pour l'application internationale du droit de la concurrence. Les accords de coopération sont toutefois plus fréquents entre pays développés abritant de grandes multinationales à même d'avoir une implantation sur leurs territoires respectifs. On peut penser que les incitations des grands pays développés à conclure des accords avec des pays plus petits ou des pays en développement sont moindres. Cette réticence peut s'expliquer par la crainte qu'un accord ne mette davantage à contribution l'autorité plus développée et plus expérimentée de la juridiction d'origine des multinationales se livrant à des pratiques anticoncurrentielles dans ces pays plus petits ou en développement. Il est probable, à l'inverse, que les pratiques des entreprises de pays en développement nuiront plus rarement aux marchés des pays développés.⁶⁴

Les accords bilatéraux sont des instruments juridiques non contraignants, qui expriment le souhait de se consulter et de coopérer, et qui ne limitent pas le pouvoir d'appréciation des autorités chargées de la réglementation.⁶⁵ Bien qu'il s'agisse d'accords internationaux opposables, signés par les représentants des gouvernements,⁶⁶ ils ne modifient pas les lois nationales qui interdisent de partager des informations commerciales confidentielles sans le consentement de la source ; ils prévoient en outre expressément que la partie requise doit prendre en compte ses propres intérêts nationaux pour déterminer si et dans quelle mesure elle doit coopérer comme on le lui demande. En fin de compte, dans le cas d'enquêtes parallèles, les autorités ne peuvent partager des informations confidentielles que si la source de ces informations y consent.

4.3.2 *Accords d'assistance mutuelle dans la lutte contre les pratiques anticoncurrentielles*

Les accords d'assistance mutuelle dans la lutte contre les pratiques anticoncurrentielles permettent une coopération plus poussée que les accords bilatéraux traditionnels de coopération. Le niveau renforcé de coopération est rendu possible par les lois nationales qui autorisent, en vertu d'accords d'assistance mutuelle, certaines mesures d'assistance qui seraient autrement interdites, concernant en particulier l'accès à des preuves situées à l'étranger et le partage des informations. Il existe quelques exemples d'accords de troisième génération en vigueur. Le premier est l'accord de coopération et de coordination signé en 1994 entre la commission australienne de la concurrence et de la consommation et la commission néo-zélandaise du commerce, qui a été actualisé en 2007. Cet accord ne prévoit toutefois pas le partage d'informations confidentielles. Un accord d'assistance mutuelle dans l'application du droit de la concurrence a été signé en 1999 entre les États-Unis et l'Australie.⁶⁷ Il permet aux autorités signataires de requérir une assistance étendue dans les affaires pénales et civiles d'infraction au droit de la concurrence en dehors du cadre de fusions et prévoit notamment la possibilité contraignante d'obtenir des témoignages et des informations documentaires.⁶⁸

⁶⁴ cf. Jenny (2002) et (2006).

⁶⁵ Stephan (2005).

⁶⁶ ou par délégation des pouvoirs de l'autorité de la concurrence.

⁶⁷ Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, 1999, [1999] ATS 22.

⁶⁸ cf. section 4.4 ci-après, pour une discussion des avantages supplémentaires limités des accords d'assistance mutuelle pour l'application du droit de la concurrence.

4.3.3 *Mémoires d'accord*

Les mémoires d'accord non contraignants entre pays sont généralement des accords en vertu desquels les autorités de la concurrence cherchent à mieux se connaître tout en s'engageant à faire leurs « meilleurs efforts ». Les mémoires d'accord ne nécessitent pas un accord international formel. Ils peuvent matérialiser des relations de coopération existantes ou bien initier un rapprochement entre autorités de la concurrence. Le mémoire d'accord conclu récemment entre la Chine et les États-Unis a été qualifié par le Procureur général adjoint alors en poste au département de la Justice des États-Unis de « témoignage de la relation existant entre nos deux pays, qui permet également, en servant de cadre à une coopération renforcée entre nos agences, de commencer un nouveau chapitre de notre collaboration en matière de droit et de politique de la concurrence. »⁶⁹ Les mémoires d'accords constituent en quelque sorte un avant-projet pour la construction d'un cadre plus durable de coopération. Certains d'entre eux vont plus loin et s'apparentent davantage aux accords bilatéraux de coopération décrits ci-avant.⁷⁰

4.4 *Dispositions du droit national*

Certaines lois nationales constituent une base juridique directe pour la coopération entre autorités ou juridictions, alors que d'autres confèrent un mandat pour conclure des accords de coopération avec d'autres juridictions. Dans un cas comme dans l'autre, les juridictions dont les lois autorisent directement la coopération ont également conclu des accords bilatéraux de coopération, ce qui semble indiquer que ces accords ont davantage d'utilité.⁷¹

Les lois nationales peuvent prévoir des « passerelles » juridiques pour la divulgation volontaire aux autorités judiciaires étrangères d'informations recueillies dans le cadre de la propre enquête du pays requis. Ces dispositions devraient permettre le partage d'informations ayant trait à des enquêtes pénales ou civiles de l'autorité requérante.

La loi du Royaume-Uni sur les entreprises (*Enterprise Act*) permet la divulgation à une autorité publique étrangère des informations recueillies par l'*Office of Fair Trading* (OFT) dans le cadre de ses pouvoirs d'investigation, afin de faciliter l'exercice par l'autorité étrangère de toute fonction en rapport avec des affaires civiles ou pénales de violation du droit de la concurrence dans ces juridictions, y compris les ententes.⁷² Actuellement, lorsque l'OFT envisage de divulguer des informations à une autorité étrangère, il est tenu de prendre en compte certaines considérations définies par la loi. L'OFT doit procéder à une évaluation, au cas par cas, des mesures de protection qui existent dans la juridiction étrangère pour le traitement des informations divulguées. Il doit en outre s'interroger pour savoir si cette divulgation peut porter préjudice aux intérêts commerciaux légitimes de l'entreprise ou aux intérêts de la personne concernée par l'information.⁷³

⁶⁹ Varney (2011).

⁷⁰ cf. par exemple le Protocole d'entente entre le Commissaire de la concurrence (Canada) et le Fiscal Nacional Economico (Chili) concernant l'application de leurs lois respectives sur la concurrence (2001).

⁷¹ ICN (2007), p.13.

⁷² United Kingdom Enterprise Act, Chapter 40, s243 (2002), *the overseas disclosure information gateway*.

⁷³ Plusieurs restrictions s'appliquent à la divulgation d'informations à des autorités officielles étrangères. Premièrement, l'OFT ne divulgue généralement pas à une autorité officielle étrangère les dépositions de témoins sous contrainte. Deuxièmement, lorsque des informations ont été apportées volontairement par une personne physique dans le cadre d'une requête de clémence, l'OFT ne fournit pas ces informations à une autorité officielle étrangère en vue de poursuites pénales, à moins d'une garantie d'immunité de l'autorité requérante. Troisièmement, l'OFT ne divulgue pas les informations contenues dans une requête de

La passerelle britannique de divulgation d'informations à l'étranger a été utilisée, par exemple, par la commission australienne de la concurrence et de la consommation dans le cadre de l'enquête sur l'entente des *tuyaux marins*⁷⁴ et a eu selon elle une importance décisive pour l'enquête.⁷⁵ La procédure peut toutefois être longue et mobiliser des ressources importantes (à la fois du côté de l'OFT et de l'autorité étrangère).⁷⁶

La loi allemande sur les obstacles à la concurrence prévoit non seulement une coopération étendue entre les autorités membres du REC, mais étend également cette coopération aux autorités en dehors de l'UE. Elle limite toutefois le partage des informations confidentielles à celles autorisées par leur source.⁷⁷

Suite à l'amendement du droit australien de la concurrence, l'autorité australienne de la concurrence (ACCC) est autorisée, en vertu de l'article 155AAA de loi de 2010 sur la concurrence et la consommation (*Competition and Consumer Act*), à divulguer des « informations protégées » à une agence gouvernementale étrangère si elle décide que cette divulgation peut permettre à cette agence d'exercer ses fonctions ou ses pouvoirs, ou l'y aidera, et si elle considère cette divulgation appropriée en fonction des circonstances. Cette disposition confère à l'ACCC des pouvoirs d'appréciation élargis en matière de partage d'informations protégées avec des autorités étrangères. La loi ne précise pas les éléments que l'ACCC doit prendre en considération pour décider de divulguer ou non les informations. L'ACCC a toutefois pour politique de tenir compte plus particulièrement de certains facteurs en fonction des circonstances. Elle peut notamment s'intéresser : aux relations entre l'Australie et les autres pays ou à l'impact de la divulgation sur les programmes nationaux et internationaux en matière d'ententes, y compris la politique de clémence de l'ACCC.⁷⁸

La nouvelle passerelle d'information de l'Australie a été utilisée en plusieurs occasions par la commission du commerce de la Nouvelle-Zélande (NZCC). Dans le cadre d'une enquête de fixation des prix dans les services de transport par avion sanitaire, la NZCC a demandé la transcription d'entretiens confidentiels de certains témoins communs. L'ACCC a assorti la divulgation des informations transcrites dans le cadre de l'enquête de conditions spécifiques auxquelles la NZCC a accepté de se plier en signant un engagement écrit.⁷⁹

La Nouvelle-Zélande devrait adopter un nouveau projet de loi de la commission du commerce (International Co-operation and Fees Bill), qui vise à permettre à la NZCC d'aider dans leurs enquêtes les régulateurs étrangers avec lesquels elle est liée par un accord de coopération.⁸⁰ Cette assistance s'étendrait

clémence concernant une entreprise, excepté pour les besoins d'une mesure applicative contre une autre entreprise ou personne physique que celle ayant fourni les informations.

⁷⁴ ACCC c. Bridgestone Corporation & Ors [2010] FCA 584.

⁷⁵ cf. contribution écrite de l'Australie au Forum mondial sur la concurrence de 2012, [DAF/COMP/GF/WD\(2012\)36](#).

⁷⁶ L'OFT a par conséquent proposé des amendements à la législation visant à permettre une évaluation initiale des juridictions disposant de garanties juridiques suffisantes. Cela éviterait de devoir réaliser une évaluation complète des conditions légales de divulgation applicables pour chaque divulgation envisagée. OFT (2011), p. 130.

⁷⁷ Article 50(b) de la loi allemande contre les entraves à la concurrence.

⁷⁸ cf. contribution écrite de l'Australie au Forum mondial sur la concurrence de 2012, [DAF/COMP/GF/WD\(2012\)36](#).

⁷⁹ Borrowdale (2011).

⁸⁰ Cette disposition vise à refléter la loi existante australienne de 1992 sur l'assistance mutuelle dans la réglementation des entreprises, qui autorise des autorités comme l'ACCC à apporter leur concours à des

aux perquisitions et aux avis d'information. Afin de garantir la réciprocité et la confidentialité, le projet prévoit que la Nouvelle-Zélande ne devrait pas conclure d'accord de coopération « sans foi raisonnable dans les dispositions de l'autre partie en la matière ».⁸¹ Il renforcera de façon générale la coopération avec les autres juridictions, mais il devrait être utilisé le plus souvent avec l'ACCC, compte tenu des liens géographiques et économiques étroits entre les deux pays.⁸²

Au lieu d'autoriser directement la coopération avec d'autres juridictions, les États-Unis se sont dotés d'une législation autorisant la conclusion d'accords de coopération spécifiques dans le domaine de la concurrence. L'*International Antitrust Enforcement Assistance Act*, adopté en 1994, permet aux États-Unis de conclure des accords bilatéraux d'entraide judiciaire pour lutter contre les infractions au droit de la concurrence, en vertu desquels une assistance peut être apportée aux autorités étrangères dans les procédures civiles et pénales et des informations peuvent être échangées, alors que cette assistance et ces échanges seraient autrement contraires à la loi. En théorie, ces dispositions permettent aux pays de mener des procédures conjointes, ou tout au moins, coordonnées, dans l'application du droit de la concurrence, sans devoir rechercher l'autorisation des parties à l'origine des informations. La législation autorisant la conclusion d'accords de troisième génération reconnaît qu'une coopération internationale efficace passe par la possibilité de partager plus largement des informations avec des autorités étrangères de la concurrence.

La loi de 1994 requiert toutefois des engagements réciproques des juridictions étrangères concernées. Cette condition recouvre notamment une législation équivalente garantissant une protection suffisante des informations confidentielles devant être partagées. Autrement, les États-Unis ne peuvent conclure d'accord de coopération renforcée avec ces juridictions. La plupart des pays n'ont pas aujourd'hui un cadre juridique qui leur permettrait de conclure ce type d'accord.⁸³ A ce jour, seule l'Australie a tiré parti des possibilités offertes par la nouvelle loi, ce qui tient sans doute aux quelques avantages supplémentaires offerts par les traités d'entraide dans la mise en œuvre du droit de la concurrence. L'Australie a conclu en 1999 un accord d'entraide avec les États-Unis et a invoqué au moins une fois cet accord pour obtenir des informations.⁸⁴

4.5 *Coopération fondée sur les renonciations au droit à la confidentialité consenties dans le cadre de requêtes de clémence*

Le Réseau international de la concurrence (RIC) estime que « [l'] introduction de programmes de clémence dans davantage de juridictions apparaît comme un facteur de plus en plus important de la coopération entre les agences, grâce aux renonciations au droit à la confidentialité consenties dans le cadre de requêtes d'immunité ou d'amnistie. »⁸⁵

enquêtes étrangères de réglementation, bien qu'elle n'autorise pas la divulgation d'informations à l'autorité étrangère.

⁸¹ Le projet de loi et les documents explicatifs sont disponibles sur le site Internet du bureau des conseillers parlementaires de la Nouvelle-Zélande (*New Zealand's Parliamentary Counsel Office*).

⁸² cf. contribution écrite de la Nouvelle-Zélande au Forum mondial sur la concurrence de 2012, [DAF/COMP/GF/WD\(2012\)14](#).

⁸³ Swaine (2011) p. 19.

⁸⁴ First (2001). cf. également, la contribution écrite de l'Australie au Forum mondial sur la concurrence de 2012, [DAF/COMP/GF/WD\(2012\)36](#).

⁸⁵ RIC (2007), p 31.

De nombreux pays sont aujourd'hui dotés de dispositifs de clémence ou d'amnistie. Les dispositifs de clémence incitent les parties à des ententes à se désolidariser de celles-ci, à dénoncer leur existence et à coopérer dans le cadre de l'enquête en échange d'une immunité ou d'une réduction de toutes sanctions qui pourraient ordinairement être imposées. Ils constituent un outil très efficace, voire l'outil le plus efficace, dans la lutte contre les ententes.

Le nombre des requêtes de clémence déposées simultanément auprès de plusieurs autorités de la concurrence était en augmentation lors de l'établissement du troisième rapport de l'OCDE (2005) et il paraît peu probable que cette dynamique se soit ralentie. Les requêtes de clémence simultanées comportent souvent des renoncements au droit à la confidentialité. Ces renoncements créent davantage d'occasions de coopération plurijuridictionnelle en permettant aux autorités de la concurrence concernées de partager des informations reçues dans le cadre des demandes de clémence et de coordonner les enquêtes.⁸⁶ Dans un discours prononcé en 2003, alors qu'un nombre croissant de juridictions envisageaient de se doter de dispositifs de clémence, Scott Hammon, Assistant du Procureur général au département de la Justice des États-Unis, a synthétisé l'intérêt des renoncements au droit à la confidentialité en ces termes :

« De la même façon qu'il est devenu courant que les entreprises sollicitent simultanément la clémence des États-Unis, de la CE et du Canada (et souvent d'autres juridictions également), elles acceptent couramment de partager leurs informations avec les juridictions auprès desquelles elles sollicitent la clémence. Ainsi, nous sommes amenés fréquemment à discuter des stratégies d'investigation avec la CE et le Canada et à coordonner nos perquisitions, notifications d'assignation, inspections impromptues et dépôts d'accusations, afin d'éviter la divulgation prématurée d'une investigation et une éventuelle destruction de preuves. »⁸⁷

L'adoption d'un dispositif de clémence est un instrument qui facilite la coopération avec d'autres pays dotés de programmes de clémence. Autrement, les candidats n'ont aucune raison de consentir à partager des informations avec des juridictions sans dispositif de clémence. L'ASEAN a expressément reconnu cet état de fait dans ses lignes directrices régionales sur la politique de la concurrence.⁸⁸ La simple existence d'un programme de clémence, peut toutefois ne pas constituer une incitation suffisante au dépôt de requêtes de clémence. Les juridictions doivent être dotées de programmes crédibles d'application de la législation contre les ententes, pour que leurs dispositifs de clémence soient efficaces.⁸⁹ L'absence d'un programme de clémence pleinement opérationnel soutenu par une répression effective des ententes a par exemple été identifiée comme un obstacle à une coopération réussie entre nations d'Afrique australe dans la lutte contre les ententes.⁹⁰

Les renoncements au droit à la confidentialité consenties dans le cadre de la sollicitation d'une mesure de clémence permettent aux autorités d'échanger des informations rapidement et à un stade précoce, ce qui facilite la coordination des premières étapes de l'investigation. Cela peut permettre d'éviter de devoir passer par les canaux officiels des procédures formelles de coopération et les retards que cela pourrait occasionner.

⁸⁶ OCDE (2005), p. 33.

⁸⁷ Hammon (2003).

⁸⁸ ASEAN, *Regional Guidelines on Competition Policy*, 2010, 6.9.5.3.

⁸⁹ Les trois composantes essentielles qui doivent être en place avant qu'une juridiction puisse mettre en œuvre un programme de clémence avec succès sont les suivantes : sévérité des sanctions, plus grande crainte d'être démasqué et transparence des mesures d'application.

⁹⁰ Skata (2011), p.18.

Certaines autorités de la concurrence envisagent de subordonner la clémence à la renonciation au droit à la confidentialité, tant celle-ci est utile. Même lorsque les dispositifs de clémence ne le requièrent pas officiellement, les autorités les plus reconnues dans la répression des ententes tendent à exiger ces renonciations et à les étoffer, afin d'autoriser l'échange non seulement des informations, mais aussi des preuves.

La multiplication des programmes de clémence à travers le monde renforce l'intérêt d'harmoniser les conditions imposées aux bénéficiaires de ces programmes.⁹¹ Les conflits ou incohérences cruciales entre les conditions imposées par les programmes de clémence des juridictions concernées peuvent être déterminants pour susciter ou non les requêtes et guider le choix des autorités auprès desquelles les déposer. Les similarités entre les programmes de clémence, en particulier en ce qui concerne les conditions imposées aux bénéficiaires, limitent les complications inhérentes aux procédures plurijuridictionnelles et incitent les entreprises à contacter de multiples juridictions. D'un point de vue pratique, en harmonisant ses programmes de clémence avec ceux des grandes juridictions comme les États-Unis et l'UE (qui sont semblables sur les aspects importants), un pays sera mieux à même d'attirer davantage de requêtes de clémence.

Par conséquent, outre qu'elle contribue à l'amélioration des programmes de clémence, la convergence des politiques de clémence présente des avantages particuliers du point de vue de l'efficacité de fonctionnement, dans la mesure où elle réduit les complications induites par la dénonciation d'ententes internationales auprès de plusieurs juridictions. L'ASEAN reconnaît ces avantages dans ses lignes directrices régionales sur la politique de la concurrence.⁹²

4.6 *Coopération informelle*

L'expression « coopération informelle » désigne, dans l'usage, toute coopération entre autorités de la concurrence qui n'entraîne ni le partage d'informations confidentielles, ni l'obtention de preuves pour le compte d'une autre autorité. Ce type de coopération est plus fréquent que la coopération formelle, sans doute parce qu'elle est plus facile à réaliser et ne se heurte pas aux contraintes légales de l'échange d'informations confidentielles qui existent dans chaque pays.

Malgré ses limites, la coopération informelle peut contribuer à renforcer l'efficacité des mesures d'application. Les conférences, réunions bilatérales et autres échanges de savoir-faire accroissent les compétences et la compréhension mutuelle. Les accords bilatéraux de coopération peuvent faciliter la coopération dans le cadre d'affaires spécifiques en améliorant la compréhension par chaque partie des systèmes et attentes de l'autre partie. La coopération informelle dans le cadre d'affaires spécifiques peut recouvrir les discussions sur les stratégies d'investigation, les informations de marché, les évaluations de témoins, le partage de pistes d'investigation et la comparaison des approches de dossiers communs. Les informations ou l'assistance obtenues dans ce cadre peuvent optimiser la stratégie d'investigation et contribuer à recentrer l'enquête.

La coopération informelle est souvent étayée par des contacts personnels et la participation aux nombreux réseaux qui se sont développés ces dernières années dans le domaine de la concurrence permet de construire des relations de confiance. Les forums internationaux et régionaux, comme l'OCDE, la CNUCED, le RIC, l'ASEAN, l'APEC, le Forum africain de la concurrence et l'ICAP, constituent autant de lieux où autorités et représentants officiels peuvent se rencontrer, partager des idées, des pratiques et apprendre à comprendre les cadres juridiques et les institutions de leurs homologues. Ces rencontres

⁹¹ cf. contribution écrite du BIAC au Forum mondial sur la concurrence de 2012, [DAF/COMP/GF/WD\(2012\)57](#).

⁹² cf. 6.9.8 des Lignes directrices.

pourront être le prélude à d'éventuelles prises de contact et à l'instauration d'une coopération entre autorités. L'assistance au renforcement des capacités est un moyen de développer les compétences techniques et de promouvoir la compréhension mutuelle et la coopération future.

La coopération informelle a été la clé qui a permis de débloquer plusieurs enquêtes sur des ententes. Dans le dossier des *tuyaux marins*, l'ACCC s'est appuyée sur des informations et des documents fournis de façon informelle par le département de la Justice des États-Unis, ainsi que sur des informations communiquées de façon formelle par l'OFT britannique.⁹³ C'est dans le cadre d'une conférence à Washington que les autorités brésiliennes ont pris connaissance de l'enquête du département américain de la Justice sur la lysine, qui les a amenées à mener leur propre enquête. Les informations relatives aux poursuites étaient déjà dans le domaine public et le département américain de la Justice a ensuite fourni aux autorités brésiliennes des documents et des pistes d'enquête. Dans l'entente sur les vitamines, l'enquête du Brésil a bénéficié de pistes fournies de façon informelle par le Bureau canadien de la concurrence.⁹⁴ Cet échange a été attribué aux relations professionnelles établies entre les membres des autorités brésiliennes et canadiennes.

L'absence d'accord de coopération formelle n'interdit pas l'échange d'informations non confidentielles, ni la coordination d'inspections surprises. La commission de la concurrence de l'Afrique du Sud (*Competition Commission of South Africa - CCSA*) a par exemple réalisé en 2007 des perquisitions coordonnées avec l'UE et le département de la Justice des États-Unis dans les locaux de plusieurs sociétés soupçonnées d'entente. C'était la première fois que la CCSA coordonnait une inspection avec d'autres autorités de la concurrence.⁹⁵

Il semblerait dans la pratique que les autorités de la concurrence allient coopération formelle et informelle dans la détection et l'investigation des ententes. L'existence d'accords internationaux ne garantit pas la coopération et leur absence ne l'interdit pas. L'avantage du tissu complexe d'accords internationaux entre gouvernements et autorités est qu'il offre un cadre officiel pour la coopération, malgré les limites imposées par la législation. Par ailleurs, la conclusion d'accords internationaux démontre la volonté et la capacité de mener un dialogue constructif avec des homologues étrangers. Le défi pour les autorités de la concurrence, des pays en développement en particulier, consiste à trouver le juste équilibre entre ce qui peut être réalisé à travers la coopération informelle et ce qui nécessite des mécanismes plus formels.

4.7 Exemples récents de coopération dans des affaires d'ententes internationales

4.7.1 L'entente des tuyaux marins

Entre 1986 et 2007, les fabricants de tuyaux marins se sont entendus, à l'échelle internationale, pour fixer les prix, se partager les marchés, se répartir la clientèle, limiter l'offre et manipuler les appels d'offres. Pour dissimuler cette entente, les sociétés utilisaient des comptes privés de courrier électronique, des numéros de téléphone privés et des noms de code. Une entreprise jouait le rôle de coordonnateur et les autres lui transmettaient les informations relatives aux contrats sur le point d'être signés avec leurs clients. L'une de ces sociétés a sollicité la clémence simultanément au Japon, aux États-Unis et dans l'UE, se mettant à l'abri de toute sanction pécuniaire et déclenchant des mesures coordonnées parmi les autorités chargées d'enquêter.

⁹³ cf. cas d'espèce ci-après.

⁹⁴ De Araujo(2002), pp.5, 7.

⁹⁵ cf. contribution écrite de l'Afrique du Sud à la table ronde de l'OCDE sur les aspects juridictionnels des ententes, y compris la doctrine des effets, [DAF/COMP/WP3/WD\(2008\)92](#) (non publié) et au Forum mondial sur la concurrence de 2012, [DAF/COMP/GF/WD\(2012\)51](#).

L'entente des tuyaux marins a suscité un niveau de coopération sans précédent entre les autorités du Royaume-Uni, des États-Unis et de l'UE chargées d'instruire l'affaire. Le département de la Justice des États-Unis a eu recours à des techniques de mise à exécution relativement musclées, associant informateurs, écoutes et perquisitions du FBI et a obtenu l'autorisation des tribunaux pour enregistrer et filmer en secret une réunion entre membres de l'entente dans une chambre d'hôtel à Houston au Texas. C'est à la suite de cette réunion, en mai 2007, que les huit dirigeants non américains impliqués dans cette entente ont été arrêtés par les autorités américaines. En même temps que les États-Unis enquêtaient, l'Office of Fair Trading du Royaume-Uni menait une investigation qui a duré 11 mois, réalisant perquisitions et entretiens sur site. La Commission européenne a également mené une enquête parallèle, avec des inspections surprises coordonnées en France, en Italie et au Royaume-Uni, en liaison avec ses homologues des autorités nationales de la concurrence.

L'une des principales innovations de l'affaire des tuyaux marins a été la négociation de transactions pénales, qui ont permis aux trois ressortissants britanniques de plaider coupables devant la justice américaine, avant de revenir au Royaume-Uni pour y être jugés et y purger leur peine. C'était la première fois que l'OFT intentait des poursuites pénales contre des ressortissants britanniques coupables d'entente, ce qui montre l'étendue de la coopération entre l'OFT et le ministère américain de la justice.

Les autorités de la concurrence des États-Unis,⁹⁶ du Royaume-Uni,⁹⁷ de l'UE,⁹⁸ de l'Australie⁹⁹ et du Japon¹⁰⁰ ont toutes introduites des procédures dans cette affaire d'entente. L'ACCC australienne a attribué le succès de sa procédure à l'aide reçue du ministère américain de la Justice et de l'OFT, qui ont fourni des documents déterminants pour l'enquête de l'Australie. Les informations nécessaires ont été obtenues de façon informelle pour celles provenant des États-Unis et fournies par le département de la Justice des États-Unis, mais de façon formelle, pour celles de l'OFT, en application des articles applicables de la loi britannique sur les entreprises. L'ACCC et l'OFT ont également coopéré de façon informelle avant le dépôt d'une requête formelle.¹⁰¹

Au Japon, des sanctions pécuniaires ont été imposées à l'une des entreprises japonaises impliquées alors que la Commission japonaise des pratiques commerciales loyales (*Japan Fair Trade Commission - JFTC*) a prononcé des injonctions enjoignant les autres de mettre un terme à l'activité incriminée. C'était la première fois que la JFTC prenait une décision de ce type contre des entreprises étrangères dans une affaire d'entente internationale.

4.7.2 L'entente du fret aérien

Entre 2000 et 2006, plusieurs grandes compagnies aériennes internationales de transport de marchandises se sont entendues pour gonfler le prix du fret aérien. Pendant six années, elles ont coordonné les suppléments appliqués au titre du carburant et de la sécurité. Dans un premier temps, les contacts sur les tarifs ne concernaient que le surcoût du carburant, aboutissant à l'imposition par les compagnies aériennes de transport de marchandises à l'échelle internationale d'un supplément forfaitaire par kilo de

⁹⁶ *U.S. c. Bridgestone Corp.*, Criminal No. H-11-651.

⁹⁷ *R c. Whittle, Allison, et Brammar*, [2008] EWCA Crim. 2560, [2009] Lloyd's Rep. FC 77.

⁹⁸ COMP/39.406 — *Marine Hoses*.

⁹⁹ *ACCC v Bridgestone Corporation & Ors* [2010] FCA 584.

¹⁰⁰ Communiqué de presse de la Japan Fair Trade Commission, *Cease and Desist Order and Surcharge Payment Order against Marine Hose Manufacturers*, 22 février 2008.

¹⁰¹ cf. contribution écrite de l'Australie au Forum mondial sur la concurrence de 2012, [DAF/COMP/GF/WD\(2012\)36](#).

fret aérien. Les compagnies aériennes ont ensuite étendu leur entente à la tarification de la sécurité, imposant un supplément et refusant de verser aux transitaires (leurs clients) des commissions sur les suppléments. Le refus de verser des commissions garantissait que les suppléments ne permettaient pas d'obtenir un avantage concurrentiel en octroyant des remises aux clients. Au total, des sanctions pécuniaires ont été imposées à 22 compagnies aériennes et des poursuites ont été intentées contre 21 personnes physiques, pour entente. La Lufthansa et sa filiale, la Swiss, ont bénéficié d'une totale immunité d'amendes dans le cadre du programme de clémence de l'UE et de programmes de clémence ou d'immunité dans de nombreuses autres juridictions.

Le 14 février 2006, les autorités de la concurrence ont perquisitionné dans les locaux des compagnies aériennes dans divers pays à travers le monde afin d'établir si elles avaient participé à cette entente. Les États-Unis, l'UE, l'Australie, la Nouvelle-Zélande, le Canada et la Corée ont introduit des procédures. Aux États-Unis, le département de la Justice a poursuivi 22 compagnies aériennes, imposé plus de 1,8 milliard de dollars d'amendes (le montant le plus élevé imposé à ce jour aux États-Unis pour une infraction au droit de la concurrence) et prononcé des peines de prison contre 6 dirigeants. En Australie, l'ACCC a poursuivi 15 compagnies aériennes et imposé 46,5 millions de dollars australiens d'amendes. En Nouvelle-Zélande, la NZCC a poursuivi 13 compagnies aériennes et 7 dirigeants. Au Canada, le Bureau a reçu des reconnaissances de culpabilité de 6 compagnies aériennes et a imposé plus de 17 millions de dollars canadiens d'amendes. En Corée, la KFTC a poursuivi 19 compagnies aériennes et imposé 18 millions de dollars des États-Unis d'amendes. En Europe, l'UE a imposé un total de 799 millions d'euros d'amendes à 11 compagnies aériennes de transport de marchandises, en accordant des remises aux compagnies qui avaient coopéré dans le cadre du programme de clémence de l'UE.

La dimension mondiale de la répression contre l'entente du fret aérien a montré qu'une entreprise implantée à travers le monde ne peut plus présumer qu'une affaire est close lorsqu'elle est réglée dans une juridiction. Les entreprises se voient en effet désormais contraintes de conclure des accords avec toutes les autres juridictions pouvant avoir été touchées par leur comportement. L'entente du fret aérien a révélé au secteur privé que « les autorités chargées de l'application coopèrent entre elles et que les reconnaissances de culpabilité, témoignages et documents obtenus par l'une d'entre elles traversent les frontières pour être partagés avec d'autres. »¹⁰² Elle a toutefois suscité des préoccupations parmi les entreprises sur l'usage qui pourrait être fait de ces informations dans le cadre d'éventuels recours collectifs ultérieurs.

5. Les défis à relever pour assurer une coopération internationale efficace dans les enquêtes sur les ententes

Le nombre croissant de pays réprimant les ententes et la nécessité qui en découle pour les autorités de la concurrence de coordonner leurs enquêtes sur les comportements collusifs pouvant avoir des retombées internationales soulignent les contraintes du système actuel de coopération internationale. Certaines de ces contraintes sont communes aux autorités de la concurrence des pays développés et des pays en développement ; d'autres sont plus spécifiques aux autorités plus récentes et moins expérimentées.

5.1 Problèmes communs à toutes les juridictions

5.1.1 Partage d'informations confidentielles

L'un des aspects les plus sensibles de la coopération concerne le partage d'informations et de données confidentielles entre autorités de la concurrence. Une étude récente du RIC met en évidence ces lacunes.¹⁰³ Ces difficultés trouvent leur origine dans les dispositions de droit national qui limitent le partage

¹⁰² Evans et Booth (2010).

¹⁰³ RIC (2007).

d'informations confidentielles. La plupart des législations nationales interdisent le partage d'informations confidentielles issues de l'enquête d'une autorité de la concurrence et ne permettent pas à une autorité d'utiliser ses pouvoirs de collecte d'informations pour le compte d'une autorité étrangère de la concurrence. Hormis les très rares exceptions décrites dans les sections précédentes, la majorité des instruments et accords dans le domaine de la concurrence n'autorisent pas le partage d'informations confidentielles.

Par exemple, la Turquie a signalé que l'absence de mécanismes formels de coopération autorisant le partage d'informations confidentielles avec la Commission européenne avait limité ses possibilités d'enquête dans des affaires d'entente. Dans une affaire de suspicion d'activités d'entente dans le secteur des appareillages hermétiquement clos, qui semblaient avoir lieu en dehors de la Turquie, mais affectaient le marché turc, la même entente faisait l'objet d'investigations de la part de la Commission européenne. Malgré la demande de coopération formulée par la Turquie, la Commission n'a pas pu communiquer d'informations confidentielles en l'absence de mécanisme autorisant le partage d'informations confidentielles. Le fait de ne pas pouvoir obtenir des informations de source étrangère a entravé considérablement les possibilités d'enquête de la Turquie sur cette affaire d'entente.¹⁰⁴

Dans les ententes sur les *vitamines*¹⁰⁵ et les *électrodes en graphite*¹⁰⁶, le rapport de l'OCDE sur les ententes injustifiables note que d'autres autorités de la concurrence ont été informées des ententes et ont ouvert des enquêtes lorsque les procédures de l'UE, des États-Unis et du Canada ont été rendues publiques. Dans certains cas, les discussions informelles tenues avec les autorités américaines ou européennes et les informations non confidentielles qu'elles ont fournies, ont aidé les autres autorités de la concurrence.¹⁰⁷ Toutefois, de nombreux pays membres de l'OCDE soulignent que leurs enquêtes sur ces ententes ont été entravées par l'incapacité d'accéder à des informations détenues par des autorités étrangères de la concurrence, mais protégées par des dispositions de confidentialité.

Dans le contexte de l'application du droit de la concurrence, les limites imposées aux autorités en matière d'échange d'informations confidentielles se justifient par le fait que ces échanges réduiraient l'incitation des entreprises à coopérer avec les autorités dans le cadre de leurs dispositifs de clémence et nuiraient par conséquent globalement à l'efficacité des programmes nationaux de répression des ententes.

On s'inquiète en outre, de la même façon, qu'une fois échangées, les informations confidentielles confiées à une autorité dans une juridiction donnée puissent tomber dans le domaine public (par exemple en raison de règles plus souples d'accès au dossier de l'autorité de la concurrence dans le pays requérant) ou puissent simplement devenir plus faciles à découvrir dans la juridiction recevant les informations. La source des informations pourrait ainsi se trouver exposée au risque de recours privés et de recherches consécutives en dommages et intérêts. Ce risque est particulièrement important si les informations peuvent être utilisées devant des tribunaux susceptibles d'allouer des dommages et intérêts punitifs aux requérants, comme dans le cas des dédommagements au triple imposés aux États-Unis. Ces préoccupations ont récemment ressurgi suite au jugement de la Cour de justice de l'Union européenne dans l'affaire *Pfleiderer*.¹⁰⁸ La Cour a conclu que les plaignants dans le cadre de procès privés pouvaient, dans certaines circonstances, avoir accès au dossier de l'autorité de la concurrence, y compris aux pièces soumises dans le

¹⁰⁴ OCDE (2005), p. 32.

¹⁰⁵ Case COMP/E-1/37.512 – *Vitamins* [10.01.03] OJ L 6/1, see paras 155-157.

¹⁰⁶ Case COMP/E-1/36.490 — *Graphite electrodes* [18.07.01] OJ L 100/1.

¹⁰⁷ Par exemple, la coopération informelle du Brésil avec les États-Unis dans l'entente sur les vitamines, cf. *supra*.

¹⁰⁸ C-360/09, *Pfleiderer AG v. Bundeskartellamt*, arrêt de la Cour de justice de l'Union européenne du 14 juin 2011.

cadre de programmes de clémence. Selon elle, il appartient à chaque tribunal national des États membres de l'UE appelé à se prononcer sur une infraction au droit de la concurrence passible de dommages et intérêts de mettre en balance au cas par cas les intérêts du plaignant privé et la préoccupation légitime de ne pas nuire à l'efficacité du programme de clémence.

Box 5. *Pfleiderer* : accès à des documents fournis dans le cadre de programmes de clémence et application privée du droit européen de la concurrence

Une affaire européenne (*Pfleiderer v Bundeskartellamt*) a récemment ramené sur le devant de la scène les questions afférentes à l'autorisation d'accès à des documents communiqués dans le cadre d'une demande de clémence.¹⁰⁹ Dans l'affaire *Pfleiderer*, un client de l'entreprise sanctionnée pécuniairement pour avoir pris part à une entente dans le secteur des papiers décor a présenté une demande d'accès complet au dossier du *Bundeskartellamt*. Le *Bundeskartellamt* ayant refusé l'accès aux documents du dossier de clémence, *Pfleiderer* a intenté une procédure devant le tribunal local allemand (Amtsgericht). L'Amtsgericht a ordonné un renvoi devant la Cour de justice de l'Union européenne afin qu'elle détermine si le refus de l'accès aux documents du dossier de clémence était contraire au droit européen. Dans sa décision, la Cour reconnaît qu'autoriser à des tiers l'accès aux documents des dossiers de clémence risque de compromettre les programmes de clémence. Ce n'est toutefois pas une raison suffisante pour priver les personnes physiques de leur droit bien établi à demander réparation du préjudice que leur aurait causé un comportement anticoncurrentiel.¹¹⁰ Faute de réglementation européenne contraignante sur le sujet, il appartient aux tribunaux nationaux de décider au cas par cas s'il convient de rendre publics les documents soumis dans le cadre de programmes de clémence.

Certains commentateurs se sont inquiétés de ce que cet arrêt renforce les tensions entre les dispositifs de clémence et les recours en droit privé, avec le risque « *d'implications graves pour la répression des ententes* ». ¹¹¹ On craint que l'incitation des entreprises mises en cause à conclure des programmes d'amnistie ou de clémence ne soit gravement affectée si les éléments de preuve qu'elles apportent peuvent être utilisés contre elles dans le cadre de procès civils. Ces craintes pourraient toutefois être excessives. D'abord, le relèvement du montant des amendes, l'instabilité inhérente des ententes et le développement général de la gouvernance d'entreprise devraient continuer d'inciter les entreprises à conclure des programmes de clémence. Ensuite, il peut exister des moyens indirects de rechercher ces documents et, dans tous les cas, il est probablement peu fréquent que les motifs des poursuites reposent entièrement sur les documents « accessoires » figurant dans le dossier des autorités de la concurrence. ¹¹² A l'issue de l'arrêt de la Cour de Justice sur le dossier *Pfleiderer*, l'affaire a été renvoyée devant les tribunaux allemands et l'Amtsgerichte a confirmé le 30 janvier 2012 la décision initiale du *Bundeskartellamt* de refuser l'accès aux documents du dossier de clémence.¹¹³ Ce jugement constitue un précédent important en droit allemand et le ministère fédéral de l'Économie entend profiter des modifications en cours du droit allemand de la concurrence pour codifier la protection des documents communiqués dans le cadre d'un dispositif de clémence.¹¹⁴

5.1.2 Différentes définitions du concept d'« informations confidentielles ».

Il n'existe pas de définition commune de la notion d'information confidentielle dans le domaine de la concurrence. Les divergences dans la définition par les autorités de la concurrence ou les tribunaux de l'information confidentielle dans les affaires d'ententes peuvent faire obstacle à une coopération efficace.

¹⁰⁹ Ibid.

¹¹⁰ Ibid, cf paragraphes 26 - 28 de l'arrêt.

¹¹¹ Stephan (2011).

¹¹² Brown (2012).

¹¹³ Communiqué de presse du *Bundeskartellamt*, *La décision du Tribunal local de Bonn renforce le programme de clémence*, 30 janvier 2012.

¹¹⁴ Ibid.

Dans la mesure où, comme on l'a vu plus haut, de nombreux instruments de coopération internationale n'autorisent pas le partage d'informations confidentielles, dans la plupart des cas, les autorités requises doivent démontrer au préalable que les informations qu'elles s'approprient à partager avec l'autorité requérante ne sont pas confidentielles.¹¹⁵ Ce processus peut être long et engager la responsabilité juridique de l'autorité requise en cas d'erreurs.

Pour certaines autorités, le caractère confidentiel d'une information peut tenir à la façon dont elle a été recueillie (toute information recueillie dans le cadre d'une enquête a un caractère confidentiel). D'autres autorités prennent en compte la nature des informations, définissant comme confidentielles toutes informations dont la divulgation nuirait aux intérêts commerciaux de la source de ces informations (les informations relatives aux prix, ventes, coûts, clients et fournisseurs). Dans ce dernier cas, il peut être difficile d'établir une distinction entre les informations sensibles d'un point de vue commercial et celles qui ne le sont pas. En cas de doute, le risque de litiges peut dissuader les autorités de divulguer de telles informations à des autorités étrangères.¹¹⁶

5.1.3 *Les régimes civils ou administratifs par rapport aux régimes pénaux*

Les ententes sont passibles de sanctions pénales dans certaines juridictions, mais ne le sont pas dans d'autres, ce qui restreint également la capacité des autorités respectives à partager des informations et des éléments de preuve entre juridictions civiles et pénales et à s'entraider dans leurs enquêtes.

C'est ce qui s'est produit lorsque la Commission européenne, le département de la Justice des États-Unis, la JFTC et le Bureau canadien de la concurrence ont monté des interventions coordonnées contre une des sociétés soupçonnées d'entente internationale dans le secteur de la chimie de spécialité. Les éléments de preuve recueillis par l'UE lors de perquisitions surprises n'ont pas pu être communiqués aux enquêteurs américains pour cause d'interdictions et de restrictions d'usage imposées par l'article 20 du règlement européen 17/1962 alors en vigueur, empêchant leur emploi à des fins pénales.¹¹⁷

Comme indiqué plus haut, dans le cadre des enquêtes sur des ententes internationales, les juridictions pénales peuvent avoir recours à des traités d'entraide juridique pour obtenir des documents et des témoignages à l'étranger. Cette possibilité n'est cependant ouverte que lorsque les deux juridictions considèrent les ententes comme des infractions pénales. Les États-Unis ne peuvent, par exemple, pas partager d'informations confidentielles avec l'UE au titre d'un traité d'entraide juridique parce que l'UE ne punit les infractions au droit de la concurrence que de sanctions administratives. Il n'y a pas, par conséquent, de « double incrimination ».

Plusieurs pays ont introduit ou envisagent d'introduire des sanctions pénales contre les comportements collusifs, ce qui pourrait faciliter la coopération et créer une alliance de fait entre les juridictions appliquant le même régime. Comme le faisait remarquer un ancien procureur général adjoint au département de la Justice des États-Unis, « le fait que des collègues d'autres juridictions ciblent une procédure pénale induit davantage de succès dans nos propres procédures nationales, avec un accès facilité

¹¹⁵ Des questions semblables se posent concernant les informations considérées comme devant être gardées secrètes par l'avocat dans une juridiction, mais pas dans d'autres. Les Pratiques exemplaires de l'OCDE en matière d'échanges d'informations dans le cadre d'enquêtes sur des ententes injustifiables contiennent des recommandations utiles pour les autorités de la concurrence en cas de différences entre les droits de la défense et les systèmes juridiques (Section II C « Protection du secret professionnel applicable à certaines professions juridiques »).

¹¹⁶ On trouvera une discussion sur la définition des informations confidentielles et leurs implications dans RIC (2007), p.26-27.

¹¹⁷ Joshua, Camesasca, Jung (2008), p. 25.

aux éléments de preuve et aux témoins. »¹¹⁸ Cela étant, la tendance à se doter de dispositions pénales n'a pas eu pour corollaire une progression des mesures d'exécution pénales. En dehors des États-Unis, seules quelques très rares juridictions ont effectivement poursuivi des ententes dans un cadre pénal, les autres continuant à enquêter sur les ententes en vertu de mandats civils ou administratifs, ce qui limite considérablement la portée de la coopération sur des enquêtes parallèles.

Les comportements collusifs ne sont par exemple pas passibles de sanctions pénales dans de nombreux pays en développement et émergents. En outre, bon nombre de ces pays ne sont pas dotés d'un programme pleinement opérationnel de répression civile ou administrative des ententes. L'imposition de sanctions personnelles apparaît depuis longtemps comme l'instrument de dissuasion et de sanction le plus efficace contre les ententes, car il permet d'invoquer la responsabilité personnelle des personnes physiques et de les exposer à des peines d'emprisonnement. Il reste encore toutefois du chemin à parcourir, tant dans les pays développés que dans les pays en développement, pour que la répression pénale des comportements collusifs devienne un moyen de coopération efficace plutôt qu'une entrave.

5.1.4 *Autres obstacles courants*

Les autres obstacles courants sont notamment :

- La barrière linguistique ou les lacunes dans l'organisation interne des autorités de la concurrence induisant des compétences insuffisantes pour une coopération efficace,
- Les difficultés pratiques pour coordonner les enquêtes, par exemple, si elles en sont à différents stades ou si les différences de fuseaux horaires créent des difficultés,
- Les contraintes de ressources empêchant de déposer ou de répondre à des requêtes, en particulier lorsqu'elles exigent des canaux officiels. La coopération peut mobiliser des ressources importantes et empiéter sur les moyens, déjà rares, alloués à d'autres mesures d'application.¹¹⁹ Les contraintes de ressources peuvent également faire obstacle aux mesures nécessaires pour tenter de résoudre certains problèmes. Aux États-Unis, par exemple, des équipes dédiées (« *taint teams* ») filtrent les informations recueillies avant de les transmettre à l'équipe chargée de l'enquête afin de limiter le risque de compromettre l'intégrité de la procédure de la juridiction requérante. Les autorités disposant de moins de moyens ne pourront sans doute pas se permettre un tel investissement.

¹¹⁸ Barnett (2006).

¹¹⁹ Dans un rapport de 2012 au Congrès, le département de la Justice des États-Unis note les difficultés liées à la coopération internationale : « dans le cadre de nos mesures d'application, nous nous heurtons à des parties, des éléments de preuve potentiels et des effets à l'étranger, qui ajoutent à la complexité et, partant, au coût, des procédures. Que cette complexité et ce coût résultent de la collecte d'éléments de preuve à l'étranger ou de la conduite de négociations intergouvernementales poussées pour entendre un témoin étranger, il n'en reste pas moins que la procédure d'enquête est très différente et généralement plus compliquée que cela n'est le cas si on se limite à enquêter aux États-Unis sur des comportements et des personnes physiques. En effet, la division doit faire davantage d'investissements dans les services et outils de traduction, les services d'interprétation et les communications, et son personnel doit voyager plus loin pour accéder aux personnes et aux renseignements nécessaires à la bonne conduite de l'enquête et dépenser davantage de ressources pour coordonner nos mesures d'application avec les autres pays et les organisations internationales », département de la Justice des États-Unis (2012).

5.2 *Défis particulièrement pertinents pour les économies en développement et les économies émergentes*

On recense relativement peu d'exemples de coopération effective entre autorités de la concurrence de pays en développement ou entre autorités de pays développés et de pays en développement dans la lutte contre les ententes. Cette situation est due en partie au fait que plusieurs juridictions viennent à peine de se doter de législations de la concurrence et n'ont instauré des mesures d'exécution que depuis relativement peu de temps. Certaines ne font peut-être même pas encore des ententes une priorité dans leur programme d'application. Il est cependant vrai que de nombreux pays en développement et de nombreuses autorités de la concurrence récemment établies n'ont pas encore tissé de relations bilatérales ou multilatérales permanentes avec d'autres juridictions à même de promouvoir la coopération.

5.2.1 *Obstacles institutionnels et judiciaires*

Les régimes de la concurrence plus récents et moins expérimentés doivent se doter d'institutions de la concurrence crédibles et élaborer les instruments et les politiques nécessaires à une lutte efficace contre les ententes. Dans l'intervalle, ils ne disposent peut-être pas des ressources ou de l'expérience requises pour retirer de la coopération les mêmes avantages que les juridictions plus expérimentées.¹²⁰

L'absence de pouvoirs d'investigation, comme la capacité de procéder à des perquisitions surprises, peut empêcher certaines autorités de participer à des inspections coordonnées avec des autorités étrangères. Plusieurs pays ont modifié leurs lois pour les rapprocher de la norme des juridictions plus expérimentées afin de pouvoir théoriquement participer à des actions communes de recherche de preuves.¹²¹ Comme mentionné ci-avant, l'absence de programmes de clémence pleinement opérationnels pour les entreprises est aussi un enjeu pour une coopération efficace dans les enquêtes sur les ententes internationales.

A l'instar de toute autorité nouvellement établie, la dotation en ressources humaines pose problème. Il faut du temps pour acquérir les compétences et l'expérience requises. Même lorsque les autorités de la concurrence se voient allouer des pouvoirs étendus, par exemple, pour exiger la présentation de documents et réaliser des inspections surprises, le manque d'expérience et l'absence de capacité institutionnelle peuvent être à l'origine de difficultés.

Les autorités de la concurrence peuvent commettre des erreurs dans leurs premiers efforts de mise à exécution. En Afrique du Sud, la première fois que les pouvoirs de perquisition et de confiscation ont été utilisés, la Haute Cour a été amenée à débouter la Commission pour erreur de procédure et enfreinte aux droits des accusés en raison de la communication d'informations aux médias sur la perquisition et de la facilitation de leur accès aux locaux des accusés durant l'inspection.¹²²

Les tribunaux nationaux peuvent entraver les efforts des autorités de la concurrence si le système judiciaire n'a pas une connaissance ou une pratique suffisante du droit de la concurrence. Au Sénégal, la seule décision de la Commission nationale de la concurrence en matière d'entente à ce jour a été annulée

¹²⁰ CNUCED (2011), p.33.

¹²¹ Le Chili et le Mexique ont par exemple modifié récemment leur droit de la concurrence (le premier en 2009 et le second, en 2010) pour renforcer leurs pouvoirs d'enquête, y compris leur aptitude à perquisitionner sans préavis.

¹²² *Pretoria Portland Cement Company Ltd. and Another v Competition Commission and Others* (64/2001) [2002] ZASCA 63 (31 mai 2002).

par le Tribunal administratif du fait d'une interprétation de la loi limitant les comportements collusifs à la fixation des prix.¹²³

La priorité des autorités récemment établies consiste souvent à développer leur capacité institutionnelle. La coopération internationale avec ces autorités a donc surtout concerné, ce qui paraît logique, l'aide au développement des capacités et l'assistance technique.

La répression active des ententes peut ne pas être la principale priorité des autorités de la concurrence de création récente. Il est donc peut-être encore trop tôt pour attendre de ces autorités qu'elles accordent la priorité à la coopération internationale dans l'application du droit de la concurrence alors même que leurs structures institutionnelles ne sont pas encore totalement établies ou qu'elles peinent encore à faire appliquer leur propre législation.

5.2.2 *Manque de confiance et de foi dans le système juridique*

La confiance est cruciale pour tisser des relations de coopération entre autorités.¹²⁴ Dans la lutte contre les ententes, la confiance est un ingrédient essentiel lorsque les autorités souhaitent coordonner des perquisitions, élaborer des stratégies communes et partager des informations.

Le manque de confiance peut résulter de la fragilité du cadre juridique du pays souhaitant coopérer, de l'opacité des procédures de l'autorité de la concurrence ou l'insuffisance des garanties de régularité des procédures. Ces facteurs renforcent la perception d'un risque accru de fuites pouvant compromettre l'enquête des autorités étrangères et miner l'efficacité des programmes de lutte contre les ententes et leurs instruments associés. Il peut exister un déficit de confiance dans l'aptitude du pays requis à fournir des informations répondant aux normes de qualité et autres permettant au pays requérant de les utiliser dans le cadre de sa procédure. Ce risque est plus important lorsque les autorités sont récentes et n'ont pas encore établi les sauvegardes nécessaires ou acquis une expérience suffisante pour traiter de telles requêtes.

C'est un cercle vicieux. Si les jeunes autorités de la concurrence ne commencent pas à coopérer, elles ne développeront pas leur expertise et ne se doteront pas des mesures de protection nécessaires pour assumer les responsabilités induites par les requêtes de coopération. Si certains tâtonnements sont inévitables dans le développement de l'expérience et des capacités requises pour que la confiance s'établisse entre différentes autorités de la concurrence, il ne faut pas que la pérennisation d'une telle situation renforce la perception selon laquelle les pays aux régimes de concurrence plus avancés ont une faible incitation à coopérer avec ceux où l'application du droit de la concurrence est considérée comme inadéquate.¹²⁵

Il est également important de construire une relation de confiance entre les autorités de la concurrence et les entreprises. Les entreprises doivent être sûres que les dispenses de confidentialité n'auront pas pour effet de compromettre les informations les concernant. Les candidats potentiels à des programmes de clémence doivent avoir confiance dans leur fonctionnement et être en mesure de prévoir avec un degré de

¹²³ cf. contribution écrite du Sénégal au Forum mondial sur la concurrence de 2012, [DAF/COMP/GF/WD\(2012\)18](#).

¹²⁴ cf. par exemple, contribution écrite de l'Inde ([DAF/COMP/GF/WD\(2012\)52](#)) et de l'Afrique du Sud ([DAF/COMP/GF/WD\(2012\)51](#)) au Forum mondial sur la concurrence de 2012.

¹²⁵ OMC (2002) commentaires de la Thaïlande p. 4.

certitude élevée comment ils seront traités s'ils sollicitent la clémence ; autrement, ils ne se manifesteront pas pour dénoncer les comportements collusifs.¹²⁶

5.2.3 Ententes à l'exportation

Les ententes à l'exportation représentent un défi particulier pour l'amélioration de la coopération internationale dans les enquêtes sur les ententes. Les ententes à l'exportation sont établies dans une juridiction, mais leurs effets sont exclusivement ressentis dans une autre juridiction.¹²⁷

Le plus souvent, elles ne sont pas interdites dans la juridiction d'origine, si le droit de la concurrence n'interdit que les ententes qui ont une incidence sur le territoire de cette juridiction. Plusieurs pays, développés et en développement, conservent des dérogations explicites pour les ententes à l'exportation, certains exigeant la notification des activités et d'autres une autorisation officielle. Si les documents pertinents sont dans le domaine public, les autorités étrangères de la concurrence peuvent obtenir des informations concernant l'existence d'ententes et l'identité de leurs membres. Toutefois, l'exclusion explicite des ententes à l'exportation du droit national de la concurrence dissimule ces ententes aux autorités étrangères.

Les cibles explicites ou implicites des ententes à l'exportation sont souvent des pays en développement. Même si les pays en développement ont été plus nombreux à se doter d'une législation de la concurrence ces dernières années et si l'application de la doctrine des effets pourrait en théorie justifier des procédures contre les ententes à l'exportation, dans la pratique, ces procédures ont peu de chances d'aboutir. La juridiction affectée peut avoir du mal à obtenir les éléments de preuve relatifs à l'entente s'ils se situent hors de son territoire.¹²⁸ Les dérogations dont bénéficient les ententes à l'exportation empêchent les autorités de la concurrence du pays où les entreprises sont domiciliées (là où se trouvent le plus d'informations sur leur comportement et où elles sont les plus accessibles) d'aider celles des pays qui pâtissent des comportements anticoncurrentiels (les territoires cibles).¹²⁹ Mais, même si ces dérogations n'existaient pas, l'application de la doctrine des effets permettrait difficilement que des autorités de la concurrence poursuivent leurs propres entreprises pour des effets ressentis par les consommateurs d'une autre juridiction.

La coopération internationale est entravée par des problèmes qui appellent une attention différente de la part des pays développés et des pays en développement. Comme le soulignait l'ancien Directeur général de la Direction générale de la concurrence : « [u]ne fois que nous aurons surmonté ces difficultés, une coopération aussi avancée devrait se traduire par des avantages considérables. »¹³⁰

6. Coopération internationale en matière fiscale

Les problèmes associés à la coopération internationale ne sont pas l'apanage de la concurrence. Les autorités chargées de l'application d'autres domaines du droit, comme la fiscalité, la lutte contre la corruption et le blanchiment des capitaux sont confrontées à des enjeux similaires. Des idées pourront

¹²⁶ Brandenburger (2010).

¹²⁷ OCDE (1993).

¹²⁸ La courtoisie active ne serait pas nécessairement la solution. Si la pratique suspecte ne constitue pas une infraction dans la juridiction où les entreprises sont basées, l'autorité de la concurrence ne disposera peut-être pas des moyens juridiques pour enquêter.

¹²⁹ Becker (2007).

¹³⁰ Lowe (2006).

jaillir d'un débat futur sur l'emploi possible dans l'application du droit de la concurrence de certains des outils adoptés dans ces domaines pour résoudre les problèmes de coopération.

Nous analysons dans cette section la situation dans le domaine de la fiscalité. Les problèmes auxquels ont été confrontées les autorités fiscales dans le cas d'affaires internationales sont analogues à plusieurs de ceux rencontrés par les autorités de la concurrence, en particulier en ce qui concerne le partage des informations. Les outils déployés par les autorités fiscales pour surmonter ces obstacles allient notamment des instruments multilatéraux ouverts, des accords bilatéraux, des arrangements de partage des tâches et un cadre juridique pour le partage des informations.

6.1 *Les instruments facilitant la coopération internationale en matière fiscale*

Plusieurs instruments permettent de mettre en œuvre la coopération internationale dans le domaine de la fiscalité. Il s'agit notamment des conventions internationales, bilatérales et multilatérales, des instruments de l'UE (pour ses pays membres) et des législations nationales.¹³¹

6.1.1 *Les conventions fiscales bilatérales*

- *Les conventions de double imposition.* Il existe quelque 3000 conventions de double imposition en vigueur à travers le monde. Ces conventions s'inspirent généralement des modèles de l'OCDE¹³² et (ou) de l'Organisation des Nations Unies, qui servent souvent de base de négociation entre les pays.¹³³ Une convention de double imposition est un accord entre deux États visant à coordonner l'exercice de leurs droits d'imposition afin d'éliminer ou de réduire la double imposition. Les conventions fiscales bilatérales éliminent ou réduisent la double imposition soit en attribuant les droits d'imposition exclusivement à l'un des États signataires (l'État de résidence ou d'origine), soit en les attribuant à un État et en obligeant simultanément l'autre État à consentir un dégrèvement fiscal correspondant. Les conventions de double imposition constituent le fondement juridique de la coopération entre les autorités compétentes des États signataires afin d'éviter l'évasion et la fraude concernant tout impôt, qu'il figure ou non dans le champ d'application de la convention, et d'y remédier. Certaines conventions de double imposition prévoient en outre une entraide pour le recouvrement de l'impôt.

¹³¹ Outre les instruments bilatéraux et multilatéraux conclus expressément pour la coopération en matière fiscale, les échanges de renseignements peuvent également avoir lieu à travers d'autres instruments juridiques internationaux non spécifiques à la fiscalité, comme les traités d'entraide juridique, qui sont applicables aux questions fiscales.

¹³² Le Modèle de convention fiscale de l'OCDE concernant le revenu et la fortune (le Modèle de convention) vise un règlement uniforme des problèmes les plus courants dans le domaine de la double imposition juridique internationale. Les pays membres, lorsqu'ils concluent ou révisent des conventions bilatérales, devraient se conformer au Modèle de convention. Le réseau mondial de traités fiscaux inspirés du Modèle de convention contribue à éviter le risque de double imposition en édictant des règles consensuelles claires pour l'imposition du revenu et de la fortune. Le Modèle contient également des dispositions spécifiques concernant la coopération internationale, en particulier pour les échanges de renseignements et l'assistance dans la collecte de l'impôt.

¹³³ Les deux Modèles de conventions fiscales sont très semblables en substance en ce qui concerne les échanges de renseignements. Il existe quelques différences de formulation de l'article 26 entre le Modèle des l'ONU et celui de l'OCDE. Dans le Modèle de l'ONU, les restrictions à la divulgation d'informations n'ont pas une portée aussi générale et la formulation des procédures de mise en œuvre du partage des renseignements est plus explicite.

- *Les accords bilatéraux d'échange de renseignements* sont conclus lorsque l'un des pays n'a pas de système d'imposition en vigueur. Ces accords prévoient souvent des programmes structurés d'échange précisant le type de renseignements à échanger, l'usage des renseignements dans le cadre de procédures pénales et le partage des coûts. Certains d'entre eux s'inspirent du Modèle de convention de l'OCDE sur l'échange de renseignements en matière fiscale.
- *Les accords d'échange de renseignements fiscaux* sont des accords bilatéraux entre deux juridictions établissant un fondement juridique pour la coopération administrative dans les affaires fiscales. Ils s'inspirent souvent du modèle publié par l'OCDE en 2002¹³⁴ et ils se multiplient de façon exponentielle. Ils prévoient l'échange d'informations sur demande et autorisent sous certaines conditions la présence de représentants officiels étrangers dans le cadre de procédures pénales ou civiles ou d'enquêtes ayant trait à la fiscalité.

6.1.2 *Les conventions fiscales multilatérales*

Plusieurs conventions fiscales multilatérales prévoient la coopération internationale dans ce domaine, dont la plus importante est la Convention concernant l'assistance administrative mutuelle en matière fiscale, modifiée en 2010. La Convention prévoit expressément toutes les formes possibles de coopération administrative entre États pour le calcul et le recouvrement de l'impôt, en particulier afin de lutter contre l'évasion et la fraude fiscale. Cette coopération couvre l'échange de renseignements, y compris les échanges automatiques, et le recouvrement des créances fiscales étrangères. Le nombre de signataires de la Convention ne cesse d'augmenter.

La Convention a initialement été élaborée conjointement par le Conseil de l'Europe et l'OCDE et a été ouverte à la signature des États membres de ces deux organisations le 25 janvier 1988. Elle facilite la coopération internationale pour améliorer le fonctionnement des lois fiscales nationales, tout en respectant les droits fondamentaux des contribuables. Elle s'applique à un large éventail de contributions, directes (impôt sur les plus-values, impôt sur la fortune, etc.) et pratiquement toutes formes de contributions indirectes (hormis les droits de douane) imposées aux niveaux nationaux et locaux. La Convention prévoit toutes les formes possibles de coopération administrative entre États pour le calcul et le recouvrement de l'impôt, en particulier afin de lutter contre l'évasion et la fraude fiscales. Cette coopération couvre l'échange de renseignements, y compris les échanges automatiques,¹³⁵ et le recouvrement des créances fiscales étrangères. La Convention prévoit des vérifications fiscales à l'étranger et des vérifications fiscales simultanées. Ces dernières impliquent les efforts concertés de plusieurs autorités fiscales pour contrôler simultanément et indépendamment, chacune sur son territoire, des contribuables étroitement affiliés (comme une société mère et sa filiale). Des échanges réguliers de renseignements ont lieu à chaque étape des opérations de contrôle.

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Le Modèle de convention de l'OCDE sur l'échange de renseignements en matière fiscale (le Modèle de convention) vise à promouvoir la coopération internationale en matière de fiscalité à travers les échanges de renseignements. Il est le fruit des travaux entrepris par l'OCDE pour lutter contre les pratiques fiscales dommageables. L'absence d'échange effectif d'informations est l'un des critères clé permettant d'identifier les pratiques fiscales dommageables. Le Modèle de convention représente la norme requise pour un échange effectif de renseignements aux fins de l'initiative de l'OCDE concernant les pratiques fiscales dommageables. Le Modèle de convention, publié en avril 2002, n'est pas un instrument contraignant, mais contient deux modèles d'accords bilatéraux. Plusieurs accords bilatéraux s'en sont inspirés.

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L'échange automatique de renseignements, que certains pays appellent également échange de renseignements de routine (routine exchange) correspond à la transmission systématique et régulière d'un large volume de renseignements concernant diverses catégories de revenus (dividendes, intérêts, redevances, traitements, pensions, etc.).

En avril 2009, le G20 a lancé un appel à agir pour que les pays en développement puissent bénéficier « des avantages procurés par le nouveau climat de coopération en matière fiscale, y compris une approche multilatérale pour les échanges de renseignements. »¹³⁶ En réponse à cet appel, l'OCDE et le Conseil de l'Europe ont élaboré un protocole d'amendement de la Convention concernant l'assistance administrative mutuelle en matière fiscale pour l'ouvrir à tous les pays et l'aligner sur la norme internationale sur l'échange de renseignements.

6.1.3 *Directives et règlements européens*

Au sein de l'Union européenne, plusieurs directives et règlements prévoient la coopération internationale dans le domaine de la fiscalité. La directive 2011/16/UE du Conseil du 15 février 2011 relative à la coopération administrative dans le domaine fiscal (abrogeant la directive 77/799/CEE) établit les règles et procédures selon lesquelles les États membres coopèrent entre eux aux fins d'échanger les informations vraisemblablement pertinentes pour l'administration et l'application de la législation interne des États membres relative aux taxes et impôts. Elle s'applique à tous les types d'impôts à l'exception de la taxe sur la valeur ajoutée (TVA), des droits de douane et des droits d'accises couverts par d'autres textes de l'Union relatifs à la coopération administrative entre États membres. Le règlement (CE) n° 2073/2004 du Conseil du 16 novembre 2004 relatif à la coopération administrative dans le domaine des droits d'accise renforce expressément la coopération entre les autorités fiscales dans le domaine des droits d'accise. Il définit des règles et des procédures pour permettre aux autorités compétentes des États membres de coopérer et d'échanger, par voie électronique notamment, toutes les informations propres à les aider à évaluer correctement les droits d'accise. Le règlement (UE) n°904/2010 du Conseil du 7 octobre 2010 concernant la coopération administrative et la lutte contre la fraude dans le domaine de la taxe sur la valeur ajoutée définit des règles et procédure de coopération et d'échange d'informations entre les autorités compétentes des États membres de l'UE chargées de l'application de la TVA.

Le système fiscal européen permet à des représentants d'un pays membre d'être présent et de recueillir des informations durant un contrôle fiscal réalisé sur le territoire d'un autre pays membre. Il contient également des dispositions encourageant une collaboration efficace et en temps opportun entre administrations fiscales nationales.¹³⁷

6.1.4 *Législations nationales*

Certaines juridictions se sont dotées de législations nationales permettant à leurs autorités fiscales d'échanger des renseignements avec certains pays de façon unilatérale. Ces lois apportent généralement certaines précisions, concernant par exemple les pays avec lesquels les liens sont souhaités, ainsi que les procédures, conditions, limitations et garanties applicables. Dans certaines circonstances, les législations nationales peuvent remédier efficacement aux lacunes des traités internationaux d'une juridiction et autoriser des mesures qui n'auraient pas été possibles autrement.

¹³⁶ OCDE, site Internet du Centre de politique et d'administration fiscales, page sur l'Échange de renseignements, mis à jour en janvier 2012.

¹³⁷ Il exige en particulier de répondre sans retard aux demandes en imposant des dates butoirs explicites et il encourage les pays à partager leurs expériences et leurs rapports dans le cadre des contrôles.

Box 6. Opération « Green fees » – Un cas d'espèce

Au cours des deux dernières années, les autorités chargées de l'application du droit et de la fiscalité dans les différents pays d'Europe ont engagé un bras de fer avec les réseaux criminels impliqués dans la fraude à la TVA au sein du système communautaire d'échange de quotas d'émission (SCEQE), qui a entraîné pour les contribuables européens un préjudice estimé à 5 milliards d'euros. Les actions menées en 2010 ont permis l'inspection de plusieurs centaines de bureaux à travers l'Europe et l'arrestation de plus d'une centaine de personnes.

Lors de la dernière opération, le 17 décembre 2010, la Guardia di Finanza italienne, a inspecté, dans le cadre de l'opération « Green fees » quelque 150 sociétés dans huit régions différentes de l'Italie. Ces opérations se sont déroulées quelques semaines à peine après que la bourse italienne de l'électricité (le GME) eut interrompu toutes les cotations sur les crédits carbone en raison d'un volume élevé de transactions présentant des anomalies. Le manque à gagner potentiel en TVA est estimé à environ 1 milliard d'euros.

Quelques mois plus tôt, les autorités d'autres pays, dont la France, l'Allemagne, l'Espagne et le Royaume-Uni, avaient réalisé de nombreuses opérations contre des réseaux criminels impliqués dans la fraude aux crédits carbone. L'action la plus spectaculaire, en Allemagne, a réuni plus de 2500 agents de pays membres et non membres de l'UE.

Des indications de transactions suspectes ont été remarquées à la fin 2008, lorsque plusieurs plates-formes de marché ont enregistré un accroissement sans précédent du volume de transactions de quotas d'émissions de gaz à effets de serre. Les volumes de transaction ont culminé en mai 2009, avec plusieurs centaines de millions de quotas échangés en France et au Danemark, notamment. A cette époque, le cours d'un quota, représentant 1 tonne de dioxyde de carbone, avoisinait 12.5 euros. Pour éviter de nouvelles pertes, plusieurs États membres ont dû modifier leurs règles d'imposition sur ces opérations, ce qui a fait chuter de pas moins de 90 % le volume des transactions.

La fraude dite « carrousel » se produit lorsque des groupes criminels organisés volent la TVA en exploitant les modalités de recouvrement de cette taxe dans les États membres de l'UE. La fraude aux crédits carbone est une variation de la fraude carrousel à la TVA.

La réussite de l'opération « Green fees » tient à l'utilisation des outils de coopération internationale entre l'Italie, d'autres États membres de l'UE et plusieurs pays d'Amérique centrale et d'Extrême-Orient. Elle a permis de tirer parti des différents instruments juridiques servant de fondement aux procédures civiles et pénales, ainsi que de la coopération en matière de renseignements avec les administrations fiscales, les douanes, les cellules de renseignements financiers et les forces de police.

6.2 Mécanismes de partage des informations et autres formes de coopération dans le cadre d'instruments de l'OCDE

La Convention, le Modèle de convention, et le Modèle d'accord traitement spécifiquement de l'échange de renseignements en matière de fiscalité. Le chapitre III de la Convention traite des différentes formes d'assistance et sa section I précise notamment les différentes formes d'échanges de renseignements. L'article 26 du Modèle de convention établit un cadre pour l'échange de renseignements sur demande, spontané et automatique.¹³⁸ L'article 5 du Modèle d'accord prévoit l'échange de renseignements sur demande.¹³⁹ Il convient de remarquer que l'échange de renseignements dans le cadre de ces divers instruments est obligatoire, comme le démontre l'emploi du verbe devoir (« Ces renseignements doivent être échangés »). En 2006, le Comité des affaires fiscales de l'OCDE a approuvé un nouveau manuel sur l'échange de renseignements (ci-après, « Manuel »).¹⁴⁰ Ce Manuel constitue une aide pratique à l'intention

¹³⁸ Article 26, Modèle de convention fiscale concernant le revenu et la fortune (2008).

¹³⁹ Article 5, Modèle de convention de l'OCDE sur l'échange de renseignements en matière fiscale (2002).

¹⁴⁰ Manuel de mise en œuvre des dispositions concernant l'échange de renseignements à des fins fiscales, approuvé par le Comité des affaires fiscales de l'OCDE le 23 janvier 2006.

des fonctionnaires chargés de l'échange de renseignements en matière fiscale et peut être également utile pour la conception ou la mise à jour de manuels nationaux. Il a été élaboré en collaboration avec les pays membres de l'OCDE et des pays non membres. Le Manuel adopte une démarche modulaire. Tout d'abord il traite les aspects généraux et juridiques de l'échange de renseignements et couvre ensuite les thèmes spécifiques contenus dans les divers instruments OCDE mentionnés ci-dessus :

- *L'échange de renseignements sur demande*, qui correspond à une situation dans laquelle une autorité compétente demande des renseignements particuliers auprès d'une autre autorité compétente. Normalement, les renseignements demandés concernent un contrôle, une enquête ou des investigations sur l'impôt dû par un contribuable au titre d'exercices précis ;
- *L'échange spontané de renseignements*, qui correspond à une transmission spontanée à une autre partie contractante de renseignements vraisemblablement pertinents pour celle-ci et n'ayant pas fait l'objet d'une demande préalable. En raison de sa nature même, l'échange spontané de renseignements se fonde sur la participation active des fonctionnaires locaux des impôts (inspecteurs des impôts, etc.) et leur coopération. Les renseignements fournis spontanément se révèlent habituellement efficaces, ceux-ci concernant des questions particulières identifiées et choisies par les fonctionnaires des impôts du pays ayant communiqué ces renseignements durant ou après un contrôle ou un autre type d'enquête fiscale ;
- *L'échange automatique de renseignements (ou échange de renseignements de routine)*, que certains pays appellent également échange de renseignements de routine (*routine exchange*) correspond à la transmission systématique et régulière d'un large volume de renseignements concernant diverses catégories de revenus (dividendes, intérêts, redevances, traitements, pensions, etc.). Ces renseignements sont obtenus de façon systématique dans le pays de la source, généralement lorsque le débiteur (établissement financier, employeur, etc.) rend compte des paiements qu'il a effectués. Les avantages de l'échange automatique de renseignements tiennent à la possibilité de rapprocher les renseignements de la source étrangère avec la base de donnée de l'autorité destinataire (souvent par le biais de programmes informatiques permettant de capturer les renseignements pertinents) et de les comparer automatiquement avec le revenu déclaré par le contribuable ;
- *L'échange de renseignements à l'échelle d'un secteur économique*. Avec le développement des transactions internationales, il est devenu de plus en plus nécessaire pour les parties à des conventions fiscales de rechercher l'assistance de leurs partenaires en mettant en commun leurs connaissances et leurs expertises concernant certains secteurs et certaines questions spécifiques d'intérêt commun. Les échanges de renseignements à l'échelle d'un secteur économique peuvent constituer une réponse car ils concernent l'échange d'informations fiscales qui portent plus particulièrement sur l'ensemble d'un secteur économique et non sur des contribuables en particulier. L'objet d'un tel échange est de fournir des données complètes sur les pratiques d'un secteur et ses modes de fonctionnement au niveau mondial, de manière à permettre aux inspecteurs des impôts d'effectuer des vérifications plus circonstanciées et plus efficaces des différents contribuables du secteur.

L'OCDE a élaboré des manuels sur d'autres formes de coopération entre les autorités fiscales de différentes juridictions qui prévoient inévitablement la nécessité d'échanger des renseignements. Ces autres formes de coopération recouvrent :

- *Les contrôles fiscaux simultanés*. On entend par contrôle fiscal simultané, un contrôle entrepris en vertu d'un accord par lequel deux ou plusieurs États contractants conviennent de contrôler simultanément et de manière indépendante, chacun sur son territoire, la situation fiscale d'un ou

plusieurs contribuables qui présente pour elles un intérêt commun ou complémentaire en vue d'échanger les renseignements ainsi obtenus. En tant qu'outils de discipline fiscale et de contrôle utilisés par les administrations fiscales, les contrôles fiscaux simultanés sont efficaces lorsque l'existence de pratiques d'évasion et de fraude fiscales internationales est suspectée. Plusieurs pays qui entreprennent depuis plusieurs années des contrôles fiscaux simultanés constatent qu'ils constituent un outil de contrôle utile et productif. Les contrôles fiscaux simultanés multilatéraux, en particulier, suscitent un intérêt croissant en raison de la dimension de plus en plus multilatérale des mécanismes de fraude fiscale et de la nécessité de resserrer la coopération internationale entre les administrations fiscales. Le manuel élaboré par l'OCDE suggère notamment qu'il pourrait être souhaitable qu'un fonctionnaire fiscal de l'un des pays participants soit présent lors d'un contrôle fiscal simultané ;

- *Les contrôles fiscaux à l'étranger.* La procédure de contrôle fiscal à l'étranger permet aux administrations fiscales, lorsque la demande en a été faite et dans les limites imposées par les lois de leurs pays, à autoriser les fonctionnaires des impôts d'un pays étranger à participer à des contrôles fiscaux menés par le pays requis. Cela contribue à remédier aux limites des méthodes traditionnelles d'échange de renseignements, privilégiant la voie écrite. La procédure écrite est souvent longue et son efficacité peut se révéler moindre que d'autres méthodes de discipline fiscale lorsqu'une intervention rapide de l'administration fiscale est requise. En outre, participer à un contrôle fiscal à l'étranger permet à une administration fiscale de comprendre clairement et de manière détaillée les relations, et notamment les relations d'affaires, liant le résident d'un pays étranger soumis à un contrôle fiscal à ses associés étrangers ;
- *Les contrôles conjoints.* Les contrôles conjoints sont une forme de coopération innovante entre pays dans le domaine de la fiscalité. Les contrôles conjoints bilatéraux ou multilatéraux recèlent un potentiel intéressant en matière de vérification des prix de cession interne, notamment. Un contrôle conjoint se définit comme un accord par lequel les pays signataires conviennent de coordonner le contrôle d'un ou plusieurs contribuables (qu'il s'agisse de personnes morales ou physiques), lorsque ce contrôle porte plus particulièrement sur des intérêts ou transactions communs ou complémentaires. Les contrôles conjoints se sont révélés extrêmement utiles face à l'accroissement sans précédent de la mobilité des contribuables et des activités économiques transfrontalières. Les entreprises multinationales fonctionnent à une échelle mondiale ; leurs opérations et leurs affaires financières sont complexes et traversent de nombreuses juridictions fiscales. Dans ce contexte, il est particulièrement difficile pour une juridiction fiscale unique de contrôler de façon exhaustive des contribuables qui opèrent à un niveau mondial.

6.3 *Enjeux, défis et enseignements pour les autorités de la concurrence*

Le facteur clé de la coopération entre autorités fiscales est le principe de résidence,¹⁴¹ en vertu duquel les entreprises et les personnes physiques sont imposées sur leur revenu, où qu'il soit généré à travers le monde, au taux défini par leur juridiction de résidence. D'un point de vue national, on peut penser que les pays n'ont pas intérêt à fournir des informations à d'autres juridictions parce qu'un pays qui apporte des renseignements aux autorités fiscales étrangères perd de son attrait pour les investisseurs étrangers. L'intérêt national semble par conséquent dicter précisément de ne pas fournir d'informations afin de devenir une destination relativement plus attrayante pour les investisseurs. On doit toutefois opposer à ce raisonnement les avantages potentiels de la réciprocité : la communication de renseignements à d'autres juridictions peut être le prix à payer pour recevoir des renseignements de ces autres juridictions. Le schéma

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Par opposition au « principe de la source », selon lequel l'imposition doit avoir lieu dans la juridiction où le revenu trouve sa source.

des incitations à l'apport de renseignement peut par conséquent présenter une structure complexe, contraignant les pays à soupeser des intérêts divergents.¹⁴²

Les autorités fiscales sont confrontées à plusieurs obstacles ou défis pour le partage des renseignements, dont certains sont identiques à ceux qui se posent aux autorités de la concurrence, tels que mentionnés dans la première partie de ce document. Il s'agit notamment i) de la double incrimination, ii) du critère de l'intérêt, iii) des restrictions liées au secret bancaire, iv) des restrictions juridiques d'ordre général, v) de l'anonymat, vi) de l'incapacité du pays recevant les renseignements de pouvoir les utiliser pleinement et vii) des exigences nationales prioritaires par rapport aux demandes de renseignements de l'étranger.

- Un premier obstacle tient au fait que certains pays adhèrent au principe de double incrimination, c'est-à-dire qu'ils ne peuvent pas partager des renseignements à moins que l'infraction potentielle ne constitue également une infraction à la fiscalité si elle est perpétrée dans leur propre juridiction. Lorsque les définitions des infractions à la fiscalité sont similaires, ce principe n'entrave généralement pas l'échange de renseignements. La question est plus complexe s'ils ont différentes conceptions de la notion d'infraction fiscale.
- Un autre type de difficultés se pose lorsque les pays appliquent le critère de l'intérêt, c'est-à-dire qu'ils ne sont pas en mesure de partager des renseignements concernant des affaires qui ne présentent pas pour eux un intérêt du point de vue fiscal. A l'instar de ce que nous avons vu plus haut concernant les ententes à l'exportation, si un comportement n'est pas réprimé dans le pays requis, il sera dans l'impossibilité de coopérer avec les pays dans lesquels ce comportement est réprimé.
- En vertu des règles du secret bancaire, pour que les autorités fiscales puissent avoir accès à des renseignements bancaires, les infractions à la fiscalité doivent présenter un caractère pénal et non civil. Hormis le secret bancaire, d'autres restrictions juridiques peuvent bloquer l'accès aux renseignements bancaires. Il se peut par exemple que l'accès aux renseignements bancaires ne soit pas automatique, mais nécessite une requête dans le contexte d'un contrôle fiscal spécifique.
- La coopération peut par ailleurs être entravée du fait que l'établissement financier (à l'origine des informations) ne dispose pas d'informations suffisantes pour associer les renseignements concernant un compte ou un autre actif spécifique à une personne physique ou morale précise, ce qui limite sa capacité de répondre à une requête précise d'une autorité fiscale. La difficulté (voire l'impossibilité) de relier les renseignements financiers au bénéficiaire ultime peut créer encore un autre niveau de complexité. Dans le cas de fiducies, par exemple, les informations nécessaires sur le plan fiscal peuvent concerner le constituant, le bénéficiaire et l'administrateur de la fiducie.
- Une autre catégorie d'obstacles potentiels peut provenir de ce que les renseignements peuvent être échangés mais ne sont pas utilisables par l'autorité qui les reçoit, car les rapprochements avec les données nationales sont impossibles si les méthodes de stockage et d'organisation des données diffèrent d'un pays à l'autre.
- Des obstacles d'ordre plus pratique peuvent tenir au fait que les ressources des administrations fiscales risquent d'être trop sollicitées et que la priorité doit dans ce cas être donnée aux besoins nationaux, qui passent avant les demandes de renseignements de l'étranger.

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On trouvera dans Keen et Lighthart (2006) une analyse de la recherche sur les incitations personnelles des pays à fournir des informations aux autorités étrangères.

Malgré ces obstacles, le partage entre autorités fiscales nationales de renseignements spécifiques sur les contribuables apparaît comme la question qui retient le plus l'attention des autorités fiscales sur le plan international. Les pays et les organisations internationales ont élaboré des outils pour promouvoir la coopération transfrontalière. Certaines de ces initiatives peuvent être une source d'inspiration pour les autorités confrontées à des défis similaires dans d'autres domaines comme la politique de la concurrence.

Premièrement, l'expérience en matière de fiscalité illustre l'importance des instruments multilatéraux ouverts à côté des instruments bilatéraux. La disponibilité de cadres multilatéraux de coopération garantit aux juridictions qui n'ont pas les ressources nécessaires pour entreprendre la négociation d'un réseau d'accords bilatéraux un accès à la coopération multilatérale et facilite la coordination des efforts dans l'examen d'affaires transfrontalières.

Deuxièmement, dans le cas d'affaires ayant un impact à l'étranger, l'efficacité des mesures d'application peut être renforcée par les « arrangements de partage des tâches ». Les expériences de contrôles conjoints, de contrôles fiscaux étrangers et simultanés de contribuables apparaissent comme des aspects importants de la coopération multilatérale.

Enfin, la diversité des mécanismes de partage des informations montre l'importance de se doter d'un cadre juridique à l'échelon multilatéral pour formaliser et définir les types d'échanges et les devoirs et obligations qui en résultent entre les autorités.

7. Conclusion

Ce document met en évidence les acquis et les limites de la coopération internationale dans les affaires d'ententes. La coopération semble s'être régulièrement renforcée au fil des années et revêt de multiples formes, à travers un éventail de mécanismes formels et informels, bilatéraux et multilatéraux. Les instruments de l'OCDE ont contribué à promouvoir un climat de coopération.

Toutefois, des obstacles importants persistent à différents niveaux, i) entre autorités expérimentées, ii) entre autorités plus expérimentées et autorités de création plus récente dans les économies en développement et les économies émergentes, et (iii) entre autorités récemment établies dans les pays en développement. Les méthodes et instruments actuels de coopération sont tous utiles dans une certaine mesure, mais aucun n'apporte une solution adéquate aux limites auxquelles se heurtent les autorités de la concurrence pour collaborer et échanger des informations confidentielles. Compte tenu des contraintes qui continuent d'entraver la coopération entre autorités chargées de réprimer les ententes dans les pays membres de l'OCDE, la mise en place des conditions, incitations et outils qui permettront d'accueillir les autorités plus récentes des pays en développement dans le réseau international de la lutte contre les ententes constitue un enjeu majeur.

Il convient peut-être de se pencher à nouveau sur certaines recommandations émises il y a plus de dix ans par le Comité consultatif des États-Unis sur la politique de la concurrence internationale (International Competition Policy Advisory Committee - ICPAC)¹⁴³. L'ICPAC recommandait le partage des tâches dans le cadre d'enquêtes plurijuridictionnelles.¹⁴⁴ Cette formule peut aller de la mise en place d'équipes d'enquête conjointes à la désignation d'une juridiction responsable de fait, si certaines juridictions sont préparées à renoncer à un contrôle significatif sur une procédure pour autoriser une coopération aussi poussée. Ce concept, qui s'apparente à la courtoisie renforcée, a été évoqué à plusieurs reprises,

¹⁴³ L'ICPAC était un comité consultatif indépendant réunissant des experts du droit, de l'économie et des affaires, créé en 1997 par le ministère américain de la Justice pour étudier les questions de politique internationale de la concurrence.

¹⁴⁴ ICPAC (2000).

notamment par les entreprises, et le débat se poursuit. Il a déjà été appliqué avec succès aux efforts de coopération internationale entre autorités fiscales.

Les discussions portent également sur les coûts et les avantages du remplacement d'un patchwork d'accords de coopération bilatéraux par une plateforme multilatérale, sachant que des plateformes multilatérales régionales existent déjà et connaissent des taux de réussite inégaux. Les accords multilatéraux dans d'autres domaines ont soutenu les progrès considérables réalisés dans la coopération internationale entre autorités chargées de l'application et ont facilité la coordination de différents systèmes juridiques.

Des solutions plus spécifiques ont également été envisagées, dont certaines sont énumérées ici :

- *La libéralisation des législations pour permettre le partage des renseignements.* Les restrictions au partage d'informations entre autorités de la concurrence sont plus strictes que dans d'autres domaines du droit et vont au-delà de ce que dicte la protection des informations confidentielles. Pour pouvoir lutter de façon réellement efficace contre les ententes, il faut que d'autres pays se dotent d'une législation autorisant les autorités de la concurrence à partager des informations confidentielles dans des circonstances appropriées et sous réserve de garanties adéquates ;
- *Une définition commune du concept d'informations confidentielles.* Il pourrait être utile de parvenir à une compréhension commune de la notion d'informations confidentielles pour les besoins de la coopération entre autorités de la concurrence. On pourrait également améliorer la définition de ce que recouvre le concept d'information détenue par une autorité par opposition à la notion d'information confidentielle, en vue de faciliter l'échange du premier type d'informations. Les autorités de la concurrence sont normalement autorisées, mais non contraintes par la loi, à limiter l'accès aux informations internes concernant par exemple la nature ou le statut de leurs investigations, leurs théories d'enquête ou leurs conclusions préliminaires ;
- *L'élimination des incohérences entre les politiques de clémence.* On pourrait s'attacher davantage à éliminer les exigences contradictoires des programmes de clémence afin d'encourager les demandes de participation à ces programmes. Une plus grande harmonisation rendrait les dispositifs de clémence plus attrayants dans davantage de juridictions, suscitant potentiellement davantage de dispenses de confidentialité qui autorisent la coopération entre autorités ;
- *L'élaboration d'outils pratiques pour améliorer les capacités et la compréhension.* Le RIC a par exemple des projets en cours pour faciliter le partage des expériences de coopération et l'élaboration d'outils pour faciliter les contacts entre autorités, identifier les questions appropriées à la coopération et réaliser des représentations graphiques des mécanismes de partage des renseignements entre autorités.

Les ententes ayant un impact mondial, la coopération internationale n'est pas un luxe mais une nécessité. Il faut résoudre les difficultés qui entravent cette coopération afin qu'un plus grand nombre d'autorités de la concurrence puissent bénéficier de ses retombées positives. L'intensité et la qualité de la coopération doivent être améliorées pour que la coopération formelle dans le cadre d'affaires devienne courante et engendre des succès comparables à ceux de la coopération informelle entre autorités chargées de lutter contre les ententes.

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AUSTRALIA

1. Introduction

As international trade has increased in frequency, scope and sophistication, international cooperation has become increasingly important to Australia's ability to investigate and pursue cartels affecting Australian markets. In this global context, competition authorities can only be truly effective by working together to ensure that cartels can be prosecuted effectively in all jurisdictions.

Australia's anti-cartel enforcement capabilities have benefited directly from international cooperation. For example, in 2009, Australia secured a court order for AUD \$8.24 million in a multi-jurisdictional cartel case, a matter that could not have been prosecuted without the cooperation and assistance Australia received from agencies in other jurisdictions.

Australia has a number of formal and informal mechanisms that provide for international cooperation and the sharing of information in cross-border cartel investigations. This range of mechanisms provides Australia with flexibility in its approach to cartel investigations and allows it to assess each matter on a case by case basis. Australia protects shared information via legislative and informal safeguards, which require recipient jurisdictions to treat the information appropriately and to use it for the purpose for which it was provided.

Australia sees challenges and opportunities for improving cooperation with other jurisdictions and the efficiency of multi-jurisdictional cartel investigations. Some challenges include differences in legal and cultural practices between jurisdictions. Possible improvements include streamlining processes and greater use of confidentiality waivers for information provided by non-agency informants.

In this paper, Australia will discuss, in relation to cartel investigations, its mechanisms for cooperation with other jurisdictions, the safeguards in place to mitigate risks of exchanging confidential information and possible methods for improving the current state of international cooperation. The paper concludes by reiterating Australia's firm commitment to international cooperation in cartel investigations and advocating for the strengthening of inter-agency cooperation in international anti-cartel enforcement and continued improvement of the current international cooperation processes.

2. Existing tools and types of cooperation

Australia's competition agency, the Australian Competition and Consumer Commission (ACCC), cooperates with its competition counterparts through a variety of formal and informal means, both generally and in respect of cartel investigations. Having access to a comprehensive range of cooperation measures enables flexibility and enhances the effectiveness of the ACCC's coordination with other jurisdictions. Australia's cooperation in respect of cartel investigations primarily relates to the exchange of information and intelligence, including for example, in appropriate circumstances, sharing documents and investigation strategies on common cases, or engagement on specific issues such as amnesty and leniency.

2.1 *Methods of formal cooperation*

Formal mechanisms for international cooperation are provided for under Australian legislation and under bilateral and plurilateral treaty arrangements. These include:

- the Competition and Consumer Act 2010 (CCA)¹
- the Mutual Assistance in Criminal Matters Act 1987 (MACMA)
- the Mutual Assistance in Business Regulations Act 1992 (Cth) (MABRA)
- the Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance (the US-Australia Agreement)
- confidentiality waivers
- the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Convention) and in particular:
 - letter of request
 - taking of evidence by consular officials, and
- free trade agreements (FTAs).

It is important to note that the MACMA, the MABRA and the Convention enable the ACCC to actively gather information, documents and evidence on behalf of foreign agency. The CCA does not allow the ACCC to gather such items on behalf of the agency but rather provides a framework to disclose (in certain circumstances) existing information previously gathered under the CCA. Most of Australia's FTAs contain a commitment to consult on matters of mutual interest but no obligation to gather or disclose information. Further detail about the ACCC's formal mechanisms for cooperation is set out below.

2.1.1 *Competition and Consumer Act 2010*

A foreign agency can make a formal request for the ACCC to provide information, which would be considered under section 155AAA of the CCA. This section enables the ACCC to disclose to foreign government bodies (including competition counterparts) 'protected information', that is, information provided to the ACCC in confidence and information gathered under the ACCC's compulsory powers. The ACCC will disclose such information only if the ACCC's Chairperson is satisfied that particular protected information will enable or assist a competition counterpart to perform or exercise any of the functions or powers of that agency.

Generally speaking, the ACCC adopts a two-step process where its international counterparts may first be authorised to access information to determine its relevance and to narrow down any subsequent request to use the information for other purposes.

Section 155AAA itself does not impose any factors that the ACCC must consider when disclosing generally protected information to a foreign government body. However, the ACCC will elect whether to disclose protected information to foreign government bodies after weighing certain considerations, which will vary according to the circumstances but may include: Australia's relations with other countries; the need to avoid disruption to national and international efforts relating to law enforcement; the interests of the administration of justice; regard for the ACCC's policies, including its immunity policy for cartel conduct; and the effect that disclosure could have on the safety of an informant, as well as the fact that

¹ Formerly the *Trade Practices Act 1974* (TPA). The CCA superseded the TPA on 1 January 2011.

disclosure may discourage informants from providing information in the future. Decisions to release information will be made in accordance with the relevant provisions in the CCA and such decisions will be made on their merits.

Prima facie, section 155AAA of the CCA ensures that information received by the ACCC (from both international and domestic sources) is treated confidentially. However, by setting out specific exemptions, it also allows the ACCC to share information with foreign competition agencies when appropriate, to assist with their cartel investigations. This in turn benefits Australia as the effects of a cartel can often extend beyond a single country's borders.

The New Zealand Commerce Commission also has a special arrangement with Australia in relation to enforcement proceedings with a trans-Tasman element. The *Trans-Tasman Proceedings Act 2010* was made to:

- streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency;
- minimise existing impediments to enforcing certain NZ judgments and regulatory sanctions; and
- implement the Trans-Tasman Agreement in Australian law.²

The CCA contains provisions relating to the *Trans-Tasman Proceedings Act 2010* that allow an Australian court to conduct proceedings in New Zealand and a New Zealand court to conduct proceedings in Australia. For example, section 155A of the CCA provides the ACCC with the power to obtain information and documents in New Zealand relating to trans-Tasman markets and section 155B allows the ACCC to receive information and documents on behalf of the New Zealand Commerce Commission. However, these provisions are not used as frequently as section 155AAA of the CCA.

2.1.2 *Mutual Assistance in Criminal Matters Act 1987 (MACMA)*

Australia may provide and obtain assistance from foreign governments in relation to criminal investigations via mutual legal assistance, which occurs under the remit of Australia's *Mutual Assistance in Criminal Matters Act 1987*. Australia can make or receive a request for mutual assistance from any country. The process is assisted by over 20 bilateral mutual assistance treaties and some multilateral international conventions to which Australia is a party.

The MACMA regulates how Australia can provide or request international assistance in criminal matters. Some examples of the assistance that Australia can provide to requesting countries are: gathering evidence; executing a search warrant; seizing, restraining or confiscating property; and enforcing foreign orders or pecuniary penalties. The MACMA also facilitates the participation of certain witnesses in foreign criminal proceedings.

The ACCC has twice assisted the United States Department of Justice (US DOJ) to execute search warrants in Australia under the MACMA. In one of these cases, the US DOJ launched an investigation into suspected practices in a particular industry. The investigation involved companies operating out of Australia. The US DOJ requested Australia's assistance in gathering information related to the investigation from Australian territory. Australia agreed to the request and assisted the US DOJ and

² Please note: provisions to implement the Trans-Tasman Agreement in New Zealand law are in the corresponding New Zealand legislation.

Federal Bureau of Investigation staff, who visited Australia in person, to collect information from Australia. The US DOJ has provided feedback that the information was useful to its investigation.

2.1.3 Mutual Assistance in Business Regulation Act 1992 (MABRA)

The MABRA enables Australia to provide assistance to foreign regulators in obtaining relevant information, documents and evidence for purposes relating to the administration and enforcement of a foreign business law. Unlike under the MACMA, Australia will only provide assistance under the MABRA if it receives an undertaking from the foreign agency that the information or evidence provided to the foreign regulator will not be used for the purposes of criminal proceedings against the person or for proceedings against the person for the imposition of a penalty.

Whether or not Australia will respond to such a request is ultimately decided at Ministerial level. In considering whether to provide such assistance, some of the issues that the MABRA requires Australia to consider are: whether Australia will be able to obtain the requested information, documents or evidence; the cost of providing it; whether the foreign regulator would be likely to reciprocate to a request from Australia; and whether the matter would be more appropriate for the request to be made via a mutual legal assistance request. In practice, Australia rarely receives a request for assistance under this legislation.

2.1.4 Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance

The Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance (the Agreement) provides that Australia and the United States of America can exchange evidence on a reciprocal basis for use in competition law enforcement and help each other obtain evidence from the other's country while ensuring that confidential information is protected.

In one example, the ACCC instituted proceedings against several corporations from a number of countries. The ACCC alleged that the companies entered into an agreement outside Australia to allocate market shares and fix prices for a good or service on an international basis, including for Australia, in contravention of section 45 of the then *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010*).

To assist its case, the ACCC made a request under the Agreement for access to documents that were produced to a Grand Jury as part of a US DOJ investigation.

The ACCC liaised with US DOJ informally as to the scope of the request and the documents sought before making a formal request under the Agreement. The US DOJ then applied to the relevant US District Court to have the documents released. ACCC staff travelled to the US to inspect the documents for relevance. ACCC staff considered that the documents inspected were relevant to the ACCC's proceedings.

The US DOJ sought approval of the US Attorney-General to release the documents to the ACCC on public interest grounds and the documents were provided to the ACCC subject to the terms of the Agreement.

The ACCC maintained the confidentiality of the documents and returned the documents to the US DOJ when they were no longer required. The ACCC found the ability to access the US DOJ's information very useful in its investigation of suspected cartel conduct.

2.1.5 *Hague Convention on the taking of evidence abroad in civil or commercial matters (Convention)*

The Convention enables a foreign court that is a signatory to the Convention to apply to an Australian court for certain orders, including an order for the examination of witnesses or the production of documents under relevant state or territory legislation. Australia will provide such assistance in relation to a proceeding that has been or is likely to be instituted in a court of the requesting jurisdiction, but not in respect of matters in an early investigation stage.

The Convention also provides for a diplomatic or consular agent of another country to gather evidence on a voluntary basis in Australia, within the area where the official exercises his or her functions. The consular official must only obtain such evidence in relation to proceedings that have already commenced within his or her own country and must also have the permission of the appropriate authority which has been designated by Australia.

2.1.6 *Free trade agreements*

Australia has five bilateral free trade agreements (FTAs) currently in force, and a further six in negotiation.³ Australia also has one regional FTA in force and a further three under negotiation.⁴ Most of these FTAs provide for 'consultation', although the obligation to consult is non-binding and at the discretion of parties to the agreement. 'Consultation' may include exchange of confidential information in relation to cartel investigations.

2.2 *Methods of informal cooperation*

Informal cooperation complements and enhances formal cooperation by building an understanding amongst jurisdictions of their respective legal systems and by enabling the exchange of information at an early stage of an investigation. The speed with which intelligence can be shared to support investigations in various jurisdictions is central to effective informal cooperation. Australia engages in informal cooperation through bilateral intelligence and information exchange and through its participation in multilateral forums.

2.2.1 *Cooperation arrangements*

The ACCC is party to several bilateral and plurilateral cooperation arrangements with agencies in other jurisdictions, including jurisdictions in the Asia-Pacific region, Europe and North America.⁵ Generally, these arrangements establish a framework for notification, cooperation and coordination on competition and consumer protection enforcement activities, exchange of information and avoidance of conflict.

The arrangements recognise that it is in the Parties' common interest to cooperate and share information where appropriate and practicable. However, the ACCC is not required to communicate information to the foreign agency if such communication would be incompatible with its interests in the application of Australia's competition law. The ACCC may provide information on a confidential basis.

³ Australia currently has bilateral FTAs in force with Chile, New Zealand, Singapore, Thailand and the US. Currently under negotiation are: China, India, Indonesia, Japan, Malaysia and South Korea.

⁴ The regional agreement in force is AANZFTA (ASEAN-Australia-New Zealand Free Trade Agreement). Regional agreements under negotiation are: Gulf Cooperation Council, PACER Plus, Trans-Pacific Partnership.

⁵ For further information about the ACCC's cooperation arrangements, please see <http://www.accc.gov.au/content/index.phtml/itemId/564911>.

The foreign agency may also informally request the ACCC's assistance in obtaining information located in Australian territory to aid in an investigation. However, no information will be exchanged pursuant to the arrangement which could not have been exchanged in the absence of the arrangement. The arrangement provides that requests will be addressed in as timely and practicable a manner as circumstances permit.

2.2.2 Confidentiality waivers

The ACCC also cooperates with other jurisdictions through the sharing of information under confidentiality waivers. In such a case, the ACCC seeks waivers from applicants under its immunity and cooperation policies to discuss the details of their applications with other jurisdictions in which the applicant has also sought immunity. Waivers vary from case to case and may provide for information sharing for the purposes of coordinating investigations through to sharing of specific information and documents provided by the applicants. Confidentiality waivers are increasingly being used in cartel investigations, as applicants for immunity under Australia's cartel provisions are often also seeking immunity in other jurisdictions.

2.2.3 International forums

Australia's participation in international forums enables the ACCC to foster its relationships with and learn from competition agencies in other jurisdictions. The ACCC is, for example, an active member of the International Competition Network (ICN). The ICN provides a valuable forum to build relationships between agencies, and exchange information and ideas on particular matters. The informal network, comprising over 120 competition agencies from around the world, provides practical assistance to its members through the publications of ICN Manuals and best practice materials. The ICN also facilitates practical cooperation through initiatives such as the current Cartel Working Group project to create a chart summarising the mechanisms available for sharing information between agencies.

2.2.4 Inter-agency communication

The ACCC also holds regular teleconferences with competition agencies from certain jurisdictions to share information and discuss issues of mutual interest. For example, in 2011, the ACCC, the New Zealand Commerce Commission (NZCC) and the Competition Commission of Singapore (CCS) established the Australia–New Zealand–Singapore Sharing Arrangement (ANZSSA). Under the ANZSSA, the three agencies participate in a monthly teleconference to discuss: case investigations of interest; intelligence activities; outreach, awareness and compliance activities; technical cooperation; and legal and policy developments. While the ANZSSA is a new cooperative arrangement, the ACCC has found this arrangement useful for staying informed of developments in the region and for building informal relationships with the NZCC and CCS.

3. The complementary nature of informal and formal assistance

A good example of the complementary nature of both informal and formal assistance is that of Australia's investigation into cartel conduct regarding the supply of marine hose to oil and gas suppliers. As mentioned in the introduction of this paper, in 2009 Australia successfully obtained an order for a total of AUD \$8.24 million against companies participating in this cartel.

The case was in relation to cartel conduct which occurred between 2001 and 2006 by four suppliers of marine hose to oil and gas producers. The conduct in question involved controlling prices, bid rigging and allocating market shares. The cartel was effectively terminated in early 2007 following the execution of search warrants and arrests by the European Commission, Japan's Fair Trade Commission, the UK Office of Fair Trading (UK OFT) and the United States Department of Justice (US DOJ).

From Australia's perspective, the ACCC alleged that four foreign based suppliers of marine hose gave effect to global cartel arrangements by submitting rigged bids to supply marine hose to customers in Australia. While the making of the cartel arrangements occurred outside Australia, Australia's legislation enabled it to take action in relation to the dealings of the companies which gave effect to cartel conduct.

The successful outcome for the ACCC in this case would not have been possible without the assistance of both the US DOJ and the UK OFT, who provided information and documents that were significant to Australia's investigation. The information and documents were obtained informally from the US DOJ, and formally from the UK OFT via a request by the ACCC under the relevant section of the UK's *Enterprise Act 2002*. However, prior to the formal provision of this information, the ACCC and the UK OFT had been in close cooperation regarding the case, the processes related to the provision of formal assistance and the evidence that was available to be provided via a formal request. Through making use of the tools available under both forms of cooperation, Australia was able to maximise the information it obtained and provided in this matter and successfully prosecute and international cartel.

4. Australia's cooperation relationships with other jurisdictions

As noted above, the ACCC has agency-to-agency cooperation arrangements in place with a number of foreign agencies. These agreements provide mechanisms for the informal sharing of information and for coordination of enforcement action. To facilitate these arrangements, ACCC senior management and investigators hold regular bilateral meetings with their counterparts, on a periodic or as-required basis, to discuss case issues such as investigative steps, timing, and settlement approaches.

The ACCC has a particularly close cooperative relationship with the NZCC. In 1994, the two parties entered into a Cooperation and Coordination Agreement, which formally recognised that it is in the parties' common interest to cooperate and share information where possible and practicable. In accordance with the agreement, where the parties pursue enforcement activities with regard to the same or related matters, they endeavour to coordinate their enforcement activities to the extent possible. However, neither party to the agreement is required to communicate information to the other if such communication would be contrary to the party's interests.

The ACCC values its cooperative relationships with other competition agencies and the information it gains through these relationships. The ACCC can rely on information gathered in another competition authority's investigation in the ACCC's own investigation to the extent that it can be used for intelligence in investigating or opening a case.

In court, admissibility of foreign evidence is governed by the *Foreign Evidence Act 1994* and matters are assessed on a case by case basis. Evidence will only be accepted in a criminal matter in an Australia court if it is received under the MACMA.

4.1 Safeguarding sensitive information

The ACCC considers that the ability to protect confidential information is extremely important to the ongoing success of its immunity program and cooperation policy and, therefore, to its ability to detect and pursue cartels.

The ACCC takes appropriate precautions to protect information relating to immunity applicants and the information that they may provide. The ACCC acknowledges that sharing such information with other agencies raises certain concerns. However, the ACCC seeks to prevent adverse impacts on informants from disclosure of their information. It assesses requests to share immunity-related information on a case by

case basis. Where appropriate, the ACCC will take steps in court to protect confidential information being disclosed.⁶

Recent changes to Australia's competition law provide enhanced protection for confidential information in the possession of the ACCC relating to cartel investigations. Three levels of protection are potentially available for information disclosed to the ACCC, including protecting certain cartel information, public interest immunity and legal professional privilege. A request for such documents/information and a challenge to any of those three limbs of protection is ultimately left to a decision of the court.

4.1.1 Protected cartel information

In addition to laws relating to the disclosure of general protected information held by the ACCC, provisions were introduced into Australia's cartel legislation in 2009 enable the ACCC to refuse to produce, or to prevent the ACCC from being required, to produce certain documents and information called 'protected cartel information'. Such information includes information which was provided to the ACCC in confidence, both voluntarily and compulsorily, which relates to a potential breach of the cartel offence or civil prohibition. In general, this protection applies to orders for the production of information before a court or tribunal and to discovery or production of information during an investigation, or to third parties.

4.1.2 Public interest immunity and legal professional privilege

Where the ACCC considers it is in the public interest to prevent disclosure of certain information, it may assert that claim to the court. The court will then make a decision whether to disclose the information. In making this decision the court considers the need to protect informers, thereby encouraging informers to provide information to the ACCC in the future, as well as the need to ensure that defendants receive a fair trial and whether the administration of justice would be impaired if the documents were withheld.

Claims for public interest immunity are assessed on a case by case basis and judges exercise their discretion in making any such orders.

The ACCC may also claim legal professional privilege over confidential communications concerning certain advice and litigation privilege, which protects communications between a solicitor and their client that were conducted for the purpose of receiving legal advice. Legal professional privilege may cover any documents made by a client to its lawyers and knowledge or opinions of clients derived from privileged communications made to them by their lawyers.

4.1.3 Consultation

Where the ACCC is compelled to produce confidential information (for example, in response to a subpoena or a discovery order), it will endeavour to notify and consult the agency that provided confidential information about the proposed release of that information. In this way, the ACCC can afford the agency an opportunity to seek confidentiality orders.

⁶ For information about recent ACCC efforts to protect confidential information, see, for example: ACCC v Cadbury Schweppes Pty Ltd; ACCC v Prysmian Cavi e Sistemi Energia Srl & Ors; Korean Airlines v ACCC. Please note, however, that all of these cases relate to a period before Australia's new competition law, the *Competition and Consumer Act 2010*, and the associated additional protections for cartel information came into effect.

The *Freedom of Information Act 1982* also requires the ACCC to consult, as far as possible, before disclosure, any person whose business or professional affairs or personal information is contained in a document and give such a person rights of review in relation to any decision to release such information.

5. Challenges and opportunities for improvement

International cooperation between competition agencies is inherently challenging, due to the differences in respective countries' legal systems, culture and language. Nevertheless, such challenges can be overcome, in most cases, by developing an understanding and tolerance of the systems, requirements and expectations of a counterpart jurisdiction.

A key issue that each country must manage when cooperating with another country is the difference between its enforcement priorities and those of its counterpart country. A case that is a high priority in one country may not be a high priority in the country it is requesting assistance from, which can influence how quickly a country - including Australia - responds to a request and the resources that are allocated to it. Similarly, each country may have divergent interests in the same investigation. For example, one country may be seeking evidence to prosecute a particular offender, whilst another country may be seeking information from that person in the same matter to investigate a much broader cartel arrangement.

The existence of separate immunity and/or leniency policies in different jurisdictions can present challenges for international cooperation in cartel investigations. For example, an immunity and/or leniency applicant may be open to prosecution in relation to a certain cartel in two jurisdictions. That applicant might obtain immunity from prosecution in only one of those jurisdictions. Immunity usually requires ongoing cooperation with that jurisdiction's competition authority and disclosure of all information relevant to the case. Exchange of that information between the competition authorities of the two jurisdictions may expose that applicant to prosecution in the second jurisdiction.

In addition to conditional immunity, the ACCC's immunity policy interpretation guidelines also outline the ACCC approach of providing for 'amnesty plus' under its *Cooperation Policy for Enforcement Matters*.

If a person cooperates with the ACCC investigation into a cartel despite being ineligible for immunity because another person has been granted conditional immunity in relation to that cartel, the ACCC may recommend to the court a reduced penalty in civil proceedings and recommend to the Commonwealth Director of Public Prosecutions (CDPP) a reduced fine or sentence in criminal matters. If, in addition to cooperating with investigations into the first cartel, such a person reports a second cartel, and is granted conditional immunity in relation to the second cartel, the ACCC will recommend to the court a reduced penalty in civil proceedings and recommend to the CDPP a reduced fine or sentence in criminal matters be further reduced in relation to the first cartel. This arrangement is known as 'amnesty plus'.

Cartel prosecutions and related disclosure of information may also give rise to private actions against the applicant by parties affected by the alleged cartel. The ACCC's immunity and cooperation policies do not provide applicants with protection from private actions. Further, parties are not restricted from seeking redress from corporations and individuals who have been prosecuted in criminal or civil proceedings.

Legislative restrictions and a country's right to exercise its discretion to share information must also be considered. Australia's legislation specifies particular circumstances where it may request or share information, and ultimately each case is determined on a case by case basis.

A further challenge of international cooperation is the time and process involved in sharing information or working collaboratively with another jurisdiction, particularly through formal means. Delays may be incurred as jurisdictions undertake strict legislative and procedural procedures, such as

seeking Ministerial or Court approval. Cooperation via mutual legal assistance, for example, whilst an essential part of many criminal investigations, can take many months or even years. In some cases, countries may be required to follow a lengthy process of intelligence or evidence exchange which may not lead to any concrete outcome.

Given these challenges, Australia considers that international cooperation in cartel investigation can continue to improve and become more effective. Some possibilities to explore might include:

- introducing necessary legislation providing competition agencies with a discretion to, where appropriate, share evidence it has gathered as part of compulsory domestic processes with international counterparts similar to section 155AAA of the CCA;
- streamlining the process for requesting and responding to requests for information related to cartel investigations;
- developing informal and formal relationships with competition agencies in other jurisdictions and addressing potential language barriers and costs for translation of documents; and
- increasing the use of confidentiality waivers from cooperation partners in multi-jurisdictional cartel investigations.

BRAZIL

1. Existing tools for international co-operation

- 1.1 Please identify any formal mechanisms and/or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of a competition authority from another jurisdiction?*

When it comes to cooperation between competition authorities, we have established cooperation agreements and protocols with Argentina, Canada, Chile, DG-Comp, France (signed in December 2011), Mercosur, Portugal, Russia, and the U.S. Most of these agreements allow for the cooperation between agencies on the form of notifications with respect to enforcement activities which may affect the other agency's interests, consultations, technical cooperation, exchange of information (subject to the laws of each jurisdiction protecting confidential information), regular meetings and the granting of negative or positive comities.

On a broader cooperation level (i.e., cooperation between countries), MLATs signed with Canada, China, Colombia, Cuba, Italy, France, Mercosur, Peru, Portugal, Spain, South Korea, Suriname, Switzerland, Ukraine, the U.S., and Uruguay are also in force. Pursuant to a MLAT it is possible to execute a request, for example, for providing confidential and non-confidential information, searches, as well as lifting of (banking, fiscal, telecom and communication) secrecies, and seizure, confiscation, and repatriation of assets.

We are also part of the Inter-American Convention on Mutual Assistance in Criminal Matters, the Inter-American Convention against Corruption, The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the OECD Anti-Bribery Convention, United Nations Convention against Transnational Organized Crime, and the United Nations Convention against Corruption.

Finally, it is possible to execute a Letter Rogatory. Based on our domestic law, it is possible to execute a Letter Rogatory, for example, aiming at providing service of process, as well as providing an *exequatur* to a foreign order.

- 1.2 Please describe the informal mechanisms your competition authority has in place for co-operating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections/dawn raids in conjunction with another competition authority?*

Besides the formal cooperation mechanisms listed above, the BCPS sometimes maintains informal contacts with agencies during investigations of international cartel cases. This informal cooperation takes place by e-mails and phone calls in which we exchange experiences and general views with regards to case investigations and also on how to try to solve practical problems in the course of the these investigations, such as the service of process of foreign companies and individuals. In recent years, we also have conducted a joint inspection with the EC and the DOJ in a cartel case.

- 1.3 *To what extent have you used OECD instruments, e.g. the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and the 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, in your investigations? For what purpose were they used and how helpful were they?*

The international best practices on cooperation between agencies have been taken into account in the drafting of our formal cooperation mechanisms.

2. Types of co-operation

- 2.1 *What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to the exchange of relevant information, the organisation and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc?*

In principle, cooperation may happen at any stage during the proceedings and this has been the case in practice. Our cooperation usually relates to the exchange of non-confidential information and general views on the case. Sometimes we also hold informal discussions about practical aspects of the investigation such as the difficulties with the service of process abroad and how to overcome bureaucratic hurdles.

- 2.1 *How does the co-operation take place? For example, is it by telephone, email or through face to face meetings? How successful has the co-operation been? What aspects of co-operation have worked particularly well and what has been less successful?*

This cooperation takes place usually by e-mail or telephone (face to face meetings are less frequent because of the long distances usually implicated). The rate of success has varied a lot depending not only of the agency involved but also the particular circumstances of the case. Some cases favor more intense cooperation than others. One successful example of cooperation with the DoJ and DGComp happened in the course of the investigations of a case relating to the compressors market, in which the three agencies managed to conduct a joint dawn raid.

3. International vs. regional co-operation

- 3.1 *Which competition authorities you co-operate with the most? How often do you co-operate? Do you co-operate more with authorities located geographically close-by?*

The geographic location of the foreign agency has not been a determinant factor when it comes to the cooperation within cartel investigations. We have contacts with agencies all over the world (via networks and also bilateral understandings) and the cooperation is defined on the basis of the needs of each particular case.

In recent years, most of all cooperation involving cartel investigations has involved the DoJ and the EC, because of the particular cases we have been dealing with. We have also been in close contact with the Fiscalía Nacional Económica do Chile when they entered their first leniency agreement.

3.2 *If you are a new/young agency to what extent do you co-operate with your neighbouring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritise requests received from newer agencies?*

The cooperation agreements currently in place give evidence to BCPS' efforts to develop and maintain a close and positive interaction with some major foreign competition authorities. Our cooperation with neighboring and young agencies usually focuses on the development of joint projects for capacity building and exchange of experiences.

BCPS has a particular leading role in Latin America, organizing and participating in conferences and traineeship programs. As an example, Cade has an international internship program ("PinCADE Internacional") that takes place twice a year and provides representatives from other Latin American competition authorities with a unique, first-hand experience of the workings of the BCPS. In 2010, this Program gave rise to great interest among competition authorities in Latin America, as evidenced by the increase in the number of interested authorities (from four in 2009 to eight in 2010). In December 2011, CADE executed an agreement with the Brazilian Cooperation Agency (ABC) from the Ministry of Foreign Affairs to foster better conditions to this program, including funding.

4. Identifying gaps and improving the current frameworks

4.1 *What are the current challenges faced by your competition authority in cartel investigations which have a cross-border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?*

One of our greatest challenges has been serving foreign people abroad. Obtaining such a measure usually involves a lengthy procedure, with many bureaucratic hurdles.

The development of the culture of cooperation between agencies could help overcoming this challenge. International cooperation could, for instance, enable the creation of agency-to-agency special procedures for granting service of process on behalf of foreign agencies.

4.2 *How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and/or intensity of coordination?*

To this date we have not had to deal with problems arising from the use of information exchanged with other agencies. The Brazilian legal framework provides for criminal, civil and administrative enforcement on cartel cases.

4.3 *How do you think your current system could be improved in relation to the way in which international cartels are investigated? In what way could liaising with competition authorities in other jurisdictions be improved?*

We believe that liaising with competition authorities in other jurisdictions could be improved by deepening direct formal and informal cooperation channels.

In Brazil, our main efforts to improve international cooperation have been focused on reducing the bureaucratic hurdles that sometimes make cooperation inefficient and burdensome. We have also been conducting internal discussions so as to bring cooperative practices in the international arena closer to the day to day activities of the case handlers.

More recently we have set up a group that is starting discussions with other government entities in order to assess the need of legislative reforms allowing for more direct cooperation between agencies and the establishment of broader commitments through cooperation agreements.

4.4 *Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?*

Yes, namely regarding assistance for service of process. Sometimes serving companies and executives encompasses hardships, such as locating them and obtaining their address. Based on our experience, some foreign authorities may not feel comfortable in providing such information because they are regarded as private data.

5. Information sharing

5.1 *What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?*

Confidentiality issues have been the main barriers to information sharing we have faced. Each jurisdiction has its own rules in relation to confidentiality. Please see example mentioned above concerning information regarded as private data in some jurisdictions.

5.2 *Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?*

The Brazilian legal framework provides for confidentiality of commercially sensitive information and of information whose disclosure may jeopardize ongoing investigation efforts. This means that, in the absence of a waiver from the party concerned, access to this information is limited to the BCPS and to the party providing this information.

5.3 *To what extent can your authority rely on information gathered in another competition authority's investigation in your own investigation?*

Information obtained through public vehicles, such as agencies' websites, is regarded as information of public domain and may serve as evidence in the Brazilian proceeding.

Confidential information obtained from a foreign agency or the defendant, may also serve as evidence within Brazilian proceedings but must be kept confidential also in Brazil. Confidential information is treated as confidential until a final decision is rendered or, depending of its content, may be kept confidential even after a final decision is rendered.

It is important to clarify that, pursuant to the principle of free motivated convincement, the Brazilian Courts and the antitrust agency is free to weight evidence and reach a final judgment based on its motivated convincement. Therefore, the decision as to the extent in which both the Courts and the BCPS

will rely on information produced in another jurisdiction falls entirely on them and is made on a case-by-case basis.

- 5.4 *Does your jurisdiction/agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?*

There is no specific legislation regulating the protection of confidential information exchanged with an agency in another jurisdiction. The safeguards in place for the protection of confidential information obtained through cooperation with foreign government agencies are the same applicable for the protection of confidential information in general – i.e. separate files with no access granted to third parties and limitation of access to the information also to a limited number of people within the BCPS itself.

- 5.5 *What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?*

As part of the leniency application, we request that the applicant report all the jurisdictions in which it has already entered into a leniency agreement, as well as on which jurisdictions it has already issued a waiver. This is a means not only to facilitate our exchange of information and coordination with foreign authorities, but also to prevent foreign jurisdictions from disclosing information whose disclosure may risk ongoing investigations in Brazil. Although this is not a part of the leniency application itself, in the recent past we have requested and received waivers in the cases in which they were needed.

- 5.6 *Do you have any particular safeguards in place for information that has been given under an amnesty/leniency programme?*

The leniency agreement receives confidential treatment in Brazil. The agreement itself, in tandem with information commercially sensitive pertaining to the lenient and information whose disclosure may jeopardize ongoing investigations is kept confidential. This means that this information is filed separately, with no access granted to third parties.

6. International co-operation within other policy areas

- 6.1 *Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?*

Yes. As part of our efforts to improve our cooperation mechanisms, we have been liaising with the Internal Revenue Service and the Securities and Exchange Commission to talk about challenges faced in international cooperation. We have chosen these entities because they have managed to implement successful cooperation mechanisms that allow them to exchange information efficiently (i.e. overcoming bureaucratic hurdles) with foreign entities.

CANADA

1. Introduction

In today's globalized economy, it is essential that competition enforcement transcend national boundaries to protect the benefits of competitive and honest markets. The borderless workplace for competition enforcers has prompted the Canadian Competition Bureau (the "Bureau") to engage in a broad array of activities to encourage increased collaboration within a global network of enforcement agencies. This is particularly the case with respect to those agencies committed to the detection, investigation, and prosecution of international cartel activity.

In addition to the case-specific benefits realized, the lessons learned from increased collaboration have contributed to the convergence of legislation, policies, and practices. The international convergence of immunity and leniency programs^{1,2} is one example of a developing coherence in the international framework for competition enforcement. There is a growing readiness among jurisdictions to consider their competition legislation and practices through the prism of international enforcement cooperation.

In 2009, the Government of Canada passed amendments to the *Competition Act*³ (the "Act") that are generally regarded as the most significant reform to Canada's competition laws since the mid 1980s.⁴ Among other things, these amendments significantly changed the Bureau's approach to the treatment of agreements between competitors.⁵

One of the amendments repealed the criminal conspiracy provisions and replaced them with (a) a new *per se* criminal offence prohibiting agreements between competitors to fix prices, allocate markets or restrict output (the "Criminal Cartel Provision") and (b) a new civil provision for all other agreements between competitors that prevent or lessen competition substantially (the "Civil Agreements Provision"). These changes were designed to create a more effective criminal enforcement regime for the most egregious forms of cartel agreements, while at the same time removing the threat of criminal sanctions for legitimate collaborations between competitors, in order to avoid discouraging firms from engaging in potentially beneficial alliances.

¹ Under the Bureau's Immunity Program, the first party to disclose an offence not yet detected or to provide evidence leading to the filing of charges may receive immunity from prosecution if the party cooperates with the Bureau's investigation and complies with the terms of the Immunity Bulletin, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html>.

² Under the Bureau's Leniency Program, parties that cooperate with the Bureau's investigation may receive a lenient sentence, if they comply with the terms of the Leniency Program, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02816.html>

³ The Act is available online at: <http://www.laws.justice.gc.ca/eng/C-34/index.html>.

⁴ These amendments were included in Bill C-10 (*Budget Implementation Act, 2009*).

⁵ Additional information about the amendments is available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03036.html

The amendments also increased the maximum fine for violations of the Criminal Cartel Provision from \$10 million to \$25 million and the maximum term of imprisonment from 5 years to 14 years. The maximum term of imprisonment for bid-rigging was also increased from 5 years to 14 years. Under the Civil Agreements Provision, the Competition Tribunal was provided with the power to prohibit any person from doing anything under an agreement or requiring any person, with the consent of that person and the Commissioner, to take any other action.

This modernization of law and policy enhances the Bureau's ability to cooperate with foreign competition agencies and coordinate international cartel investigations, providing Canada with a more productive and effective cartel enforcement regime. Furthermore, increased cooperation and coordination will enhance the predictability regarding the manner in which these types of enforcement matters are assessed for businesses operating within the North American market.

2. Tools for international cooperation

International cartel enforcement presents particular challenges for the Bureau as documents and witnesses often reside outside of Canada; however, the Bureau has a range of tools and mechanisms, both formal and informal, at its disposal to facilitate and enable cooperation with its foreign counterparts.

2.1 Formal cooperation

International cooperation agreements and arrangements relating to the application of competition law foster a culture of cooperation among participating agencies. They provide formal mechanisms that expressly favour the exchange of information and formal notifications, except where prohibited by law or contrary to important domestic interests. Under such agreements, parties recognize the value of minimizing conflict and carefully considering one another's interests at all phases of their enforcement activities. Canada currently has 11 international agreements, arrangements, or memoranda of understanding covering 10 jurisdictions.⁶

The Bureau may also rely on Canada's Mutual Legal Assistance Treaties ("MLATs") to seek evidence of criminal activity located in other jurisdictions. The MLAT and its enabling statute, the *Mutual Legal Assistance in Criminal Matters Act* ("MLACMA"), permits law enforcers, including competition agencies, to request formal assistance in obtaining and transmitting evidence relating to criminal matters,⁷ for example, by providing documents or executing requests for search and seizure. To date, Canada has entered into more than thirty such treaties.⁸ MLATs are a useful tool when evidence is located abroad and/or foreign counterparts are unable to share information under less formal mechanisms. To date, the Bureau has used MLATs to seek evidence located outside of Canada in 10 investigations and has responded to 6 MLAT requests to provide evidence relating to cartel investigation to foreign agencies.

2.2 Informal cooperation

The Bureau engages in extensive informal cooperation with foreign agencies. Senior management hold regular bilateral meetings with their counterparts in several jurisdictions, including the United States,

⁶ A list of Canada's international instruments relating to cooperation in the enforcement of competition law is available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00128.html

⁷ The International Assistance Group (IAG) of the Department of Justice Canada, under the Minister of Justice, is responsible for the review and coordination of requests for investigative assistance in criminal matters.

⁸ A list of Canada's MLATs is available online at: <http://www.treaty-accord.gc.ca/result-resultat.aspx?type=10>

the European Union, Australia, New Zealand, and Japan, to discuss case-related issues such as investigative steps, timing, and settlement approaches. Communication is not restricted to senior management, as Bureau investigators routinely coordinate enforcement actions with their counterparts in other agencies; however, legal barriers may, in certain circumstances, limit the Bureau's ability to share information. In the 2010-2011 fiscal year, the Bureau engaged in informal cooperation with 9 jurisdictions.⁹

Under section 29 of the Act, communication of information obtained during an investigation, including information produced voluntarily or obtained pursuant to the exercise of formal powers, is permitted "for the purposes of the administration or enforcement of the Act."¹⁰ This allows information that is considered confidential under the Act to be communicated to a foreign counterpart where the purpose is the administration or enforcement of the Act (e.g., where communication of this information would advance a specific investigation).

When confidential information is communicated to a foreign agency, the Bureau takes rigorous steps to maintain the confidentiality of the information. This is accomplished via formal international instruments or specific assurances from the foreign agency. The Bureau does not communicate information protected by section 29 of the Act unless it is fully satisfied with the assurances provided by the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put. The Bureau requires the foreign agency to limit the use of the confidential information to the specific purpose for which it was provided. Similarly, the Bureau is willing to provide assurances to a foreign agency that the information provided will be treated confidentially, and will only be used for the administration and enforcement of the Act. The Bureau will provide notice to, and seek the consent of, the foreign agency if it intends to use the information for any other purpose.

The Bureau will not disclose the identity or information obtained from an immunity or leniency applicant to any foreign law enforcement agency without the consent of the applicant; however, applicants are encouraged to and routinely grant such consent. Improved communication with foreign agencies has also resulted in situations where the Bureau is alerted to cases by its international counterparts before counsel for immunity applicants approach the Bureau.

Finally, the Bureau builds relationships with foreign agencies by providing technical assistance, participating in employee exchanges and internships,¹¹ and participating in multilateral organizations.¹²

2.3 Multilateral cooperation

The International Competition Network ("ICN"), together with the Organisation for Economic Co-operation and Development ("OECD"), have helped foster international cooperation and enhanced the

⁹ Australia; Chile; European Commission; Japan; Mexico; New Zealand; South Africa; the United Kingdom; and the United States.

¹⁰ For more information see the *Information Bulletin on the Communication of Confidential Information under the Competition Act*, Competition Bureau, October 10, 2007, available online at: <http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/eng/01277.html>.

¹¹ For example, in early 2010, six employees from Chile's competition agency, the Fiscalía Nacional Económica, completed a two-week internship at the Bureau's head office in Gatineau, Québec.

¹² The Bureau participates in multilateral organizations such as the International Competition Network and the Organisation for Economic Co-operation and Development. Please see below for more information on Multilateral Cooperation.

global effort to investigate and bring competition offenders to justice. These multilateral fora also help facilitate relationships between foreign agencies.

The Senior Deputy Commissioner of the Criminal Matters Branch is the Co-Chair of the Enforcement Techniques Subgroup of the ICN Cartel Working Group (“SG 2”). In order to enhance international cooperation in anti-cartel enforcement, SG 2 is currently undertaking a project that will provide practical summaries of the ways in which members can share cartel-related information with each other. Once completed, the summaries will set out the key characteristics of the information sharing regimes of each member agency and will be made available to all ICN members.¹³ Asia-Pacific Economic Cooperation (“APEC”) is undertaking a similar project this year, although their summaries of information sharing mechanisms will be created for all APEC members and will relate to all aspects of competition law, not just cartel enforcement.

The Bureau’s involvement in the ICN complements its contribution to the OECD Competition Committee, the OECD Working Party No. 2 on Competition and Regulation, and the OECD Working Party No. 3 on Enforcement and Cooperation, all of which are designed to strengthen competition law enforcement against cartels. The Bureau routinely provides submissions to the OECD and participates in roundtable discussions addressing cartel enforcement matters.

3. Emerging issues

3.1 *Intelligence network*

An emerging tool for increasing international cooperation is proactive intelligence gathering. The Bureau recognizes that an important means of deterring cartel behaviour is to increase the likelihood of detection. In addition to relying on its Immunity and Leniency Programs to disclose the existence of a cartel, the Bureau proactively profiles product markets that are subject to cartel investigations outside of its borders, with a view to detecting, and ultimately deterring, similar conduct in Canada.

With respect to cooperation and information sharing between agencies, the potential posed by developing intelligence and leads on cartel activity has not been fully realized. Even merely furthering the exchange of publicly available information (e.g., information that can be obtained by any interested party without legal restrictions) would be beneficial, as agencies commonly limit information and announcements on their websites to significant case developments, such as case resolutions. The benefits of exchanging publicly available information are demonstrated by the International Consumer Protection and Enforcement Network (“ICPEN”).¹⁴ Agencies that participate in ICPEN share comparatively more information than non-participants. With that in mind, the Bureau explored the creation of an intelligence network with competition agencies in other jurisdictions, but had limited success owing to resource constraints, confidentiality constraints and differing legal enforcement regimes across agencies. There is potential for more work to be done in this area, particularly with respect to sharing publicly available information among foreign agencies. The European Competition Network has had success in exchanging intelligence among agencies. Their experiences could be considered as part of a benchmarking exercise for any future developments in this area.

¹³ SG 2 plans to complete the summaries in time for the 2012 ICN Annual Conference, which will be held in Rio de Janeiro, Brazil from 17-20 April 2012. They will be made available on the ICN website.

¹⁴ For example, when one agency helps another agency gain time by providing information that is already in the public domain, such as information about the market arising from studies carried out by the agency.

3.2 *Coordinated approach to outreach*

A coordinated approach to outreach further enhances public awareness of the severe penalties associated with operating a cartel and should increase the detection, deterrence, and prevention efforts of competition agencies. It is also an excellent method of proactive detection. This approach involves conveying a consistent outreach message¹⁵ on an international scale and requires considerable cooperation, coordination, and communication among competition agencies, similar to the manner in which agencies cooperate internationally on enforcement activities. There is potential for more work to be done in terms of implementing a coherent international approach to outreach and, ultimately, detection, from a domestic to an international scale.

The Bureau has recently developed a risk-based outreach strategy. In developing this strategy, the Bureau engaged in substantive international benchmarking. The Bureau also relied on the OECD's 2009 *Guidelines for Fighting Bid-Rigging in Public Procurement*¹⁶ to better understand outreach efforts undertaken by foreign agencies.

In 2010-2011, the ICN Cartel Working Group facilitated a series of enforcer discussions relating to cartel awareness and outreach. Through this series of 'roundtable' discussions, members were able to share expertise and exchange practical ideas on effective anti-cartel enforcement. The roundtable series was complemented by a collection of examples of public messages and materials used by competition agencies from around the world in their respective cartel-related outreach efforts. The collection of examples facilitates the sharing of experiences and ideas as to how to raise awareness around issues such as the prevention, reporting and prosecution of anti-cartel conduct.¹⁷

3.3 *Cooperation following exercise of formal powers*

International cooperation and coordination is fairly advanced during the covert stage of investigations that begin with immunity applications. Agencies involved in multi-jurisdictional investigations of this nature do an excellent job at coordinating the execution of formal powers, such as searches, dawn raids, and production orders. Commentators have noted that better coordination between agencies could be undertaken once investigations go overt; for example, in regards to immunity and leniency marker management, fine calculation methodologies, ability to pay issues, charging individuals and comity considerations. Timing issues, as well as different settlement procedures in various jurisdictions may limit the ability to improve this type of coordination.

In Canada, as well as in many other jurisdictions, settlement discussions are privileged; accordingly, the Bureau is typically restricted in the settlement information it can share with foreign agencies. For example, information sharing may be limited to a general discussion of the factors considered in reaching a settlement, rather than a detailed discussion of settlement terms. Seeking waivers from cooperating parties may be one option to consider to facilitate in-depth settlement discussions with foreign counterparts.

4. **Some remaining challenges**

There are many challenges associated with international cooperation and information sharing.

¹⁵ For example, signalling that cartelists will not be allowed to hide behind international borders.

¹⁶ For more information, see the *Guidelines for Fighting Bid-Rigging in Public Procurement*, March 12, 2009, available online at: http://www.oecd.org/document/29/0,3343,en_2649_40381615_42230813_1_1_1_1,00.html

¹⁷ For more information see the Cartel Awareness and Outreach compilation, available online at: <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness.aspx>

4.1 *Legal barriers*

Most jurisdictions have provisions in their national laws that restrict the communication of some or all confidential information in a cartel investigation to foreign agencies.¹⁸ For example, many agencies are restricted from sharing confidential information, which definition differs across jurisdictions.¹⁹ Some of these issues can be addressed with a formal cooperation agreement or arrangement, as described above; however, establishing these formal instruments can be a lengthy and resource intensive process, and may not be possible for some agencies. Furthermore, if the conditions in which the information was gathered in the sending jurisdiction do not meet the requirements in the requesting jurisdiction, the information may not be admissible as evidence in the requesting jurisdiction.²⁰

Barriers to sharing information are even greater when agencies operate in different legal frameworks. In particular, agencies operating in a civil or administrative enforcement regime may face additional challenges regarding the sharing of information with an agency operating in a criminal enforcement regime if there is a possibility that the information will be used for the purpose of seeking custodial sanctions against an individual.

4.2 *Evidence*

Trials and public hearings in one jurisdiction may have implications for other jurisdictions. Issues have emerged recently with respect to the disclosure of internal investigation documents by cooperating parties. Suffice to say, if evidence or testimony varies across jurisdictions, the disclosure of such material could seriously impact each involved agency's investigation and subsequent prosecution, for example, by impeaching the credibility of cooperating witnesses. There may be a need to coordinate across multiple jurisdictions to ensure consistent witness statements. One possible method of coordinating witness evidence could be to obtain shared witness declarations that could be used in multiple jurisdictions.

5. **Conclusion**

This submission provides an overview of the Bureau's existing tools for international cooperation, as well as identifying some recent developments in international cooperation in Canadian cartel investigations. As described above, there remain many challenges with respect to international cooperation and information sharing. Some of these barriers may be addressed with formal cooperation agreements or arrangements, while others would require a change in framework or policy. Some of the challenges identified may benefit from closer review by the OECD Competition Committee in the context of its strategic theme on international cooperation.

The amended conspiracy provisions have streamlined Canada's cartel laws to provide appropriate, internationally harmonized standards to address cartels. This convergence in laws, particularly with the United States, Canada's largest trading partner, enhances the Bureau's ability to cooperate with foreign agencies.

¹⁸ See above for more information on section 29 of the Act, which permits the sharing of confidential information for the administration and enforcement of the Act.

¹⁹ For more information, see the ICN report on "Cooperation between competition agencies in cartel investigations", available online at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf>

²⁰ Ibid.

CHILE

1. Existing tools for international co-operation

1.1 Formal mechanisms

Twenty years ago Chile initiated a trade policy aimed at opening foreign markets to Chilean exports and reducing barriers to imports by means of signing bilateral trade agreements (BTAs). Most of the BTAs agreed so far consider provisions on competition policy and some of them extend the corresponding provisions to include cooperation for enforcement.

Duties, obligations and rights with regards to competition policy contained in the BTAs and Association Agreements (AAs) most frequently include: positive and negative comity¹; notification²; consultation³; coordination in law enforcement⁴; and information sharing⁵.

The following chart summarizes the scope of rights and duties considered by chapters on Competition Policy included in several BTAs and AAs signed by Chile:

¹ According to *Positive Comity*, a country should give full and sympathetic consideration to another country's request; that is, open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests. *Negative Comity* or principle of abstention encourages countries that are conducting law enforcement activities to consider how they might conduct them so as to avoid or minimize harm to the other countries. OECD (1999) CLP Report on Positive Comity [DAFFE/CLP\(99\)19](#).

² A country should notify or communicate its law enforcement and investigation activities to the other when such activities may affect substantially the other party's relevant interests; when the enforcement or investigation activities concern restraints to competition that may have direct and significant effects in the other party's territory; and, when anticompetitive conducts have taken place mainly in the other party's territory.

³ A country may submit consultations to the competition authority of the other party when relevant interests of the requesting country are negatively affected in the other party's territory.

⁴ A country may communicate to the competition authority of the other party that it pretends to coordinate law enforcement activities in relation to a specific case.

⁵ The extension of this duty is broad and general and varies among agreements. It includes, among others, exchange of information regarding sanctions and remedies in cases affecting the other party's interests and the grounds for their imposition; general law enforcement activities; and, the enactment of exemptions.

Country	Notification	Information sharing	Consultation	Comity	Coordination in enforcement
Peru	X	X	X	X	X
EU	X	X	X	X	X
Korea	X	X	X	X	X
EFTA	X	X	X	X	X
Mexico	X	X	X		
P4	X	X	X		
U.S.A.	X	X	X		
Australia	X	X	X	X	
Canada	X	X		X	X

In addition, the Chilean competition agency (*Fiscalía Nacional Económica* or “FNE”)⁶ has agreed several Memorandums of Understanding (MOUs)⁷ and other agency-to-agency agreements with foreign competition authorities aimed at building trust between agencies and at providing a more specific framework for operating when cooperation is needed.

These instruments consider similar provisions to the BTAs’ chapters on competition, but in addition they provide for specific and detailed provisions on notifications, information sharing and coordination in law enforcement activities. If a formal proceeding for requesting cooperation is used, these agency-to-agency instruments would be invoked in the first place, before BTAs competition chapters.

The following chart summarizes the scope of rights and duties considered by MOUs agreed by the FNE:

Agency/Country	Notification	Information sharing	Coordination in enforcement
CB/Canada – 2001	X	X	X
CFC/Mexico – 2004	X	X	X
CADE-SDE-SEAE /Brazil – 2008	X	X	X
SC/El Salvador – 2009		X	X
CNC/Spain – 2009		X	
DOJ-FTC/USA – 2011	X	X	X

1.2 *Informal mechanisms*

Informal mechanisms of co-operation are usually the outcome of person-to-person relationships developed between different competition authorities’ heads and high officials and are the tool most frequently used on a day-by-day basis in order to request co-operation from foreign authorities in cartel prosecution.

In the case of the FNE, these informal mechanisms have facilitated in the past the exchange of information regarding a transnational cartel case. However, formal investigations with joint dawn raids with another competition authority have not taken place so far.

1.3 *OECD instruments on co-operation*

The OECD instruments on co-operation are not used very frequently to support co-operation activities. However, they have been used by the FNE as a benchmark for defining internal procedures in its investigations, when cross-border issues may be involved.

⁶ The Chilean Competition Law System is composed by two Competition Authorities: the FNE which is an administrative body which main duties in cartel cases are to conduct investigations and litigate cases before the Competition Tribunal. The Competition Tribunal or *Tribunal de Defensa de la Libre Competencia* is a judicial body in charge of managing judicial proceedings and adjudicating in cases, with specific and exclusive jurisdiction on competition law issues.

⁷ These MOUs are available in Spanish in this link: <http://www.fne.gob.cl/internacional/participacion-internacional/>

2. Types of co-operation

2.1 *Type of cooperation requested*

In a transnational cartel case in 2010, the FNE requested information with regards to the investigations initiated by competition authorities abroad. The scope of the information requested in this case included the conduct investigated, the firms involved, the dates and duration, the evidence collected, the existence of an immunity applicant, etc. The use of a previous waiver from parties involved was part of the protocol applied.

2.2 *Type of cooperation received*

The FNE received part of the information it requested, including confirmation of the existence of investigations. When a proceeding before the Competition Tribunal was initiated, foreign authorities co-operated in accelerating the legal serving of the complaint.

2.3 *Stage of the proceedings when the co-operation takes place*

The FNE requested the cooperation during the investigation, after approving the immunity request and when the submission of a complaint was very likely. At that stage, investing resources on getting in touch with foreign authorities with the main purpose of obtaining additional information in order to support the case was considered justified.

However, the general view of the FNE is that, in most cases, the earlier the contact is made, the better. This may allow receiving input -at an early stage- of the different theories of the case under review and thus defining the corresponding investigation strategies. An early contact also avoids any interference in the investigations steps of each agency, an issue that could become difficult to solve when coordination is adopted later.

In the transnational cartel case above mentioned, the co-operation took place by means of meetings between officials and conference calls with case handlers in several other jurisdictions in order to present and exchange views on each other's investigations in the same sector.

3. International vs. regional co-operation

Cooperation initiatives in cartel investigations are not frequent. Our experience so far has led us to request cooperation in cartel enforcement to authorities investigating the same sector but not necessarily located geographically close to Chile. This seems to be a consequence of the global character of markets in our time.

The FNE has not been requested to cooperate in specific cases of cartel enforcement activities, and only it has been informally requested to report on a transnational cartel case once it was made public.

The FNE participates in regional networks of competition authorities such as the Interamerican Alliance and the *Red Iberoamericana de Competencia*. Even though these networks are useful for general exchange of views about current developments on competition policy and law in our countries, they do not play yet a significant role in the case of co-operation in law enforcement purposes. This is mostly because the latter usually occurs among smaller numbers of authorities (most frequently in a bilateral context) and when, in addition, specific characteristics of sectors investigated are common as well as when trust relationships between agencies is already built.

4. Identifying gaps and improving the current frameworks

The main challenges in transnational cartel prosecution are jurisdictional issues due to the cross-border character of anticompetitive effects and the problems arising when evidence is located abroad. In order to overcome these challenges, younger agencies need more experience in dealing with international cartels. With some exceptions, the prosecution of international cartels is a task undertaken by competition authorities in developed countries because scarcity of resources is a relatively less significant problem. The authorities from these jurisdictions should take a leading role in fighting international cartels, inviting younger authorities to participate, coordinating efforts in joint investigations and enforcement activities.

The Chilean competition system has proven effective in dealing with international cartels. Indeed the first immunity application was submitted by a participant in a transnational cartel case in 2010. The immunity applicant in this case received total immunity and during the procedure before the Competition Tribunal, issues of extraterritorial application of the law have been raised. The Competition Tribunal's ruling on this case is about to be issued.

This experience illustrates very well what was mentioned above. Several jurisdictions were investigating the case at the time proceedings began in Chile, where the case was motivated by a leniency program applicant. Once foreign authorities had taken notice that they were facing an international cartel probably having effects in different jurisdictions, a good practice may have suggested that these authorities promoted the initiation of joint investigation. The success of a coordinated enforcement against transnational cartels depends on the leading role by some competition authorities more than on anything else.

Another problem that may arise is the different nature (administrative/judicial) of procedures used by the agencies involved as well as the degrees of progress, at each given point in time, for each of these procedures. The outcomes of judicial and administrative procedures may be different in terms of facts, duration and other features of the cartel conduct. The burden of avoiding potential differences is on the parties collaborating to the investigation, who should not behave strategically before different authorities.

5. Information sharing

5.1 *Barriers to information sharing*

The main barriers to information sharing are two. On the one hand the absence of significant levels of trust in the requesting agency's work makes the exchange of information unlikely, particularly in the absence of waivers obtained from the investigated parties. On the other hand, a separate barrier can be identified in the risk perceived by the holder of the information that their investigation or other strategic enforcement decisions could be jeopardized if they respond affirmatively to the request.

In cases where information or documents are formally requested to the FNE by any person on the basis of the Freedom of Information Act, the law considers a communication to the parties potentially affected before sharing the information and grants them the right to oppose such a request. This can be understood as a requirement to request a waiver from the party in order to proceed with an exchange of information with other authorities. Nevertheless, this general regulation has to be interpreted in light of the specific provisions on exchange of information between competition authorities that treaties, agreements and other international commitments may statute.

5.1 *Admissible character of evidence obtained abroad*

The Competition Act provides for a very broad criterion on admissible evidence. In the past, condemnatory rulings by the Competition Tribunal have been supported, among others, by decisions issued by foreign authorities, as additional circumstantial evidence.

5.2 *Confidential information*

It is relevant to make a distinction between the treatment of confidential information by the FNE during investigations and its treatment once a proceeding has been brought before the Competition Tribunal.

The FNE may request the authorization of the President of the Competition Tribunal in order to omit the notice to the investigated party; otherwise it is obliged to communicate the initiation of an investigation. Besides, the FNE can instruct not to grant access to the records of the investigation to the investigated party provided that such instruction is communicated to the President of the Competition Tribunal. In its cartel investigations, the FNE usually issues both safeguards, as a general practice. In addition, FNE's officials have the legal obligation to keep confidential all information, data and background information that they may become aware of in the execution of their duties. The violation of this legal obligation is punished as a crime. Thus, even though there are no specific provisions regarding the protection of confidentiality of information obtained from abroad, the legal framework used by the FNE for cartel investigations gives a strong protection for such confidential character.

With regards to proceedings before the Competition Tribunal, in 2009 an amendment to the Competition Act introduced a provision on the confidential and private features of information submitted. According to this provision, the Competition Tribunal may qualify information as "private" or "*reservada*" forbidding access to this information to persons which are not involved in the corresponding proceeding. On the other hand, the instruction of "confidential" character of information submitted by a party, means that not even the other parties in the proceeding have access to the information. The latter qualification is reserved for documents containing formulas, strategies, trade secrets, or any other element, the dissemination of which could significantly affect the competitive performance of the holder. However, the Competition Tribunal may order to submit a public version of the document qualified as "secret" or "confidential", in order to allow the other party or parties to comment on or to challenge the document and hence ensuring their rights of defense. Again in this case, there are no specific provisions in the Act regarding the protection of confidentiality of information obtained from abroad, but the framework is secure enough. Besides, the Competition Tribunal is about to issue an internal procedural regulation ("*Auto Acordado*") aimed at specifying this legal provision on the 'secret' and 'confidential' character of the information. As was suggested by the FNE in the draft notice and comment period, it would be a good opportunity to introduce some specifics regarding documents obtained from abroad in order to reinforce protections to confidential information sharing.

5.3 *Information received in the context of leniency applications*

In the case of information received by the FNE under the leniency program in force in Chile since 2009, a specific provision in the Act refers to the confidential character of this information. Hence, the FNE can instruct confidentiality of specific documents in order to protect the identity of the applicant or other persons that collaborated in the investigation, to preserve sensitive commercial information and to ensure the effectiveness of the investigations. In proceedings before the Competition Tribunal there are no safeguards additional to those already mentioned for confidential and secret information.

As to exchanges of information provided as part of the leniency program, the FNE has indeed requested waivers from companies in order to facilitate the information exchange with other agencies investigating the same cartel. For future international cartel cases it is expected that the FNE will request waivers, as a general practice since, according to our experience, waivers demonstrated its importance in helping the exchange and hence the effectiveness of cartel investigations in cross-border cases.

COLOMBIA

Introduction

Cooperation among competition authorities in the fight against international cartels is fundamental from multiple perspectives. First of all, it is important given that multinational corporations celebrate large and relevant agreements that have cross-border action fields. Therefore, to understand the way collusions attempt against markets, it is important to identify the corporation's *modus operandi* and to determine the impact of such behaviors in a specific country; this is only possible if it is visualized from a continental or even inter-oceanic perspective. Second of all, cooperation among competition authorities is strategic to unmask those agreements that have a negative effect on free competition considering that, in most cases, the accumulation of information that can be gathered by consolidating evidence supplied by various competition authorities is a crucial element in order to understand the incentives and purposes that generate such conducts. Extensive evidence is reflected on forceful, strong, robust arguments applicable when issuing a sanction to a group of corporations that have entered into agreements that limit free competition in a specific jurisdiction.

Based on the preceding, the Colombian Competition Authority (Superintendence of Industry and Commerce or SIC) faces a challenge that must be taken care of immediately. The Superintendence of Industry and Commerce must advance by putting into action the previously subscribed cooperation agreements against anticompetitive cartels and must develop new mechanisms of communication with competition authorities in the rest of the continent in order to combine efforts and prevent unlawful cross-border arrangements that generate exclusionary and exploitative effects in Colombian markets.

Institutional cooperation may also be deemed as an essential tool in the identification of cross-border cases of collusive practices when regional or continental databases are created. This is so because collusive agreements may be replicated in countries with similar economic and demographic characteristics.

With the use of a communication system capable of articulating the efforts that competition authorities carry out in order to prevent and detect agreements that affect competition, a sufficiently ample learning process will take place that will dissuade the execution of anticompetitive arrangements in every country by the enforcing the type of analysis used to expose them.

This casuistic memory can only be achieved through efficient and effective communication mechanisms that allow the understanding of analysis tools and final decisions issued against agreements that have a negative effect on the markets protected by different authorities.

Therefore it's important to take into account that within the context of each agreement subscribed by the Colombian Competition Authority, the determined and effective support of multilateral organizations such as the UNCTAD and the OECD constitute a direct and extensive opportunity aimed to enhance initiatives that advance towards the consolidation of a permanent communication agenda between competition authorities in the region.

Now we will go through the questionnaire and the points of consideration that compose the contributions for the Forum on the improvement of the international cooperation in cartels investigations that will take place in February, 2012, in the city of Paris, in the order they were presented.

1. Existing tools of international cooperation

1.1 Identify any formal mechanisms and/or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of a competition authority from another jurisdiction?

Considering the challenges mentioned in the introduction of this document, the Colombian Competition Authority has subscribed important cooperation agreements with multilateral institutions and homologue entities in terms of competition.

Formally speaking, the Superintendence of Industry and Commerce has subscribed agreements with COMPAL, UNCTAD, the European Union Technical Assistance Program for Colombian Commerce (through the Ministry of Commerce, Industry and Tourism), Ministry of Industries and Productivity of Ecuador, CNC of Spain, ACODECO, Regional Center for Competition and Ministry of Industry and Commerce of Paraguay. The following table describes the type of agreement and the scope for every cooperation mechanism in force:

Institution	Type of Agreement	Summarized Description
Ministry of Industries and Productivity of Ecuador	Memorandum of Understanding	<ol style="list-style-type: none"> 1. Exchange information and documentation. 2. Execute courses, conferences and workshops in competition and consumer protection issues. 3. Provide information related to studies and plans especially designed by the parts to optimize the promotion of competition and consumer protection.
Regional Center for Competition of Latin America	Agreement	Develop activities to increase the operative and technical capacity of its members by attending their demands and needs. The goal of the activities carried out by the CRC will be to benefit simultaneously the major number of members possible and take the maximum advantage of economies of scale and reach that could be derived from them.
United Nations Conference on Trade and Development. (UNCTAD)	Memorandum of Understanding	<ol style="list-style-type: none"> 1. Fortify the SIC in technical aspects and capacities related to competition and consumer protection issues. 2. Strengthen the competition advocacy, the diffusion of consumer rights and the mechanisms to guarantee that both areas remain in force. 3. Establish conditions for the free development of markets through sector studies and recommendations in the design of the public policies.
Authority for Consumer Protection and Competition Defense (ACODECO) of Panama	Covenant	<ol style="list-style-type: none"> 1. Determine general bases for institutional coordination for the establishment of permanent mechanisms of cooperation to ensure the economic liberty, promote the cooperation among competition authorities, help prevent and identify possible anticompetitive practices, as well as to exchange perspectives, institutional policies, knowledge and experiences. 2. Exchange information and documentation for the efficient compliance of the object of the covenant subject to its reserved nature. 3. Subject to an agreement among the Parties, offer courses and conferences in order to publicize the programs developed and disseminate the rights granted by law. 4. Provide information regarding studies, plans and programs especially designed by the Parties, in an individual manner to optimize the defense and promotion of the economic competition.

Authority for Consumer Protection and Competition Defense (ACODECO) of Panama (Cont.)		<ol style="list-style-type: none"> 5. Appoint the personnel responsible for the planning of the promotion and diffusion of each one of the objectives of the Covenant. 6. Report, in case of having any knowledge, the existence of anticompetitive practices among economic agents that can have effects in the markets of the country with which the Covenant is subscribed.
National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOP) of Peru	Memorandum of Understanding	<ol style="list-style-type: none"> 1. Elevate the level of consumer, businessmen and elements of competition law protection by means of strategic alliances in the above-mentioned areas that allow the parties to share experiences, good practices, doctrinal and jurisprudential guidelines in order to improve policies in intellectual property, consumer defense and competition protection. 2. Promote the joint development of projects and exchange information and experiences that allow the development of policies of continuous improvement in each institution. 3. Render technical assistance in order to strengthen professional, operational and technical capacities of both parties. 4. Exchange information and documentation for the efficient compliance of the object of the Memorandum of Understanding subject to its reserved nature. 5. Carry out courses, conferences, workshops and internships on all subjects required by the parties regarding intellectual property, consumer defense and competition protection. 6. Provide information related to studies, plans and programs especially designed by the parties, in an individual way, to optimize intellectual property, consumer defense and competition protection.
Mexican Program for international Cooperation for Development	Memorandum of Understanding	<ol style="list-style-type: none"> 1. Acquire knowledge of the Mexican experience in the development and execution of mechanisms to prosecute practices with cross border effects that restrict competition in NAFTA's markets and other free commerce treaties, through practical cases, expert analysis and work documents. 2. Assimilate the advantages and difficulties that arise when designing and setting in motion competition law in the context of free commerce treaties. 3. Train officials responsible for the enforcement of free trade regulations. 4. Strengthen mechanisms to verify the compliance of regulations regarding competition protection. 5. Improve the current practical know-how related to competition. 6. Exchange material, studies and information used for the solution of cases.

1.2 Please describe the informal mechanisms your competition authority has in place for cooperating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections jointly with another competition authority?

Although the informal mechanisms for cooperation with other jurisdictions used by the Superintendence of Industry and Commerce do not include the execution of joint investigations or the identification and prosecution of anticompetitive cartels yet, there is a constant and increasing communication with our peers on neighboring countries based mainly on exchanged experiences in investigations of this type. As an example, officials and experts in competition protection have visited us from the United States of America and Brazil, among others, with whom a productive and constant contact has been maintained.

Likewise, we have received immediate cooperation on different matters related to the interpretation and application of competition regulations via telephone communication and by e-mail.

We understand that the situations and problems we face have been previously solved in other jurisdictions in multiple occasions. These experiences are precisely what constitute the main informal channel of cooperation in the fight against anticompetitive cartels.

2. Types of co-operation

2.1 What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to the exchange of relevant information, the organization and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc?

Currently, regarding cooperation related to competition protection, especially regarding the institution strengthening for the prosecution of anticompetitive cartels, the Superintendence of Industry and Commerce of Industry and Commerce receives substantial support from the COMPAL Program, the European Union Technical Assistance Program for Colombian Commerce, USAID and the UNCTAD.

The COMPAL Program has been a mayor support by contributing with three market researches of great importance: electronic commerce, energy and gas. Additionally, this Program has provided us a series of reports with recommendations regarding the adoption of different analysis methods and economic techniques to identify collusive practices and abuse of dominant position, as well as technical advices composed by an international academically recognized consultant, known that for his important trajectory in the enforcement of competition policies in Latin America.

The European Union Technical Assistance Program for Colombian Commerce has aided the Superintendence of Industry and Commerce by providing consultants for the modernization and incorporation of better practices in competition protection, as well as redesigning institutional components for external and internal client attention, diffusion of issues regarding competition in markets, technical strengthening of various segments of the economy whose surveillance was delegated to the Superintendence of Industry and Commerce by virtue the Law 1340, the improvement of the technical and response capacity on investigations concerning restrictive practices and the strengthening of the procedure of competition advocacy.

Finally, given the determined support provided by this program, the Superintendence of Industry and Commerce had the support of important consultants who carried out diagnosis concerning the implementation of the leniency program in the institution.

As it can be extracted from the preceding, international cooperation received by Colombia has been focused, to this moment, in endowing the officials of the competition authority with sufficient tools that allow them to evaluate the situations where cartels may appear in a more technical and updated manner. Just as well, bearing in consideration the introduction of international figures such as the leniency programs, the Superintendence of Industry and Commerce has sought to extract experiences from countries where such policies have shown positive results.

Disregarding the foregoing, the cooperation received so far does not enter the dimension of a joint activity between competition authorities of different jurisdictions in specific investigations. In other words, the boundaries of knowledge and experience exchange has not reached the setting where joint raids or evidence recollection abroad are carried out in order to attack international cartels or determine sanctions.

- 2.2 *How does the co-operation take place? For example, is it by telephone, email or through face-to-face meetings? How successful has the co-operation been? What aspects of co-operation have worked particularly well and what has been less successful?*

Co-operation between different competition authorities has taken place through different channels: teleconferences, e-mails and face-to-face meetings. Generally, these communications have been very important in order to gain knowledge on other experiences and criteria to analyze and conclude different antitrust investigations.

3. **International vs. regional co-operation**

- 3.1 *Which competition authorities you co-operate with the most? How often do you co-operate? Do you cooperate more with authorities located geographically close-by?*

Even though the Superintendence of Industry and Commerce counts with informal cooperation via telephone communications, e-mail and virtual meetings with authorities in Europe, the United States of America, the United Kingdom and some countries in Latin America, it is clear that the competition agency from which we have received constant and important contributions is the Spanish National Commission of Competition (CNC). In fact, as an important joint effort of this institution with the Inter-American Development Bank (IDB), on a yearly basis, an official commission from the Colombian Competition Authority receive instruction and information related to the latest methodologies and cases studied by the CNC. This forum is an important element of cooperation received by Colombia.

On a regional scope we have strengthened cooperation ties with the Peruvian INDECOPI, the Brazilian CADE and the Chilean Fiscalía Nacional Económica de Chile. The fact that South American countries face similar circumstances concerning the structure of their markets, its participants and the difficulties the countries face when prosecuting cartels cannot be denied. For this reason, cooperation with these authorities is constant and it is based on experiences and training exchange.

Similarly, we have constant communication with the Mexican Federal Competition Commission, with whom we have shared general information on different markets (such as telecommunication market) and received training on cases concerning cartels (such as the one that took place in the cement industry) and the banking system, which are excellent examples of sectors with antitrust issues that replicate with ease in the rest of the region. The Superintendence of Industry and Commerce also seeks to share its experiences with younger regional agencies of Central America or even in countries where there is an initiative to create one.

Although it is true that the cooperation described above has been executed more frequently for approximately the last 8 years, it is evident that the countries in the region should work towards the increase of cooperation in the fight against cross-border cartels, which should be reflected, primary, on formal investigations.

- 3.2 *Are you part of a regional competition network? If so, to what extent has this network assisted in the cartel investigations you have carried out?*

The Colombian Competition Authority, as stated above, is part of the Regional Latin America Centre of Competition. Nevertheless, we have no experience in cartel investigation analyzed by this Centre. We hope that this effort of cooperation would be a good support in the future to analyze this kind of anticompetitive behaviors.

3.3 *If you are a new/young agency to what extent do you co-operate with your neighboring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritize requests received from newer agencies?*

The Colombian process of consolidation of a national policy in competition is one of the oldest in Latin America. It started with the expedition of the Law 155 of 1959, by virtue of which the general regime regarding restrictive commercial practices and preliminary control of integrations was established. The application of this law was limited given the organization of the Colombian economy during the following three decades after the adoption of that law.

The application of a new competition policy was boosted at the beginning of the nineties by several reasons, among which the State's constitutional duty to protect the free competition and the political decision to initiate a process of economic opening can be emphasized. As a result, the Decree 2153 of 1992 was issued in compliance with transitory article 20 of the 1991 Colombian Political Constitution, becoming the base of a new competition policy in the country. The abovementioned decree restructured the Superintendence of Industry and Commerce of Industry and Commerce and listed the classification of the anticompetitive behaviors.

The last great advance of Colombian competition policy was the promulgation of the Law 1340 of 2009, which updated the regulation concerning competition protection and introduced tools implemented successfully by international authorities such as the leniency program and giving the possibility for a third party to intervene when it has a direct interest in the investigation of a restrictive commercial practice. The decree also appointed the Superintendence of Industry and Commerce as the sole competition authority in national markets.

Based on the previously said, the Superintendence of Industry and Commerce can be considered a mature competition authority in the region and, at the same time, a young authority worldwide. The Superintendence of Industry and Commerce can be considered on one hand a recipient of cooperation offered by agencies with greater trajectory and experience, and on the other a strategic provider of said cooperation and policies to other Central and South American countries.

As for cooperation received, it should be said that the main cooperative international authorities are the Federal Trade Commission, the European Competition Commission and the Brazilian CADE. Nevertheless, there has been informal contact with other authorities in the region via informal media. Also, as it has been previously stated, this type of cooperation focuses on training on theoretical aspects of the competition law or in the specific market research.

As for the activities carried out by the Superintendence of Industry and Commerce as a catalyst of cooperation toward Latin-American countries, the entity has offered different countries in Central America preparation in this matter. Interesting discussions were generated around the analytical tools used in Colombia to determine the abuse of dominant position in the market as an important antitrust tool.

4. Identifying gaps and improving the current frameworks

- 4.1 *What are the current challenges faced by your competition authority in cartel investigations which have a cross-border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?*

Once again, it should be mentioned on this point that the Superintendence of Industry and Commerce has not developed any joint investigation with another country in order to discover and/or to sanction a cross-border cartel yet. Nevertheless, the former does not mean that the need to initiate the necessary activities to develop investigations of this type does not exist.

To reach this goal, the first and main challenge consists in studying possible markets or sectors in which cross-border cartels may be more plausible, making it imperative for cooperating agencies to exchange information as for the elaboration of studies.

Besides, a complete identification of the agents that compose the cartel and that normally shield in policy failures that appear in the fight of these infractions should be sought. Another challenge to overcome in these activities is the recollection and recognition of the evidence collected in other countries susceptible to be useful in national investigations, as well as the possibility to transfer evidence gathered in Colombia to any other country in the region.

- 4.2 *How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self-incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and/or intensity of coordination?*

In Colombia, the only anticompetitive agreement that can infringe criminal regulations in addition to competition law is collusion in tenders. In this sense, it is important clarify that up to now no testimonial evidence has been practiced in cartel prosecution.

Nevertheless, if Colombia had to face the aforesaid situation, it would be imperative to include in treaties or memorandums of understanding the parameters and protocols to be followed in evidence reception from other countries, in order to guarantee the investigated party's right to defense.

- 4.3 *How do you think your current system could be improved in relation to the way in which international cartels are investigated? In what way could liaising with competition authorities in other jurisdictions be improved?*

The start of any cooperation activity directed to investigate international cartels should start from the identification of relevant markets susceptible to be subject of anticompetitive conducts. For this to happen, it would be crucial to subscribe Memorandums of Understanding with neighboring countries aimed to perform sectorial studies geographically expanded to the territory of the countries involved.

This mechanism would allow the cooperating countries to have a general knowledge of the agents, their participations and their behavior in the market. The process of gathering information on companies under a certain country's control and surveillance would be in charge of each country, but the parameters of such process and the analysis of the results would be carried out jointly by the parties.

Another instrument that is currently being implemented by some countries is the transmission of information concerning imposed sanctions and decisions regarding the commencement of investigations, through points of contact in each country (officials of each agency). This is done in order to determine if an initiated investigation in one country can have direct and/or indirect impact on a neighboring country. A third phase consists of the actual exchange of evidence gathered in each country. Nevertheless, this phase can only be reached once the abovementioned steps are consolidated.

4.4 *Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?*

No, there have not been any.

5. Information sharing

5.1 *What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?*

The main barrier to exchange of confidential information is internal data protection regulations from each country. Nevertheless, it should be reminded that the Superintendence of Industry and Commerce has not carried out any official request of specific information collected by other competition authorities in the region in internal investigations aimed at the transfer of it to an internal procedure.

5.2 *Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?*

The industrial secret or the confidentiality duty of administrative authorities in procedures aimed to sanction a company does not find emulation in the Colombian “Código Contencioso Administrativo” (Administrative Litigious Code, hereinafter C.C.A.). As the law contains no reference to the matter, we face a legal abyss.

Because of the preceding, the only dispositions that could be applicable through analogy are those contained in Title I, Chapter III of the C.C.A. concerning the right to petition information, given that the Administration has the obligation to supply documents and therefore enable the petitioner to know its content with the only exception of information described as reserved, status that only can be granted according to the Law (articles 23 and 74 of the constitution and I articulate 17 to 25 of the C.C.A.).

Disregarding the foregoing, article 260 of Decision 486 of 2000 (regulation issued by the Andean Community of Nations, incorporated in our legal system) indicates that any information that has not been disclosed, legitimately possessed by individuals or corporate bodies, that may be used in a productive, industrial or commercial activity and may be susceptible to be transmitted to a third constitutes a business secret as long as such information is:

- Secret, which means that the information as a whole or one of its parts is not known neither easily accessible by those who do not handle such information.
- Because it is a secret, it has commercial value.
- Its legitimate owner must have taken all the necessary measures to maintain this information in secret.

The information deemed as a business secret can refer to the nature, characteristic or purposes of products; to the methods or processes of production; or to the media or form of distribution or commercialization of products or services provided.

The previous definition is important for administrative authorities based on the content of the second clause of article 261 of Agreement 486 of 2000, given that any information with the abovementioned characteristics that is provided in a procedure has to be considered as business secret and cannot be considered of public knowledge.

Therefore, even when the regulation analyzed does not grant these documents reserved status, it imposes a duty to officials that have may access to them that makes them responsible to guard the documents from third parties. Therefore, the stealth obligation entails that the information supplied can only be analyzed with the purpose of obtaining licenses, permissions, authorizations, registrations or any another administrative resolution in favor of the interested.

Specifically, article 15 of Law 1340 of 2009 foresees the protection of business secrets or any other information deemed as legally reserved in investigations carried out by this Superintendence of Industry and Commerce. Just as well, it establishes that revealing such information constitutes a serious disciplinary fault for the responsible official.

As a conclusion, because the information is not of public knowledge, it escapes the possibility of being requested by any person or even by a competition authority of a neighboring country.

5.3 *To what extent can your authority rely on information gathered in another competition authority's investigation in your own investigation?*

Any type of evidence that supports the existence of a cartel under the Colombian law should be argued against by the investigated corporation or individual and properly linked to a specific investigation. In this sense, although it is possible justify a decision on documents that contain general information concerning a market or its conditions, even if it is obtained from the internet, the same does not occur with information contained on an investigation carried out by a competition agency of a neighbor country. In order to do this, international treaties that allow transferring evidence must exist.

5.4 *Does your jurisdiction/agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?*

No, it does not have any.

5.5 *What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?*

Even though the clemency figure was included as one of the novelties in Law 1340 of 2009, the Superintendence of Industry and Commerce has not carried out this type of procedures so far. Therefore, it is imperative to initially strengthen this program in the country before implementing international cooperation policies in the matter.

5.6 *Do you have any particular safeguards in place for information that has been given under an amnesty/leniency programme?*

In every investigation carried out by the Superintendence of Industry and Commerce there is a reserved file where all the information included is deemed as confidential and there is a public file where reserved information is suppressed. No additional security protocols to protect informers in the clemency program exist yet.

6. International co-operation within other policy areas

6.1 *Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?*

Authorities such as the Fiscalía General de la Nación (Criminal Prosecution Office) faces similar challenges in investigations related with money laundering and corruption. In addition, the National Tax and Customs Direction (DIAN) does so in matters regarding the tax system. Other control entities such as the Procuraduría General de la Nación are involved in these activities as well.

Nevertheless, the abovementioned authorities investigate and sanction conducts considered as crimes by national and international authorities, field that counts with a well nourished activity with regards on cooperation between countries.

As an example of the above mentioned, the Colombian Constitutional Court in 2006 declared the legality of the "CONVENTION OF THE UNITED NATIONS AGAINST CORRUPTION", adopted by the General Assembly of the United Nations, in New York, October 31, 2003. In said Convention, themes related to the protection of complainants were included as extradition, reciprocal judicial assistance and joint investigations, among others.

6.2 *Does your authority liaise with any other regulatory authorities to discuss common problems/solutions?*

No, it does not.

CROATIA ¹

1. Introduction

The provisions of the Competition Act (2009) of the Republic of Croatia prohibit cartel agreements between undertakings. In its Chapter II., Agreements between Undertakings, it provides the clauses on prohibited agreements understood by such based on the Competition Law². Therefore, there shall be prohibited all agreements between two or more independent undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the distortion of competition in the relevant market, and in particular those which³:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts⁴.

These agreements particularly refer to contracts, particular provisions thereof, implicit oral or explicitly written down arrangements between undertakings, concerted practices resulting from such arrangements, decisions by undertakings or associations of undertakings, general terms of business and other acts of undertakings which are or may constitute a part of these agreements and similar, notwithstanding the fact if they are concluded between undertakings operating at the same level of the production or distribution chain (horizontal agreements) or between undertakings who do not operate at the same level of the production or distribution chain (vertical agreements).

By way of derogation from quoted prohibition, certain categories of agreements shall be granted exemption from and consequently such agreements among undertakings shall not be prohibited if they, throughout their duration, cumulatively comply with the following conditions: (1) if they contribute to improving the production or distribution of goods and/or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; (2) if they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and

¹ Author: Dr.Sc. Mirna Pavletic-Zupic, Member of the Croatian Competition Council; Croatian Competition Agency, Zagreb, Republic of Croatia.

² Croatian Competition Act (2009); furthermore: Competition Law, CA, or Act; The Law is aligned to the EU *acquis communautaire*.

³ Art. 8 CA.

⁴ The provision of the quoted Article of the Competition Act is aligned with the Treaty on the Functioning of the European Union - TFEU Art. 101.

(3) if they do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of goods and/or services in question.

However, Agreements among entrepreneurs that prevent, restrict or distort competition within the above established definitions, based on the Law, provided that they would not fulfil the conditions listed in previous paragraph, as well as the agreements which do not qualify for the block exemption, according to the Law are declared to be null and void.

Namely in certain cases the block exemptions could be granted to such agreements between entrepreneurs that could demonstrate and prove to the Agency the existence of the criteria for the block exemption, such as⁵ (i) for the agreements between undertakings not operating on the same level of production or distribution (vertical agreements), and in particular, exclusive distribution agreements, selective distribution agreements, exclusive purchase and franchising agreements; (ii) for the agreements between undertakings operating on the same level of the production or distribution (horizontal agreements), and in particular, research and development and specialization agreements; (iii) for the agreements on transfer of technology; (iv) for the agreements on distribution and servicing of motor vehicles; (v) for the agreements in insurance sector; and (vi) for the agreements between undertakings in the transport sector.

However, the Competition Agency would *ex officio*, initiate the proceedings to assess the compatibility of a particular agreement which has been granted block exemption, where it finds that the particular agreement, in itself or due to the cumulative effect with other similar agreements in the relevant market, does not comply with the conditions set out in the Competition Law (Article 8). Should the Agency in the course of the proceedings find that the agreement concerned produces certain effects which contravene such conditions, then the Agency would decline the block exemption or withdraw already granted exemption.

Finally the Croatian Competition Act also recognizes de minimis rule and establishes the further exclusions for the parties in such agreements⁶. The mentioned de minimis agreements are defined as agreements in which the parties to the agreement and the controlled undertakings have an insignificant common market share, provided that such agreements do not contain hard core restrictions of competition that, in spite of the insignificant market share of the parties to the agreement, lead to distortion of competition.

2. Existing tools for international co-operation⁷

International cooperation is important in detecting and prosecuting the cartels which are damaging to the economies of many countries affected with their harm to the international trade. Croatian Competition Agency has entered into several international cooperation agreements in order to enhance the procedural issues in finding and prosecuting the cartels which operate cross-border.

2.1 *Please identify any formal mechanisms and / or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of competition authority from another jurisdiction?*

Croatian Competition Agency has entered into several agreements on cooperation with other authorities. Within the country these authorities are from the side of various sector regulators, such as for telecommunications, energy, postal services, etc., and with the other jurisdictions competition authorities.

⁵ CA; Art. 10.

⁶ CA, Art. 11.

⁷ This paragraph contains the exact questions of the OECD Secretariat, rather than corresponding subtitles.

Such agreements are closed only with competition authorities from the foreign countries. These countries are in the Europe, some of them are the EU members, and some not. Those non EU countries, are mostly countries that are bordering to the Republic of Croatia, or within the Region. The type of the said international cooperation agreements are mostly the memoranda on understanding.

Most important is that the Agency is a member to several multilateral competition fora, such as International Competition Network (ICN), and UNCTAD, but also started the engagement in the European Competition Network (ECN), since the year 2011, and participates to the annual OECD fora on competition.

2.2 *Please describe the informal mechanisms your competition authority has in place for co-operating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections/dawn raids in conjunction with another competition authority?*

Agency cooperates also with European (EU and non-EU) countries with which it has not already closed the cooperation agreements. Such cooperation is enforced in various fields of competition law and policy implementation. Informally the written request can be send to the competition authority in certain jurisdiction(s), with the questions and inquiries that are of importance for particular case held in the Agency or for the particulate sector inquiry.

2.3 *To what extent have you used OECD instruments, e.g. the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and the 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, in your investigations? For what purpose were they used and how helpful were they?*

The said documents are used on informative basis, for the purposes of better understanding the role and the methods of international cooperation. However the said documents are built in the best practices and further documents on international cooperation discussed at the ICN dedicated working groups, to which this Agency also takes part ordinarily.

3. Types of cooperation

3.1 *What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to exchange of relevant information, the organisation and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc.?*

The most demanding, but also the most efficient way of international cooperation among the competition authorities are in cases in conducting the dawn raids in detecting the hard core cartels. The Competition Act in its Article 42, provides the rules for inspections of the business premises, other premises, land and means of transportation, as well as for the affixation of sealing and temporary seizure the objects in question.

However, prior to the conduct of an inspection (dawn raids) of the business premises, land and means of transport, the Agency shall in line with the relevant rules for collecting evidence applicable in non-contentious procedures make a request to the Administrative Court of the Republic of Croatia to issue a warrant authorizing the Agency to conduct a dawn raid of business premises, land and means of transport, to examine all records and objects relating to the business, to seal any business premises or records and to seize objects and documents found on these premises, particularly if there it can be reasonably assumed that the evidence might be destroyed or concealed.

If a reasonable suspicion exists that evidence related to the subject-matter of the inspection may be replaced or altered by the parties to the proceedings, the authorised persons of the Agency may alone or with the assistance of law enforcement authorities of the Corporate Crime Department conduct inspections, on which the parties or the proprietor of the premises and objects will be informed at the spot, at the moment of the conduct of the inspection.

The authorised persons of the Agency shall exercise their powers of surprise inspection upon production to the party to the proceeding or the proprietor of the premises and objects, of the identification card and the warrant to carry out the inspection issued by the Administrative Court of the Republic of Croatia. The authorised persons to conduct an inspection are empowered: (i) to enter and inspect any premises, land and means of transport (hereinafter: the premises) at the seat of the undertaking against which the procedure is being carried out as well as in any other location where the undertaking concerned performs its business activities; (ii) to examine the books and other records related to the business, irrespective of the medium on which they are stored; (iii) to take or obtain in any form copies of or extracts from such books or records, irrespective of the medium on which they are stored; (iv) to seize the necessary documentation and to retain it as long as it takes to make photocopies where due to technical reasons it is not possible to make photocopies during the inspection. The authorised person shall make an administrative note thereof; (v) to seal any premises and/or books or records for the period and to the extent necessary for the inspection; (vi) to ask any representative or member of staff of the undertaking for explanations on the facts or documents relating to the subject-matter and purpose of the inspection and to record the answers; (vii) to ask any representative or member of staff of the undertaking to submit a written statement on the facts or documents relating to the subject-matter and purpose of the inspection and set the deadline in which this statement must be submitted; and (viii) to perform any other actions in accordance with the purpose of the inspection.

Where during the conduct of an inspection (dawn raid), the objects, books or other documentation are temporarily seized, the Agency shall make an administrative note thereof particularly specifying the place where the objects concerned have been found accompanied with the description thereof. The authorised person of the Agency shall without delay issue a certificate on the seizure of objects and documentation concerned. The objects, books and documentation which have been seized shall be retained as long as the facts and circumstances contained in the evidence concerned are established. However, this period may not be extended after the day on which the Agency closes the proceedings in the case concerned.

3.2 *How does the cooperation take place? For example, is it by telephone, email or through face to face meetings? How successful has the co-operation been? What aspects of co-operation have worked particularly well and what has been less successful?*

The cooperation in international matters take place by email or telephone conversations / conferences.

4. International vs. regional co-operation

4.1 *Which competition authorities you co-operate with the most? How often do you co-operate? Do you co-operate more with the authorities located geographically close-by?*

Due to the specific circumstances that the most alleged injuries of the competition statutes affect cross border territories, but also considering the fact that such territories are more or less closely connected, the cooperation would rather be regional in particular cases.

- 4.2 *Are you part of a regional competition network? If so, to what extent has this network assisted in the cartel investigations you have carried out?*

Croatian Competition Agency is a part of the International Competition Network – ICN, and from the end of the year 2011 is invited to participate to particular sessions of the European Competition Network (ECN). More regional competition networks do not exist in this part of the Europe.

- 4.3 *If you are a new/young agency to what extent do you co-operate with your neighboring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritise requests received from newer agencies?*

The means of cooperation, beside already mentioned also encompass the invitation for participation to the various workshops, attending the competition days, and ad hoc consultations.

5. Identifying gaps and improving the current frameworks

- 5.1 *What are the current challenges faced by your competition authority in cartel investigations which have a cross- border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?*

The most complicated challenges which would be difficult to resolve is the dimension of the conducting the investigations, which means dawn raids in several jurisdictions because they involve the prerequisite of obtaining the court orders.

- 5.2 *How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and / or intensity of coordination?*

Croatian Competition Agency so far did not have a case of cooperation in cartel investigation that would involve the regimes that sanction cartels as a criminal deed.

- 5.3 *How do you think your current system could be improved in relation to the way in which international cartels are investigated? In what way could liaising with competition authorities in other jurisdictions be improved?*

The factors that could influence the improvement of mutual investigations involve direct communication with the persons in charge of conducting the investigations on both sides, which is proved to be the most efficient way for the direct and quick exchange of important information and coordination of the work.

- 5.4 *Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?*

Croatian Competition Agency has always provided the assistance whenever requested, and also has obtained the assistance from various enforcement competition agencies. Most important means were when sharing information in particular cases, even sending the corresponding decisions where the violation of the competition statutes were established.

6. Information sharing

- 6.1 *What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?*

Sometimes the requested information contain the protected data, and in such cases the providing authority could not disclaim them for the prevention of future possible civil actions for unauthorized disclosure of the protected information.

- 6.2 *Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?*

Croatian Competition Act provides the clauses for protecting the confidential data which come out in a course of a procedure. Consequently, the clause of the Art. 53 of the Competition Act provides for the secrecy obligation. Therefore, the Members of the Competition Council and the employees of the Agency shall keep and not disclose the information classified as a business secret, irrespective of the way they came to know it, whereby the obligation of business secrecy shall continue to be in effect 5 years after the expiry of their engagement with the Agency.

Under the term business secret, shall be considered, in particular the following:

- all data and documentation which is defined to be a business secret by law or other regulations;
- all data and documentation which is defined to be a business secret by the undertaking concerned if accepted as such by the Agency;
- all correspondence between the Agency and the European Commission and between the Agency and other international competition authorities and their networks .

However, a business secret referred to above, shall be in particular business information which has actual or potential economic and market value, the disclosure or use of which could result in economic advantage for other undertakings.

Finally, the Agency will in particular apply the following non-exhaustive list of criteria to determine whether information can be deemed to constitute a business secret:

- the extent to which the information is known outside the undertaking;
- the extent to which measures have been taken to protect the information within the undertaking, for example, through non-compete clauses or non-disclosure agreements imposed on employees etc.;

- the value of the information for the undertaking and its competitors.

In principle, the Agency considers that the following kind of information would not be covered by the obligation of business secrecy in the sense of the prescriptions of the Competition Act:

- information which is publicly available, including information available through specialised information services or information which is common knowledge among specialists in the field;
- historical information, in particular information at least five years old, irrespective of the fact whether they have been considered a business secret;
- annual and statistical information. Turnover is not normally considered as a business secret, as it is a figure published in the annual accounts or otherwise known to the market, and
- data and documentation on which the decision of the Agency is based.

However, the derogation of the strict rules can be achieved in the cases whereas the undertaking would submit to the Agency confidential documentation and data and fail to provide a copy of the relevant documentation and/or data containing non confidential information; then Agency shall after it has sent a reminder thereof to the undertaking concerned, finally assume that such a writing and/or documentation did not contain data which were covered by the obligation of keeping of the business secrecy.

6.3 *To what extent can your authority rely on information gathered in another competition authority's investigation in your own investigation?*

In the hypothetical cases where the Croatian Competition Agency would handle proceedings for the protection of competition according to the Croatian Competition Act (2009), and if it would come to the point that in the course of the proceeding some additional data, the resource of which would come from the side of already opened cases / investigations from the another authority, whether some authority within the jurisdiction of the Republic of Croatia, or authority from the foreign jurisdiction, such data could be treated only as an exhibits. The judgment of the fact whether such data / evidence is reliable and fit to be used in the case shall be assessed from case to case basis, and according to the procedural rules of the Republic of Croatia, i.e. Administration Procedural Rules Act. However, as already mentioned afore, the final ruling of the Agency issued in first degree, can be challenged in front of the Administrative Court, because the judicial protection from the administrative authorities' decisions is prescribed by the Constitution Act of the Republic of Croatia.

6.4 *Does your jurisdiction / agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?*

Croatian Competition Agency had issued internal rules for handling with the protection of confidential information acquired in a course of handling the cases in front of the Agency. However at the national level there are set of legislation that treat the keeping the protection of confidential information which have been acquired in a course of the administrative and / or court's proceeding, but such legislation do not differentiate the treatment of the exhibits / data coming out from foreign authorities from the data collected from other domestic authorities.

6.5 *What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How*

important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?

The Regulation on the Criteria for Implementing the Leniency Program was enacted in 2010⁸. Beside this, the Croatian Competition Agency has brought the internal rules considering the leniency program which would be applied in a course of the proceedings in front of the Agency. Agency already has received one application for waiving of the so called marker in a competition matter. The subjected request was taken into the consideration from the side of the Agency, and the marker was not granted, nor declined yet.

6.6 *Do you have any particular safeguards in place for information that has been given under an amnesty/leniency programme?*

The Croatian Competition Agency has already undertaken all necessary and feasible measures to ensure the safe and efficient handling with the information that are obtained under a leniency programs.

7. International co-operation within other policy areas

7.1 *Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?*

Other authorities, i.e. ministries frequently and efficiently cooperate with foreign authorities of corresponding jurisdiction. Above all, the efficient cooperation is provided based on the system of laws which regulate international matters in administrative and court's proceedings, and provide for the enforcement of court's and administrative authorities' decisions in the territory of the Republic of Croatia.

7.2 *Does your authority liaise with any other regulatory authorities to discuss common problems/solutions? Please provide examples.*

Croatian Competition Agency does liaise with other regulatory authorities in order to discuss common problems and / or solutions. Such consultations are undertaken in both formal and informal ways. The formal ways of such kind of cooperation originate from the closed agreements on cooperation / memoranda on understanding, and based on the officially lodged requests put in front of the Competition Agency from the side of some other regulatory authority, where that regulatory authority would propose to the Agency to initiate the proceeding, investigation or to provide it with the expert opinion in certain cases. Informal ways of cooperation involve direct contacts and consultations among the persons in charge for handling the cases on both sides, of the Croatian Competition Agency and on the side of the regulatory authority in question.

⁸ Regulation of 11.11.2010; Official Gazzette of the Republic of Croatia (Narodne Novine), Nr. 129/2010.

EUROPEAN UNION

1. Existing tools for international co-operation

Strict cartel enforcement is one of its main pillars on which the competition policy of the European Union (EU) is based. The understanding that cartels do not respect national borders but may increasingly cover several jurisdictions, or may even be organised on a global scale, is widely accepted.

Within the EU there are two ways in which this development has influenced the EU approach to cartel enforcement.

On the one hand the EU has created a sophisticated system of regional cooperation on competition matters including the European Commission and the competition authorities of the 27 Member States of the EU). Regulation (EC) No 1/2003¹ entrusted the EU national competition authorities with a key role in applying the EU antitrust rules, in addition to the European Commission, National competition authorities can therefore apply Article 101 TFEU to cross border cartels affecting trade between two or more EU Member States. The European Competition Network ("ECN") was created to enable the European Commission and the national competition authorities to coordinate the effective application of the EU competition rules.

On the other hand, the EU has developed a set of formal and informal mechanisms to channel cross border cooperation in international cases with third countries. The formal mechanisms include dedicated bilateral cooperation agreements with the US, Canada, Japan and Korea on competition related matters. These agreements generally cover issues such as (positive and negative) comity, mutual notification of enforcement activities, exchange of non confidential information and regular consultations and meetings. In addition, the EU has concluded Memoranda of Understanding with agencies in Brazil, China, and Russia.

Provisions on international cooperation on competition matters can also be found in non-dedicated agreements, such as Free Trade Agreements (FTAs) and other trade related agreements. The EU has concluded a large number of such agreements with third countries². Apart from provisions on substance, these agreements also often include explicit provisions on cooperation.

It is important to note though, that the presence of an underlying agreement is not a formal prerequisite for cooperation to take place. The EU also frequently cooperates with agencies in situations where such an agreement is absent. For cooperation to take place, the decisive issue is whether both of the agencies involved see an added value in such cooperation.

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1.

² Further information on such agreements is available at the following web-page of the European Commission: <http://ec.europa.eu/competition/international/bilateral/index.html>.

2. Types of cooperation

2.1 *European Competition Network*

The ECN is a system based on the application of the EU antitrust rules which allows for case attribution and seamless working arrangements between its members, including providing assistance in inspections and the exchange of confidential information.

In particular, the ECN is based upon a system of parallel competences³ and flexible work sharing rules. This means that as a matter of principle any "well placed" authority can take action in a case. Indicative, non-binding principles are set out in the Network Notice, which explain when a Network member is well-placed to act.⁴ National competition authorities of the EU member States typically deal with infringements that have their main effect in the territory of the EU Member State to which they belong. If the European Commission formally initiates proceedings, the competence of national competition authorities to deal with the same case ends. In practice, the system works as follows: an authority who is well placed and willing to investigate a potential infringement informs the ECN of its intentions at an early stage of the investigation. Other authorities may signal their interest to also act in the case and in the rare cases that authorities disagree, bilateral discussions can take place to resolve the matter. By having flexible work sharing rules, effective enforcement of the EU antitrust rules is not hindered by a lack of available resources in a particular authority. Likewise, the European Commission is not prevented from dealing with a case that deals with important issues for the development of EU competition policy. The principles of work sharing as introduced by Regulation 1/2003 and the Network Notice have been fully endorsed by the Court of First Instance (now the General Court) in the *France Télécom* judgments.⁵

The ECN is also equipped with a number of other mechanisms to facilitate close cooperation in the application of the EU antitrust rules. For example, as is explained below in section 4, competition authorities are able to exchange and use case-related information as evidence, including confidential information pursuant to Article 12 of Regulation 1/2003. Moreover, Article 22 of Regulation 1/2003 enables national competition authorities to carry out inspections or other fact-finding measures on their territory on behalf and for the account of another national competition authority (paragraph 1) and inspections upon request by the European Commission (paragraph 2). In both cases, Article 22 inspections or fact-finding measures are governed by the national law of the Member State where the inspection or fact-finding measure takes place. That means that the investigating authority acts on the basis of its investigatory powers, as provided by national law, and has to respect the procedural rights of the undertakings under investigation, as provided by national law. The results of the investigatory measures may be exchanged on the basis of Article 12.

In order to guarantee the coherent application of the EU antitrust rules, Regulation 1/2003 provides for three main tools: (i) the national competition authorities are obliged to apply EU law whenever there is an effect on trade in a manner that ensures convergence between national and EU competition law (Article 3(1)); (ii) national competition authorities are obliged to inform the European Commission about an envisaged decision at least 30 days before taking it (Article 11(4)); and (iii) the European Commission can intervene to remove the national competition authority of its competence to deal with a case if there is a

³ Articles 4 and 5 of Regulation 1/2003 give the Commission and the national competition authorities full parallel competences to apply Articles 101 and 102 TFEU.

⁴ Notice on cooperation within the Network of Competition Authorities OJ C 101 of 27.04.2004 (the "Network Notice"), p. 43-53, paras 8-13.

⁵ Case T-339/04 and Case T-340/04, *France Télécom v. Commission*, [2007] ECR II-521.

serious risk of incoherence (Article 11(6)). The European Commission has not made use of the latter possibility to date. Nonetheless, a practice has developed whereby the European Commission submits comments to the national competition authorities about their proposed course of action in many cases when it is informed about a case pursuant to Article 11(4). These observations are taken very seriously by the national competition authorities and have resulted in creative, informative and productive dialogues. The special role that the European Commission plays here reflects its position as guardian of the EU Treaties.

2.2 *Cooperation with other countries*

In addition to the cooperation within the ECN, bilateral cooperation with third country competition authorities is part of the European Commission's daily enforcement culture. For many years, the European Commission has cooperated with other agencies both on policy and enforcement matters.

In the enforcement against international cartels, there is regularly cooperation with third country jurisdictions from the very early stages of the case, in particular with regard to the timing and scope of first investigative actions. Cooperation typically takes place in order to prepare/coordinate inspections ("dawn raids") and, in addition to the timing of the inspections, this may include, where the authorities deem appropriate, informal discussions on for example the scope of the investigative actions (on the inspection target, product and geographic area concerned). In international cartel cases the Commission usually cooperates with several other agencies launching the investigations with simultaneous inspections. Such coordinated inspections offer the advantage of maintaining the element of surprise thus increasing the likelihood of a successful outcome. Thereafter cooperation can continue throughout the investigation. The Commission holds for example informal discussions on the 'state of play' and timing of the investigations, the scope of the case and possible remedies and in such discussions exchanges views and own preliminary conclusions.

Cartel investigations are often triggered by an immunity application. In the case of international cartels, applicants regularly file for immunity in several jurisdictions. The Commission leniency programme sets out a requirement for the immunity applicant to provide information which other competition authorities the applicant has or intends to approach.

Also outside cases with simultaneous leniency applications, it is possible that the Commission is contacted by another authority to discuss cooperation in a case they have. It can also occur that, on the basis of the specificities of a case that the Commission has, it appears beneficial to contact another authority and propose cooperation.

3. *International vs. regional cooperation*

The Commission usually cooperates with several other agencies in a case relating to an international or world-wide cartel. The extent to which the Commission cooperates with other agencies (outside of the ECN framework) depends on the specific circumstances of the case, for example whether it is an international or a world-wide cartel and whether there are novel issues on which there is a need to exchange views.

It is clear that over the years, in parallel with an intensification of the Commission's own enforcement action against international cartels also cooperation with other agencies has intensified. Proliferation of competition agencies around the globe with increasingly anti cartel active enforcement and with active leniency policy also means that such cooperation takes place with an increasing number of agencies.

A decision to cooperate with another agency in cartel cases is made on a case-by-case basis. The bilateral cooperation in individual cases will naturally depend on the nature of the cases and in particular on the centre of gravity of the cartel behaviour. Traditionally, also following from the scope of the cartel

cases handled, the Commission has had close cooperation with mature competition authorities in the major trading partners to the EU, but more recently also with newer agencies. The willingness to take into consideration serious concerns of the other authority, to avoid actions jeopardizing and delaying the other party's investigation and a spirit of confidence combined with open and genuine cooperation on all sides will certainly facilitate cooperation, and indeed strengthen overall the enforcement against cartels.

Given the potential for ECN cooperation which includes also the exchange of evidence between authorities and carrying out inspections on each other's behalf, there is a strong potential for intensive collaboration. In practice the national competition authorities always assist the Commission in inspections but national ECN authorities also do so between each other. The carrying out of inspections on behalf of another authority takes place on a regular basis. That said, such collaboration often takes place in cases where one *or* the other authority will proceed with a full investigation (but not both), based on discussions of case allocation, foreseen in the ECN. Conversely, in international matters the European Commission more often works with third country authorities in parallel, as each authority is pursuing an entire investigation individually for the effects in the respective territories.

4. Challenges in the international cooperation and improving the current frameworks

International cooperation is shaped according to the legal provisions of the countries involved, in particular whether the enforcement system in the cooperating jurisdiction is administrative or criminal. In particular, the exchange of evidence collected under the European Commission investigation powers is not possible even under current bilateral agreements with other competition agencies. Therefore, with sister agencies names, facts and figures stemming out of the assembled proof are not discussed. The ECN is an exception to that because all authorities in that network have powers and an obligation to apply the same EU competition rules.

The differences in the underlying legal systems (administrative vs. criminal) include in particular the differences in the rights of defence between companies that are addressed in the administrative systems and individuals that in some cases - in addition to companies – are addressed in criminal systems. In particular, there are important differences in this respect in the rights of non-self incrimination, legal professional privilege and privacy. To deal with issues associated with such rights of the defence, certain safeguards need to be provided if information were to be exchanged.

These differences stem particularly from the fact that the standards for collecting evidence to be used in a criminal procedure against individuals are usually stricter than those employed in an administrative procedure concerning companies. This means that whenever a receiving authority has a higher standard, in case evidence would be exchanged, such evidence can only be used against individuals if its collection has respected the higher standard. This is currently the principle behind evidence exchange in the European Competition Network⁶ and reflects the OECD recommended practices⁷. For example, an EU Member State applying criminal sanctions, including the possibility of a custodial sentence, cannot use in evidence information collected by the Commission under its administrative procedure.

⁶ See for reference the Commission Notice on cooperation within the Network of Competition Authorities, Official Journal C 101, 27.04.2004, p. 43-53.

⁷ See for reference the Recommendation of the OECD Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, 25 July 1995 – C(95)130/Final and the OECD Best Practices for the formal exchange of information between competition agencies in hard core cartel investigations, October 2005.

A further challenge is created by discovery⁸ requests in civil damage proceedings that have increasingly targeted across the globe the information provided to the European Commission and other enforcement agencies by companies applying for immunity or reduction of fines. Such requests, when they are made during ongoing enforcement proceedings may interfere with those proceedings. Moreover, companies that would consider cooperating with an antitrust authority in its investigation to receive a more lenient treatment in fines may be less willing to cooperate in the framework of the leniency policy on fear of disclosure risk.

In this context it should be noted that the Commission is determined to defend its leniency programme and the programmes of our ECN partners. The question is on finding the right balance between protecting the effectiveness of cartel enforcement and allowing the victims of a cartel to pursue their legitimate quest for damages. At any rate, let us not forget that damage claims often follow the enforcement action of a competition authority. As a consequence, if the authority has an effective leniency programme leading to decisions of the Commission sanctioning such reported cartels, it will be easier for the victims of a cartel on the basis of such a decision to obtain reparation. Confidentiality plays a significant role in assisting the effective enforcement of European antitrust law and encourages not only leniency cooperation, but also free and open participation by the parties under investigation. Therefore the Commission has also objected discovery of for example the Commission's Statement of Objections, recordings from oral hearing of the parties and confidential versions of the final decisions.

4.1 Information exchange within the ECN

In the ECN, the European Commission and the EU Member States' competition authorities have parallel competences to apply EU competition rules. Therefore a key element in this network is the ability of all the EU competition authorities to exchange and use as evidence information - including documents, statements and digital information - which has been collected by them for the purpose of applying EU competition rules (alone or together with national competition law). Article 12(1) of Regulation 1/2003 empowers competition authorities to exchange information *as intelligence* irrespective of the (criminal or administrative) nature of the underlying proceedings and irrespective of whether sanctions are imposed on individuals, provided that the exchange occurs for the purpose of applying the EU antitrust rules.

Conversely, the use *in evidence* of information received from another competition authority is subject to certain additional conditions, as laid down in paragraphs 2 and 3 of Article 12. Whereas Regulation 1/2003 provides for sanctions only against undertakings, some national laws also provide for sanctions against individuals for a breach of EU competition law. As far as proceedings against undertakings are concerned, Article 12(2) of Regulation 1/2003 assumes a sufficient degree of equivalence of the rights of defence in the different enforcement systems.⁹ Information collected in one system can therefore be used in evidence in another system, provided that the general conditions of Article 12(2) are fulfilled, notably that the information may be used only for the purpose of applying the EU antitrust rules and in respect of the 'subject-matter' for which it was collected.

Given the difference in the rights of defence between undertakings and individuals, Article 12(3) of Regulation 1/2003 provides that information collected from undertakings cannot be used in a way which would undermine the higher protection given to individuals. Information exchanged within the ECN can thus only be used *in evidence* to impose sanctions on individuals where:

⁸ Discovery is a procedural device, enabling disclosure of evidence, available to parties of civil litigation proceedings in a series of jurisdictions, notably in the United States, at federal and state level, and also in some EU countries.

⁹ See recital 16.

- the law of the transmitting authority foresees sanctions of a similar kind for infringements of EU competition rules (e.g. financial or custodial), in which case the Regulation presumes that there are sufficiently equivalent standards of rights of defence (the qualification of the sanctions or procedures at national level as administrative or criminal is irrelevant) or
- the types of sanctions which may be imposed on individuals are materially different, but the information has been collected in a way which respects the same standard in the protection of the individual's rights of defence, as provided for under the rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sentences.

This last provision means that a Member State authority cannot use information which has been collected by the Commission in its administrative procedure against an individual in a criminal proceeding which could result in a prison sentence.

There are special rules in place for leniency applicants. Exchange of information is only possible where:

- the leniency applicant has provided a waiver, or
- the applicant has already applied for leniency in the jurisdiction of the requesting authority, or
- the requesting authority agrees not to use the information to impose sanctions.

The question whether information was gathered in a legal manner by the transmitting authority is governed by the law of that country. When transmitting information the transmitting authority may inform the receiving authority whether the gathering of information was contested or could still be contested.

4.2 *Information exchange with other countries*

The Competition co-operation agreements that the Commission has in place with several countries do not provide for the authorities to exchange information considered confidential under their respective laws. This means in practice that information obtained by the Commission through its investigation powers (voluntary submissions, information requests or inspections) cannot be shared without a waiver from the company providing information. The legal framework allows, however, the exchange of intelligence obtained by other means and the discussions on the approach taken in the investigation with other authorities. These forms of cooperation are frequently used by the Commission.

When the Commission receives leniency applicants that apply simultaneously in different jurisdictions, such applicants provide waivers allowing sharing information between authorities. In international cartel cases the Commission systematically asks leniency applicants from the outset for such waivers, while there is no formal obligation to that effect in the Commission leniency programme. In this respect there are no such rights of defence issue as discussed above, because normally the applicant would have submitted the same evidence to different authorities. Therefore, in the European Commission's view, the authorities do not normally need to exchange evidence for use in their proceedings, but simply to freely discuss (on the basis of a waiver) on the evidence submitted .

As the Commission obtains evidence in an administrative procedure, which provides for different investigative procedures than those under criminal law, additional issues arise if one would consider the exchange of confidential information with criminal jurisdictions. As explained above, in the context of the rights of the defence, there are issues associated with the use of information for possible criminal

sanctions. In this respect, as a matter of principle, the limits imposed by the regime governing the exchange of information inside the EU would also govern the relations to third countries. The Commission would not transmit information to a third country it could not transmit to the EU Member States.

4.3 *Further improving international cooperation*

International cooperation in cartel cases has in practice proven to be highly productive starting from coordinated inspections but more and more often taking place throughout the proceedings. Even though there remain challenges particularly due to differences in the legal systems, such differences in the law should not stop competition authorities from cooperating, but should, in fact, urge agencies in the various jurisdictions to focus on common principles and work together across borders toward a pragmatic convergence in actions against cartels around the world. Namely, as cartel cases are more and more often international and companies cooperate in the investigations with various competition authorities, the authorities across the world have a converging interest. The approach taken in one jurisdiction – in particular as regards leniency rules and sanctions – affects the decision of a company to report a cartel and cooperate in the different jurisdictions. Moreover, as competition authorities continue to develop both multilateral and bilateral relations, cooperation in individual cartel cases between authorities is expected to intensify throughout all phases of an investigation.

FRANCE

Version Française

Introduction

La lutte contre les cartels a constitué, depuis sa création en 1986, une priorité du Conseil de la concurrence – devenu en 2009 l'Autorité de la concurrence.. L'expérience de l'Autorité de la concurrence en matière de détection et de sanction des cartels internationaux est néanmoins relativement plus récente, car elle n'a pu prendre son essor qu'à la faveur du renforcement des outils à sa disposition (loi sur les nouvelles régulations économiques du 15 mai 2001, qui institue notamment la clémence et la non-contestation des griefs en France, et ordonnance du 4 novembre 2004 portant adaptation de certaines dispositions du code de commerce au droit communautaire de la concurrence, qui modernise la mise en œuvre du droit européen de la concurrence à la suite de l'entrée en vigueur du règlement (CE) n°1/2003). Depuis 2005, date d'entrée en vigueur de ce dernier texte, l'Autorité a prononcé des sanctions dans près d'une vingtaines d'affaires de cartels internationaux, si l'on définit ces derniers comme tout cartel impliquant au moins une entreprise dont le siège social est situé hors du territoire français et qui a joué un rôle important dans les pratiques.

La coopération internationale en matière d'enquêtes n'est toutefois mise en œuvre de façon formelle que dans un nombre limité de cartels internationaux, c'est-à-dire pour ceux d'entre eux qui requièrent une coordination entre autorités de concurrence et/ou une assistance en vue du recueil de preuves hors du territoire national ou, à l'inverse, au bénéfice d'une autre autorité qui ne dispose pas de pouvoirs d'enquête sur le sol français.

L'expérience de l'Autorité en matière de coopération internationale est, en pratique, européenne. Cette situation s'explique par l'interpénétration forte de l'économie française avec celle de ses voisins européens ainsi que par l'existence d'un patrimoine commun de droit substantiel, tel que l'existence d'une définition commune et harmonisée des cartels au niveau européen et, surtout, par la disponibilité d'instruments de coopération efficaces. Les articles 11 à 16 et 20 à 22 du Règlement (CE) n°1/2003 du Conseil du 16 décembre 2002, la Communication de la Commission relative à la coopération au sein du réseau des autorités de concurrence (« REC ») et le programme modèle du REC en matière de clémence ont ainsi joué un rôle décisif dans la structuration de la coopération entre l'Autorité et ses homologues européennes.

A contrario, l'absence d'instruments de coopération peut dissuader les autorités de coopérer à l'échelon international, et limite en amont l'échange d'informations confidentielles, sauf accord de coopération spécifique qui doit être envisagé à l'aune de nombreux critères, parmi lesquels ses coûts et avantages, l'intensité des liens économiques entre les Etats concernés, la proximité du droit substantiel, et la fréquence constatée ou estimée d'affaires susceptibles de s'inscrire dans un tel accord.

L'expérience de l'Autorité de la concurrence en matière de coopération internationale dans les enquêtes de cartel est abordée dans la présente note de manière chronologique, suivant le déroulement concret des enquêtes : (i) la détection, le recueil d'indices et l'identification des procédures parallèles, (ii) l'allocation des cas et (iii) la coopération concrète dans les enquêtes en l'absence de réallocation d'un cas.

En conclusion, l'Autorité propose des réflexions en vue d'améliorer la coopération internationale à la lumière de son expérience européenne.

1. La détection, le recueil d'indices et l'identification de procédures parallèles en matière de cartels internationaux

L'Autorité, à l'instar de nombre de ses homologues au sein de l'OCDE, dispose d'une panoplie d'outils procéduraux qui lui permet de détecter et recueillir des indices en matière de cartels, qu'il s'agisse de plaintes et de demandes de clémence, mais également de mécanismes de veille plus active des marchés. L'Autorité peut ainsi exercer une vigilance attentive des évolutions des marchés, qui peut faciliter le recueil de preuves économiques indirectes et ouvrir ainsi une phase de recherche plus active de preuves directes par des auditions, voire des mesures d'enquête, ou mobiliser, de sa propre initiative depuis l'entrée en vigueur de la loi de modernisation de l'économie du 4 août 2008, l'outil de l'enquête sectorielle. Ces outils ne sont pas spécifiques aux cartels internationaux, mais leur application peut révéler la dimension internationale de certains cartels.

Une fois cette dimension internationale identifiée, une coopération plus ou moins formelle peut être envisagée, en général sur le fondement d'instruments contraignants lorsque l'échange d'informations confidentielles s'avère nécessaire. La coopération internationale peut toutefois être beaucoup plus efficace si elle organise, plus en amont, des mécanismes d'alerte ou d'information mutuelle, soit sur le fondement de la courtoisie internationale, soit sur celui d'instruments contraignants.

Au sein du REC, l'information mutuelle est assurée par l'article 11, paragraphe 3 du Règlement (CE) n°1/2003 qui met à la charge des autorités de concurrence l'obligation d'informer tous les membres du réseau de l'ouverture d'une procédure susceptible d'aboutir à une décision mettant en œuvre le droit de la concurrence européen, et donc d'une affaire dans laquelle le commerce entre Etats membres est susceptible d'être affecté de façon significative. Cette obligation naît dès la première mesure formelle d'enquête. Ce système d'information mutuelle est essentiel dans la mesure où il offre à chaque autorité de concurrence une visibilité sur l'activité de ses homologues européennes, et offre l'opportunité d'un partage d'expériences informel, dans le cas où des autorités enquêtent dans des secteurs économiques analogues, ou plus formel, si des mesures d'enquête conjointes sont nécessaires ou si des procédures parallèles sont identifiées. Un système électronique sécurisé (« ECN-ET ») a été créé à cet effet. Si l'on tient compte de la période de l'entrée en vigueur du règlement, le 1^{er} mai 2004, au 30 novembre 2011, la France a transmis au REC 207 fiches, ce qui la range au premier rang des contributeurs, la moyenne s'élevant à 45 fiches par Etat membre¹.

Ces mécanismes d'information mutuelle ont été approfondis et raffinés dans le cadre de la mise en œuvre de programmes de clémence au profit d'une information à un stade encore plus précoce de l'enquête. Au sein du REC, le traitement d'une demande de clémence fait l'objet d'une approche commune grâce au programme modèle co-rédigé par l'Autorité et l'*Office of Fair Trading* britannique en 2006 à la suite d'une étroite concertation avec toutes les autres autorités nationales du REC et la Commission européenne². Il répond à un triple objectif. En premier lieu, il assure une convergence des critères d'éligibilité et de récompense des demandeurs, ainsi que des procédures nationales de traitement des demandes de clémence, dont l'introduction d'un mécanisme de marqueur du rang du demandeur et le principe de l'admissibilité des demandes orales de clémence. Il s'agit d'éviter que les demandeurs, lors du dépôt officiel de leur formulaire, ne s'adressent pas à l'autorité de concurrence la mieux placée, parce que

¹ Site de la Commission européenne, DG Concurrence, statistiques du REC, <http://ec.europa.eu/competition/ecn/statistics.html>

² Programme modèle du REC en matière de clémence, http://ec.europa.eu/competition/ecn/model_leniency_fr.pdf

son programme serait moins attractif que celui d'une autre autorité concernée par l'affaire mais moins bien placée pour l'instruire. Le programme-modèle permet également d'assurer une égalité de traitement entre les demandeurs. Enfin, il allège les procédures au bénéfice des entreprises.

Ce programme-modèle constitue une expérience particulièrement fructueuse de coopération internationale. Toutes les autorités de concurrence du REC, à une exception, sont dotées d'un programme de clémence, alors que seules quatre (dont la France) en disposaient en 2002. Le dernier rapport sur l'état de convergence des programmes nationaux³ marque de nombreux autres progrès substantiels.

Le programme-modèle instaure également un mécanisme qui s'inscrit au-delà de l'objectif d'une information mutuelle mais prépare directement à une coordination dans l'allocation des affaires. Il s'agit de la demande sommaire décrite au point 22: *«lorsque la Commission est «particulièrement bien placée» pour examiner une affaire conformément au point 14 de la communication relative au réseau, l'entreprise qui a présenté ou qui s'apprête à présenter une demande d'immunité à la Commission peut adresser une demande sommaire à toute autorité de concurrence nationale que cette entreprise considère comme «bien placée» pour agir dans le cadre de la communication relative au réseau»*⁴. Ce mécanisme a été adopté à ce jour par 23 autorités nationales de concurrence en Europe⁵.

2. L'allocation des affaires dans le cas de procédures parallèles portant sur des cartels internationaux

Dans l'hypothèse où des procédures parallèles sont identifiées en raison de la nature internationale d'un cartel, les autorités de concurrence concernées doivent éviter deux principaux risques.

D'une part, il convient de respecter le principe *ne bis in idem*, qui est reconnu au niveau européen par la Convention européenne des droits de l'homme et la Charte des droits fondamentaux, ainsi que dans certains instruments de droit pénal international. Les juridictions de l'Union ont jusqu'à présent considéré, dans les affaires de concurrence, que l'application du principe *ne bis in idem* était soumise à la triple condition de l'identité des faits, du contrevenant et de l'intérêt juridique protégé⁶. L'avocat général Julianne Kokott, dans ses conclusions en date du 8 septembre 2010⁷, a estimé que ce principe ne faisait pas obstacle à ce que plusieurs autorités de la concurrence agissent au sein de l'Union européenne contre une seule et même entente en visant des périodes ou des territoires différents. Au niveau international, la Cour de justice de l'Union européenne a jugé que la Commission européenne et l'autorité de concurrence d'un États tiers pouvaient intervenir sur un même cartel international car chacune protégeait un intérêt juridique

³ ECN Model Leniency Programme, Report on Assessment of the State of Convergence, 15 octobre 2009, http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf

⁴ Les demandes sommaires contiennent les renseignements suivants sous forme succincte : le nom et l'adresse de l'entreprise qui présente la demande; les autres participants à l'entente présumée; le ou les produits visés; le ou les territoires affectés; la durée; la nature de l'entente présumée; le ou les États membres où les preuves sont susceptibles de se trouver; et les renseignements sur toute demande de clémence déjà présentée ou qui serait présentée au sujet de l'entente présumée.

⁵ Allemagne, Autriche, Belgique, Bulgarie, Danemark, Espagne, Finlande, France, Grèce, Hongrie, Irlande, Italie, Lettonie, Lituanie, Luxembourg, Pays-Bas, Pologne, Portugal, République tchèque, Roumanie, Slovaquie, Suède, Royaume-Uni.

⁶ Cour de justice de l'Union européenne, 7 janvier 2004, Aalborg Portland e.a./Commission, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P et C-219/00 P, Rec. p. I-123.

⁷ Cour de justice de l'Union européenne, conclusions de Mme Kokott, 8 septembre 2010, Toshiba Corporation e.a., C-17/10

qui lui était propre⁸, et protégeait les consommateurs dans son propre domaine de compétence géographique.

Dans une récente affaire traitée en 2011, l'Autorité de la concurrence a dû ainsi vérifier auprès de la Commission européenne que son action était menée dans le respect du principe *ne bis in idem*. L'Autorité de la concurrence s'est ainsi assurée en amont, en coopération avec la Commission européenne, qui avait sanctionné des entreprises pour s'être entendues sur le prix des lessives en poudres⁹, que l'ouverture d'une procédure au niveau européen ne l'avait pas dessaisie car l'affaire européenne et l'affaire française étaient bien distinctes. Cette appréciation a été menée *prima facie* sans préjuger des appréciations finales respectives des deux autorités. A l'issue des deux procédures, dans sa décision adoptée le 8 décembre 2011¹⁰, l'Autorité a conclu que les deux infractions étaient bien distinctes. La décision française porte notamment sur une période et une zone géographique différentes, sur une palette plus large de produits, et sur des parties différentes dont les pratiques avaient un objet différent – en l'occurrence une entente directe sur les prix et les promotions de tous les formats de lessives standard sur le marché français, dans le contexte très spécifique créé sur ce marché par les mécanismes de la loi Galland¹¹. C'est donc sans contrevenir ni au principe *ne bis in idem*, ni au droit européen applicable, que l'Autorité et la Commission européenne ont pu légitimement sanctionner deux infractions distinctes, mais concernant un même secteur d'activité, grâce au dialogue qui s'est noué entre elles.

A l'inverse, il serait contraire aux intérêts des consommateurs européens que les autorités de concurrence ne soient pas en mesure de sanctionner des entreprises qui ont commis des pratiques anticoncurrentielles parce que l'autorité disposant des preuves n'est pas bien placée pour agir. Ce risque est appréhendé par les mécanismes d'allocation au sein du REC, qui peut constituer un exemple pour d'autres coopérations régionales. La communication de la Commission européenne relative à la coopération au sein du réseau des autorités de concurrence¹² propose à cet effet d'utiliser trois catégories de critères pour l'allocation des affaires au sein du REC : la dimension géographique de l'infraction, l'autorité la mieux placée pour collecter les preuves de l'infraction et/ou pour mettre un terme au cartel le plus efficacement. Ce système de répartition des cas, qui nécessite une étroite coopération entre autorités de concurrence européenne, a produit de bons résultats, qui peuvent être illustrés par l'exemple suivant.

En 2003, la Commission européenne a ainsi renvoyé aux autorités françaises une affaire qui aboutit à une décision de sanction¹³. La Commission a ainsi transmis la plainte qu'elle avait reçue d'un ancien dirigeant d'une filiale d'un groupe basé au Luxembourg, qui s'était vu demander de limiter son action commerciale, jugée trop agressive sur le marché français.

⁸ Cour de justice de l'Union européenne, 29 juin 2006, Showa Denko, C-289/04 P, Rec. p. I-5859; 29 juin 2006, SGL Carbon/Commission, C-308/04 P, Rec. p. I-5977 ; 10 mai 2007, SGL Carbon/Commission, C-328/05 P, Rec. p. I-3921 ; Tribunal de Première Instance des Communautés européennes, 9 juillet 2003, aff. T-224/00, Archer Daniels Midland, Rec., p. II-2597.

⁹ Décision de la Commission européenne du 13 avril 2011 n°COMP/39.579 — Détergents domestiques.

¹⁰ Décision n°11-D-17 du 8 décembre 2011 relative à des pratiques mises en œuvre dans le secteur des lessives, points 334 à 348.

¹¹ Décision n°11-D-17 du 8 décembre 2011 relative à des pratiques mises en œuvre dans le secteur des lessives, points 334 à 348.

¹² Communication 2004/C 101/03 de la Commission, du 27 avril 2004, relative à la coopération au sein du réseau des autorités de concurrence (JOCE no C 101 du 27 avril 2004, p. 43).

¹³ Décision du 2 février 2009 relative à des pratiques mises en œuvre dans le secteur du travail temporaire.

A l’opposé, les autorités nationales de concurrence peuvent identifier une affaire commune dont le traitement peut être renvoyé à la Commission européenne si elle est mieux placée, par exemple parce que le territoire de plus de trois Etats membres est affecté par des pratiques. L’Autorité a ainsi mis en commun des informations avec les autorités de concurrence allemande, suédoise et britannique permettant d’identifier une possible entente de portée européenne dans l’affaire dite du « verre plat » et ouvrant la voie à une procédure contentieuse *ex officio* par la Commission européenne¹⁴.

La répartition des affaires au bénéfice de l’autorité de concurrence la mieux placée prépare, le cas échéant, une coopération efficace en matière d’échange d’information et d’inspection conjointe.

3. La coopération concrète en matière d’enquêtes et d’instruction de cartels internationaux : les inspections conjointes et les échanges d’information au sein de l’Union européenne

Le REC constitue également un puissant outil de coopération entre autorités de concurrence au stade de l’enquête, une fois confirmée l’identité de l’autorité de concurrence la mieux placée.

Il est tout d’abord à l’origine d’une coopération informelle ne nécessitant pas d’échange d’informations confidentielles, dans l’objectif d’assurer une convergence des pratiques procédurales et l’échange d’expérience pratique en matière d’analyse substantielle, qu’il s’agisse de définition de marchés pertinents, de standard de preuve ou encore des modalités d’application du droit de l’Union européenne par les autorités nationales de concurrence.

Mais le REC se distingue surtout par la coopération approfondie qu’il permet, tant en matière d’échanges d’informations que d’assistance pour les mesures d’enquête.

Concernant les échanges d’informations, l’article 12 du Règlement (CE) n°1/2003 autorise les autorités nationales de concurrence qui appliquent les articles 101 et 102 TFUE à se communiquer tout élément de fait ou de droit recueilli par l’une d’entre elles conformément à son droit national ou dans le cadre de l’inspection effectuée au titre de l’article 22 du Règlement (CE) n°1/2003, y compris des informations confidentielles, et à utiliser ces éléments comme moyen de preuve, dans les limites prévues par le texte. L’Autorité de la concurrence a mis en œuvre les dispositions de l’article 12 du règlement (CE) n°1/2003 à six reprises en 2010, dont trois avec le Bundeskartellamt.

L’article 22 du même règlement (CE) n°1/2003 confère les pouvoirs nécessaires à une autorité de la concurrence du REC pour effectuer une mesure d’enquête sur son propre territoire national, selon les procédures en vigueur sur ce territoire, « au nom et pour le compte de l’autorité de concurrence d’un autre Etat membre afin d’établir une infraction » aux articles 101 et 102 TFUE. Ces dispositions ont été appliquées par l’Autorité de la concurrence à plusieurs reprises. Cela a notamment été le cas dans l’affaire relative à des pratiques mises en œuvre dans le secteur du gaz de pétrole liquéfié (GPL) conditionné, à l’occasion de laquelle l’assistance simultanée des autorités tchèque et autrichienne a été sollicitée¹⁵, mais aussi avec les autorités italienne (2007, 2006) et belge (2006). En 2008, dans une affaire relative à des pratiques mises en œuvre par des compagnies pétrolières fournisseurs en kérosène d’Air France à l’île de La Réunion, l’Autorité de la concurrence a étroitement collaboré avec l’*Office of Fair Trading* britannique. Dans cette enquête, une grande partie des preuves matérielles étaient détenues par les filiales de la plupart des compagnies pétrolières qui soumissionnaient aux appels d’offres d’Air France pour son approvisionnement en carburacteur à La Réunion, situées au Royaume-Uni. Réciproquement, l’Autorité a

¹⁴ Décision de la Commission européenne du 28 novembre 2007 n°COMP 39/165 – Verre plat.

¹⁵ Décision 10-D-36 du 17 décembre 2010 relative à des pratiques mises en œuvre dans le secteur du gaz de pétrole liquéfié (GPL) conditionné.

fourni son assistance à ses homologues, au bénéfice du Bundeskartellamt, du Conseil de la concurrence belge ou de la Commission hellène de la concurrence.

4. Conclusion : Réflexions en vue de l'amélioration de la coopération internationale à la lumière de l'expérience européenne de l'Autorité

L'expérience de l'Autorité dans le cadre européen en matière de coopération sur des cas de cartels internationaux est susceptible de nourrir la réflexion d'autres autorités nationales agissant dans des mécanismes de coopération régionale en droit de la concurrence.

Cette expérience a également inspiré à l'Autorité six principales pistes de propositions en vue d'une évolution de la coopération au sein du REC.

La mise en œuvre de deux premières propositions viserait à préserver et rehausser la capacité de détection d'indices de pratiques anticoncurrentielles *ex officio*, complément nécessaire à une bonne mise en œuvre des programmes de clémence.

L'information mutuelle pourrait ainsi être développée plus en amont encore que dans le cadre de l'examen de demandes sommaires ou de « fiches 11-3 » adressées au réseau par d'autres autorités de concurrence. Un groupe d'autorités nationales pourrait, sur une base volontaire, entreprendre de coordonner des enquêtes sectorielles susceptibles de déboucher, si les faits et indices collectés le justifient, sur l'ouverture de contentieux.

Dans un cadre plus spécifiquement contentieux, le développement de plateformes régionales de coopération, sur le modèle nordique, pour échanger en amont des indices directs et indirects, pourrait également être envisagé. De tels échanges pourraient avoir lieu, avant que la première mesure d'investigation n'ait été réalisée, pour faciliter l'échange d'indices et l'identification des cartels de dimension internationale. Ils seraient d'autant plus efficaces qu'ils pourraient se concentrer sur des secteurs identifiés comme prioritaires et/ou dans lesquels les échanges commerciaux sont les plus intenses.

Une troisième piste de réflexion pour l'avenir pourrait consister à affiner encore les mécanismes de coopération prévus par le programme modèle de clémence et à stimuler davantage la convergence volontaire. Ainsi que le rapport précité l'a montré, il existe des marges de manœuvre en matière de convergence substantielle, par exemple pour la définition des entreprises ayant contraint une autre entreprise à participer à l'infraction (*coercer*), afin de mieux délimiter l'exclusion du bénéfice de l'immunité totale ou partielle, mais aussi, en matière procédurale, notamment pour la gestion des marqueurs, l'extension des demandes sommaires au-delà du rang 1A et l'utilisation de formulaires standardisés.

Trois dernières propositions pourraient être étudiées dans la perspective d'une révision éventuelle du règlement (CE) n°1/2003, à moyen-long terme.

Il s'agirait tout d'abord d'inclure dans la coopération sur les cartels transnationaux davantage de convergence en matière de décision, en particulier en matière de niveau des sanctions. Des sanctions dissuasives et proportionnées dans l'ensemble de l'Union européenne constituent en effet une condition clé de la prévention de la formation de cartels. Les autorités de concurrence européenne ont déjà défini des principes communs en la matière, à l'initiative de l'Autorité et de son homologue italienne¹⁶, dont

¹⁶ Groupe de travail ECA sur les sanctions « Les sanctions pécuniaires des entreprises en droit de la concurrence, principes pour une convergence », http://www.autoritedelaconcurrence.fr/doc/eca_ppes_convergence.pdf

l'application pourrait être évaluée. Plus en aval encore, une coopération entre juges prenant place dans un réseau préservant leur indépendance compléterait le dispositif actuel, créant ainsi un véritable « réseau européen des juges de la concurrence » qui serait le pendant du REC, conformément aux vœux émis par deux magistrats de haut niveau¹⁷.

La coopération développée entre membres du REC et autorités d'Etats tiers pourrait par ailleurs être davantage mutualisée, selon un principe équivalent à la « clause de la nation la plus favorisée », afin d'élargir le champ potentiel de l'échange d'informations confidentielles au sein du REC et de réduire les coûts de négociation d'accords bilatéraux.

Enfin, les mécanismes des articles 12 et 22 du règlement trouveraient un prolongement utile dans l'institution d'une base juridique autorisant l'admissibilité mutuelle des preuves devant les juridictions compétentes, compte tenu du traitement aujourd'hui différent réservé à certaines catégories de preuves, telles que les enregistrements téléphoniques.

En conclusion, la construction d'un schéma formel de coopération reposant sur l'information mutuelle précoce, notamment dans le cadre de la mise en œuvre de programmes de clémence, ainsi que le développement de coopérations formelles entre autorités de concurrence qui partagent un patrimoine substantiel commun et dont les économies nationales sont fortement liées, sont susceptibles d'aboutir à des résultats probants en matière de lutte contre les cartels internationaux et de dissuasion. Au sein de l'Union européenne, un front uni des autorités de concurrence, au sein d'un système qui permet la détection, l'allocation et la sanction des cartels s'est progressivement mis en place sur la base d'instruments contraignants et d'efforts de convergence volontaire qui peuvent encore être approfondis.

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Il s'agit de l'ancien Premier Président de la Cour d'appel de Paris et premier Président de la Cour de cassation, désormais membre du Conseil constitutionnel Guy Canivet, L'organisation des juridictions nationales pour l'application du droit communautaire de la concurrence, *Concurrences* (2004), et de Joachim Bornkamm, président de la première chambre civile de la Cour de justice fédérale allemande, J. Bornkamm, A competition judge at the Bundesgerichtshof, *Concurrences* (2008)

FRANCE

English Version

Introduction

The fight against cartels has since its creation in 1986 been a priority for the *Conseil de la concurrence* – which in 2009 became the *Autorité de la concurrence*. The experience of the *Autorité de la concurrence* in detecting and sanctioning international cartels is, however, more recent, since this activity could only expand rapidly after the legal instruments at its disposal were reinforced (the law on new economic regulations of 15 May 2001, which among other things institutes leniency and settlements in France, and the ordinance of 4 November 2004 adapting certain provisions of the (French) Commercial Code to European competition law, which modernizes implementation of European competition law following the entry into force of Regulation (EC) 1/2003). Since 2005, when the latter came into force, the *Autorité* has imposed sanctions in nearly twenty international cartel cases, that is involving any cartel with at least one company having its registered office outside French territory and played a significant role in anticompetitive practices.

International cooperation in investigations is only formally implemented in a limited number of international cartels, that is those requiring the reciprocal coordination of competition authorities and/or assistance in gathering evidence outside national territory or, conversely, for the benefit of another authority not empowered to investigate on French soil.

In practice, the *Autorité's* experience in international cooperation is European-based. This situation can be explained by the high degree of interpenetration of the French economy with those of its European neighbours, and by the existence of a common heritage of substantive law, such as a common and harmonized definition of cartels at European level and above all the availability of effective instruments of cooperation. Articles 11 to 16 and 20 to 22 of Council Regulation (EC) no. 1/2003 dated 16 December 2002, the Commission's Notice on cooperation within the European Competition Network (ECN) and the ECN's model programme on leniency thus played a decisive role in structuring cooperation between the *Autorité* and its European counterparts.

Conversely, the lack of cooperative instruments may dissuade authorities from cooperating at a global level, and limits upstream exchanges of confidential information, unless there is a special cooperation agreement that must be framed from the standpoint of many factors, e.g. the costs and benefits, the strength of the economic ties between the states concerned, the similarity of their substantive laws, and the known or estimated frequency of cases liable to fall within the scope of such an agreement.

This contribution reviews the experience of the *Autorité de la concurrence* in international cooperation in cartel investigations in chronological order as the investigations proceed in practice: (i) detecting and gathering evidence and identifying parallel procedures, (ii) allocation of cases and (iii) practical cooperation in investigations if a case was not reallocated. In conclusion, the *Autorité* offers its thoughts on how to improve international cooperation in the light of its European experience.

1. Detecting and gathering evidence, and identifying parallel procedures as regards international cartels

Like many of its OECD counterparts, the *Autorité* has at its disposal a range of procedural instruments that enable it to detect and gather evidence on cartels, whether as a result of complaints or applications for leniency, but also through more proactive market intelligence mechanisms. The *Autorité* can thus carefully monitor market developments, which makes it easier for it to gather circumstantial economic evidence and thereby initiate a more active phase of gathering direct evidence through hearings or even through investigative measures, or by mobilizing the sector inquiry instrument, on its own initiative since the law on the modernization of the economy of 4 August 2008 came into force. These instruments are not specific to international cartels, but their application can reveal the international dimension of certain cartels.

Once this international dimension has been identified, formal or less formal cooperation can be considered, generally on the basis of binding instruments when an exchange of confidential information proves to be necessary. International cooperation can, however, be much more effective if reciprocal alert or information mechanisms are set up in advance, either on the basis of the comity of nations or on that of binding instruments.

Within the ECN, mutual information is provided for by article 11, paragraph 3 of Regulation (EC) no. 1/2003, which imposes on competition authorities an obligation to inform all network members of proceedings liable to result in a decision implementing European competition law, and thus of a case in which trade between Member States may well be significantly affected. This obligation arises as soon as the first formal investigative measure is adopted. This mutual information system is essential, inasmuch as it enables each competition authority to follow up the activities of its European counterparts, and offers an opportunity for informally sharing experiences, if the authorities are investigating in similar economic sectors, or more formally if joint investigative measures are necessary or if parallel procedures have been identified. A secure electronic system (ECN-ET) has been set up for the purpose. In the period since the regulation came into force (1 May 2004), France has passed on 207 case files to the ECN at 30 November 2011, making it one of the largest contributors, the average being 45 case files per Member State¹.

These mutual information mechanisms have been broadened and refined as part of the implementation of leniency programmes to provide information at an even earlier stage of the investigation. Within the ECN, a common approach is adopted to processing applications for leniency thanks to the model programme co-drafted by the *Autorité* and the British *Office of Fair Trading* in 2006 following close consultation with all the other national authorities in the ECN and the European Commission². It meets a threefold objective. Firstly, it ensures convergence of the applicants' eligibility and reward criteria, as well as of the national procedures for processing applications for leniency, including the introduction of a mechanism for marking the applicant's place in the queue and the principle of the admissibility of oral applications for leniency. The purpose here is to avoid applicants officially filing their form not with the best placed authority, because its programme may be less attractive than that of another authority involved in the case but less well placed to conduct the investigation. The model programme also ensures equal treatment for applicants. Finally, it streamlines the procedures for companies.

The model programme is a particularly fruitful example of international cooperation. All the competition authorities in the ECN, with one exception, have adopted a leniency programme, whereas only

¹ European Commission site, Competition DG, ECN statistics, <http://ec.europa.eu/competition/ecn/statistics.html>.

² ECN model programme on leniency, http://ec.europa.eu/competition/ecn/model_leniency_fr.pdf

four (including France) had one in 2002. The latest report on the convergence of national programmes³ took note of many other significant advances.

The model programme also introduces a mechanism that goes beyond the objective of mutual information and directly paves the way for coordinated case allocation. This refers to the summary application described in point 22: "*In cases where the Commission is 'particularly well placed' to deal with a case in accordance with paragraph 14 of the Network Notice, the applicant that has or is in the process of filing an application for immunity with the Commission may file summary applications with any NCAs which the applicant considers might be 'well placed' to act under the Network Notice*"⁴. This mechanism has to date been adopted by 23 NCAs in Europe⁵.

2. Allocating cases in parallel procedures concerning international cartels

Should parallel procedures be identified due to the international nature of a cartel, the competition authorities concerned must avoid two main risks.

Firstly, they must respect the *ne bis in idem* principle, which is recognized at European level by the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights, as well as in certain instruments of international criminal law. In competition-related cases, the jurisdictions of the Union have hitherto considered that application of the *ne bis in idem* principle was subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected⁶. Advocate-General Julianne Kokott, in her findings dated 8 September 2010⁷, deemed that this principle did not rule out the possibility of several competition authorities within the European Union bringing action against the same cartel for offences in different periods or territories. At international level, the Court of Justice of the European Union has ruled that the European Commission and the competition authority of a third State could rule against the international cartel, because each authority would be protecting its own legal interests⁸, and would be protecting consumers in its own geographical sphere of competence.

In a recent case heard in 2011, the *Autorité de la concurrence* thus had to ascertain with the European Commission that its action was conducted in accordance with the *ne bis in idem* principle. The *Autorité de la concurrence* thus ascertained in advance, in cooperation with the European Commission, which had

³ ECN Model Leniency Programme, Report on Assessment of the State of Convergence, 15 October 2009, http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf.

⁴ Summary applications include a short description of the following: the name and address of the applicant; the other parties to the alleged cartel; the affected product(s); the affected territory(-ies); the duration; the nature of the alleged cartel conduct; the Member State(s) where the evidence is likely to be located; and information on its other past or possible future leniency applications in relation to the alleged cartel.

⁵ Germany, Austria, Belgium, Bulgaria, Denmark, Spain, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia (Slovak Republic), Sweden, United Kingdom.

⁶ Court of Justice of the European Union, 7 January 2004, Aalborg Portland e.a./Commission, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Rec. p. I-123.

⁷ Court of Justice of the European Union, findings of Mme Kokott, 8 September 2010, Toshiba Corporation e.a., C-17/10.

⁸ Court of Justice of the European Union, 29 June 2006, Showa Denko, C-289/04 P, Rec. p. I-5859; 29 June 2006, SGL Carbon/Commission, C-308/04 P, Rec. p. I-5977; 10 May 2007, SGL Carbon/Commission, C-328/05 P, Rec. p. I-3921; Court of First Instance of the European Communities, 9 July 2003, case T-224/00, Archer Daniels Midland, Rec., p. II-2597.

sanctioned companies for fixing the prices of washing powder⁹, that it had not been denied jurisdiction by proceedings brought at European level, because the European case and the French case were clearly separate. This was a *prima facie* assessment, without prejudging the final respective assessments of the two authorities. At the end of the two sets of proceedings, in its decision pronounced on 8 December 2011¹⁰, the *Autorité* concluded that the two offences were clearly separate. The French decision relates *inter alia* to a different period and area, to a broader range of products, and to different parties whose practices had different aims – in the case in point, a direct cartel on prices and promotions of all formats of standard washing powder on the French market, in the very specific context created on this market by the Galland Act¹¹. The *Autorité* and the European Commission were thus able to legitimately sanction two distinct offences that nonetheless concerned the same business segment, without contravening either the *ne bis in idem* principle or applicable European law, thanks to the dialogue between them.

Conversely, it would work against the interests of European consumers for the competition authorities not to be in a position to sanction companies engaged in anticompetitive practices because the authority in possession of the evidence is not well placed to act. This risk is averted by the allocation mechanisms in the ECN, which can set an example for other forms of regional cooperation. In this respect, the European Commission Notice on cooperation within the European Competition Network¹² suggests using three sets of criteria to allocate cases within the ECN: the geographical dimension of the offence, the authority best placed to gather evidence and/or put an end to the cartel as efficiently as possible. This case allocation system, which requires close cooperation between European competition authorities, has yielded good results, as the following example illustrates.

In 2003, the European Commission referred to the French authorities a case that led to a fining decision¹³. The Commission referred a complaint it had received from a former manager of a subsidiary of a group based in Luxembourg, who had been asked to scale down his marketing campaign, which was deemed to be too aggressive on the French market.

On the other hand, national competition authorities can identify a common case that can be referred to the European Commission if the latter is better placed, for instance if the territory of more than three Member States is affected by the practices. In one particular case, the *Autorité* shared information with the German, Swedish and British competition authorities that identified a possible cartel on a European scale in the so-called "flat glass" case, which paved the way for *ex officio* proceedings brought by the European Commission¹⁴.

Where appropriate, allocating cases to the best placed competition authority paves the way for effective cooperation as regards exchanges of information and joint inspection.

⁹ Decision of the European Commission dated 13 April 2011 no. COMP/39.579 — Domestic detergents.

¹⁰ Decision 11-D-17 of 8 December 2011 on practices in the detergents sector, points 334 to 348.

¹¹ Decision 11-D-17 of 8 December 2011 on practices in the detergents sector, points 334 to 348.

¹² Commission Communication 2004/C 101/03 of 27 April 2004 on cooperation within the European Competition Network (OJEU no. C 101 of 27 April 2004, p. 43).

¹³ Decision dated 2 February on practices in the temporary job sector.

¹⁴ Decision of the European Commission dated 28 April 2007 no. COMP/39/165 - Flat glass.

3. Concrete cooperation in investigations of international cartels: joint inspections and exchanges of information within the European Union

The ECN is also a powerful instrument of cooperation between competition authorities at the investigative stage, once the best placed competition authority has been identified.

First of all it allows for informal cooperation that does not involve exchanges of confidential information, the aim being to achieve convergence in procedural practices and to exchange practical experience as regards substantive analysis, whether this concerns the definition of relevant markets, standards of proof or even arrangements for implementation of European Union law by the national competition authorities.

But above all the ECN stands out because of the wide-ranging cooperation it allows, both as regards exchanges of information and assistance for investigative measures.

With regard to exchanges of information, article 12 of Regulation (EC) no. 1/2003 permits national competition authorities applying articles 101 and 102 TFUE to exchange any factual circumstances or points of law gathered by one of them in accordance with its national law or within the framework of an inspection conducted under article 22 of Regulation (EC) no. 1/2003, even confidential information, and allows them to be used as evidence, within the limits set by the law. The *Autorité de la concurrence* implemented the provisions of article 12 of Regulation (EC) no. 1/2003 on six occasions in 2010, three of which with the Bundeskartellamt.

Article 22 of said Regulation (EC) no. 1/2003 confers the necessary powers on a competition authority in the ECN to carry out an investigative measure on its own national territory, in accordance with the procedures in force on the said territory, "on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement" of articles 101 and 102 of the TFEU. The *Autorité de la concurrence* has applied these provisions on several occasions. One such occasion was the case involving practices in the liquefied petroleum gas (LPG) container sector, for which the simultaneous assistance of the Czech and Austrian authorities was sought¹⁵, as well as that of the Italian (2007, 2006) and Belgian (2006) authorities. In 2008, in a case concerning the practices of oil companies supplying Air France with aviation fuel in Reunion Island, the *Autorité de la concurrence* collaborated closely with the British *Office of Fair Trading*. In that investigation, a large proportion of the physical evidence was held by subsidiaries of most of the oil companies tendering for Air France aviation fuel supply contracts at Reunion Island, based in the United Kingdom. Reciprocally, the *Autorité* provided assistance to its counterparts, the Bundeskartellamt, the Belgian competition council and the Hellenic Competition Commission.

4. Conclusion: Thoughts on improving international cooperation in the light of the *Autorité's* European experience

The *Autorité's* European experience as regards cooperation on cases of international cartels can provide food for thought for other national authorities engaging in regional cooperation mechanisms from the standpoint of competition law.

This experience is also behind the *Autorité's* six key proposals for enhancing cooperation within the ECN.

¹⁵

Decision 10-D-36 of 17 December 2010 on practices in the liquefied petroleum gas (LPG) container sector.

The first two proposals aim to preserve and boost the capacity to detect evidence of anticompetitive practices *ex officio*, a necessary complement for proper implementation of leniency programmes.

Information could thus be exchanged at an even earlier stage than within the framework of the examination of summary applications or "11-3 information" submitted to the network by other competition authorities. A group of national authorities could, on a voluntary basis, undertake to coordinate sector-specific inquiries that may later lead to opening a case if the facts and evidence so warrant.

In the more specific context of cooperation with a view to commence infringement proceedings, one could also consider developing regional cooperation platforms based on the Nordic model to exchange hard and circumstantial evidence. Such exchanges could occur before the first investigative measure is implemented, to facilitate exchanges of evidence and the identification of cartels on a global scale. The regional platforms would be all the more effective as they could concentrate on sectors deemed a priority and/or in which trade is the most intense.

A third line of thought for the future could consist in further refining the cooperation mechanisms provided for by the model leniency programme and stimulating increased voluntary convergence. As the aforementioned report has shown, there is room for manoeuvre as regards substantive convergence, for instance in order to define companies having forced another company to participate in the infringement – the coercers – to better demarcate the boundaries of total or partial immunity, but also, regarding procedural matters (*inter alia* the management of markers), to upgrade the ranking of summary applications beyond 1A and use standardized forms.

Our last three proposals could be studied with a view to possibly revising Regulation (EC) no. 1/2003 in the medium or long term.

First and foremost, cooperation on cross-border cartels would require more convergence as regards decision-making, more particularly with regard to the level of sanctions. Deterrent and proportionate sanctions throughout the European Union are indeed a key condition for preventing the formation of cartels. The European competition authorities have already laid down common principles on the subject, on the initiative of the *Autorité* and its Italian counterpart¹⁶, the application of which could be assessed. At an even later stage, cooperation between judges in a network safeguarding their independence could complement the current system, thereby creating a veritable "European network of competition judges", which would be the counterpart of the ECN, in accordance with the wishes expressed by two high-ranking magistrates¹⁷.

Greater cooperation between ECN members and the authorities of third States could also be better pooled, according to a principle equivalent to the "clause of the most favoured nation", in order to broaden the potential scope of exchanges of confidential information within the ECN and to cut the cost of negotiating bilateral agreements.

¹⁶ ECA working party on "Financial penalties for companies in competition law, convergence principles", http://www.autoritedelaconcurrence.fr/doc/eca_ppes_convergence.pdf.

¹⁷ The former President of the Paris Court of Appeal and President of the Final Court of Appeal, now a member of the Constitutional Council, Guy Canivet, organization of national jurisdictions for the application of Community competition law, *Concurrences* (2004), and Joachim Bornkamm, president of the first civil chamber of the German Federal Court of Justice, J. Bornkamm, A competition judge at the Bundesgerichtshof, *Concurrences* (2008).

Finally, the mechanisms of articles 12 and 22 of the regulation could profitably be extended by instituting a legal basis for the mutual admissibility of evidence before competent jurisdictions, in view of the existing differential treatment of certain types of evidence, such as telephone recordings.

In conclusion, a formal framework for cooperation relying on early mutual information, more particularly in the framework of implementing leniency programmes, and greater formal cooperation between competition authorities sharing a common substantive heritage and whose national economies are closely related, could lead to convincing results with respect to deterrence and the fight against international cartels. Within the European Union, a united front by the competition authorities in a system permitting the detection, allocation and sanctioning of cartels has gradually been put in place on the basis of binding instruments and voluntary convergence initiatives that could be pursued yet further.

GERMANY

1. Introduction

Cartel prosecution and cartel investigations have become increasingly international issues. Whereas in the old days, most of the detected cartels operated solely on a national level, a trend has emerged in the past decades where cartels aim at restricting competition not only in national markets but also in cross-border contexts. With ever growing globalisation and the increasing integration of the European internal market, competition authorities face national and multinational enterprises engaging in cross-border cartels, which makes their detection and prosecution a lot harder. Therefore, cooperation among competition authorities in cartel investigations has become more common and to a certain extent even indispensable. Cartel prosecution cannot afford to stop at national borders. Only effective – internationally coordinated – cartel prosecution can counterbalance cross-border cartel activities and thus protect competition and consumer interests.

In the last decade, the Bundeskartellamt has realigned its focus and successfully strengthened its efforts in the prosecution of both national and international cartels. When investigating international cartels the Bundeskartellamt is in close contact with other competition authorities worldwide in order to cooperate and jointly combat such anti-competitive agreements. This paper will first give an outline of the Bundeskartellamt's legal framework for international cooperation with other competition authorities (2.). It will then continue by describing practical issues of cooperation with other competition authorities (3.) and will give recent examples of cooperation experience (4.). Finally, the paper will give suggestions on how to improve the international cooperation in cartel prosecution (5.).

2. Legal framework for international cooperation

International cooperation is governed by multilateral or bilateral agreements and national legislation. The most important multilateral agreement for international antitrust enforcement is the framework of the European Competition Network (ECN) and the Commission Notice on cooperation within the Network of Competition Authorities (a.). Furthermore, a number of agreements in the framework of the European Union and the Council of Europe also apply to mutual legal assistance.¹ International bilateral agreements are manifold. The Bundeskartellamt's international cooperation is described in the following (b.).

The national legislation is mainly laid down in the German Act Against Restraints of Competition (ARC).² Especially with regard to the disclosure of information, the Bundeskartellamt's officials are furthermore bound by the German Criminal Code. Section 203 of the German Criminal Code provides that

¹ The most important agreement for the European Union is the Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on the European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ 2000, C 197, 01. The most important agreement for the Council of Europe is the European Convention on Mutual Assistance in Criminal Matters of 1959.

² An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf.

it is a criminal offence for a public official to unlawfully disclose a secret of another party, in particular a business or trade secret, which was confided to or otherwise made known to him in this capacity.

2.1 *Cooperation within the ECN*

With Regulation (EC) no. 1/2003³ a system of parallel competences was created within which the European Commission and the competition authorities of the Member States apply the competition rules laid down in the EC Treaty (Articles 101 and 102 TFEU). Together the national competition authorities and the Commission form a network of authorities, which act in the public interest and cooperate closely to protect competition. The ECN is a discussion and cooperation forum for the application and enforcement of EC competition policy. The network provides a framework for cooperation between the European competition authorities in cases in which Articles 101 and 102 TFEU are applied and a basis for creating and fostering a common competition culture in Europe. The framework of the ECN is laid down in the “Commission Notice on cooperation within the Network of Competition Authorities”.⁴

The German provision of Section 50 a (1) ARC refers to Article 12 (1) of Regulation 1/2003. It “authorizes the competition authorities to provide, for the purpose of applying Articles 101 and 102 TFEU, the Commission and the competition authorities of the other Member States of the European Community with any matter of fact or of law, including confidential information and in particular operating and business secrets, to transmit to them appropriate documents and data, to request these competition authorities to transmit such information, and to receive and use in evidence such information. [...]”. Section 50 a (2) ARC provides further that the “cartel authority shall use in evidence the information received only for the purpose of applying Article 101 or Article 102 TFEU and in respect of the subject-matter for which it was collected by the transmitting authority [...]”.

However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under Article 12 (1) of the Regulation may also be used for the application of national competition law (Article 12 (2) Regulation 1/2003).

Finally, Section 50a (3) ARC, which mirrors Article 12 (3) Regulation 1/2003, provides that “Information received by the cartel authority [...] can only be used in evidence for the purpose of imposing sanctions on natural persons where the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 101 or Article 102 TFEU. Where the conditions set out in sentence 1 are not fulfilled, a use in evidence shall also be possible if the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the rules of the receiving cartel authority. The prohibition to use evidence pursuant to sentence 1 shall not exclude using the evidence against legal persons or associations of persons. However, compliance with prohibitions to use evidence which are based on constitutional law remains unaffected.” This provision is to ensure that the constitutional rights of the alleged cartelists and the same level of protection are provided for. This may especially be an issue when cooperating with a competition authority that adheres to a criminal cartel enforcement regime.

Within this legal framework the ECN member states can provide one another with evidence, including confidential information. The complementing Notice on cooperation within the Network of Competition Authorities provides that where a competition authority “deals with a case which has been initiated as a result of a leniency application, it must inform the Commission and may make the information available to

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L 1, 1.

⁴ Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C 101, 03.

other members of the network”.⁵ However, save for two exemptions⁶, the information voluntarily submitted by a leniency applicant can only be transmitted to another member of the ECN with the consent of the applicant.⁷ These restrictions were introduced to secure the effectiveness of the different leniency programmes in place. The Bundeskartellamt is bound by these restrictions in its cooperation.

2.2 *Other (bilateral) international cooperation*

The Bundeskartellamt also cooperates with competition authorities that are not members of the ECN. The legal basis for such interactions can be found either in bilateral international agreements⁸ or alternatively in national provisions. The Federal Republic of Germany has concluded numerous bilateral and multilateral agreements on mutual legal assistance.

In cases where there is no bilateral or multilateral mutual legal assistance agreement, the Bundeskartellamt reviews requests for international cooperation according to the provisions of the German Act on International Mutual Assistance in Criminal Matters⁹ and the ARC.

The ARC specifically contains a provision which deals with “Other Cooperation with Foreign Competition Authorities” (Section 50b ARC). This provision is more restrictive than its counterpart dealing with the cooperation in the ECN.

According to Section 50b (2) ARC the Bundeskartellamt shall forward information pursuant to Section 50a (1) ARC only with the proviso that the receiving competition authority:

“1. uses the information in evidence only for the purpose of applying provisions of competition law and in respect of the subject-matter for which it was collected by the Bundeskartellamt,

2. respects the protection of confidential information and will transmit such information to third parties only if the Bundeskartellamt agrees to such transmission; this shall also apply to the disclosure of confidential information in legal and administrative procedures.”

This provision states further that with regard to confidential information the ARC prohibits the passing on of information without a waiver of the undertaking concerned. Thus, without the consent of the company concerned, the Bundeskartellamt is prohibited from sharing such information with other

⁵ See paragraph 39.

⁶ See paragraph 41. It provides that “1. No consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving authority” and “2. No consent is required where the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions: (a) on the leniency applicant; (b) on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme; (c) on any employee or former employee of any of the persons covered by (a) or (b).”

⁷ See paragraph 40.

⁸ An example for a bilateral agreement dealing, inter alia, with cooperation and information exchange is the Treaty between the Federal Republic of Germany and the United States of America on Mutual Legal Assistance in Criminal Matters which entered into force in October 2009, BGBl. 2007 II p. 1618 ff.

⁹ „Gesetz über die internationale Rechtshilfe in Strafsachen“ in the version of October 2010, BGBl. I p. 1408 ff.

competition authorities. This constitutes one of the main boundaries for information sharing in international cooperation. These rules apply equally to the information voluntarily submitted to the Bundeskartellamt by a leniency applicant. Again, the Bundeskartellamt requires the consent of the company to pass on this information.

Information obtained from other competition authorities can be relied upon by the Bundeskartellamt subject to the provisions of the agreement under which this information was obtained.

2.3 *Other international cooperation*

Finally, the Bundeskartellamt is in constant contact with other competition authorities in different international fora such as the OECD, the International Competition Network (ICN) and UNCTAD. These different organizations allow the Bundeskartellamt to engage in both a formal and informal exchange of ideas, knowhow and, to a certain degree, information. The Bundeskartellamt is a very active member in all of these fora. It strongly believes that it can greatly benefit from the work of these organisations and highly values the opportunities to exchange views with the other competition authorities.

Some of these international organisations have issued recommendations to which the Bundeskartellamt adheres to wherever possible.¹⁰

3. Practical issues of cooperation

Within the above-mentioned framework the Bundeskartellamt has several possibilities to cooperate with other competition authorities and does so frequently. Whereas formal cooperation is restricted to the tools defined in the respective mutual legal assistance agreements, informal cooperation can take different forms.

On that basis the Bundeskartellamt can report a great number of successful cooperation cases with other competition authorities. These include, inter alia, joint dawn raids, dawn raids conducted for other competition authorities, or conducted by other competition authorities for the Bundeskartellamt, as well as the questioning of witnesses on behalf of other authorities.

The sharing of non-confidential information is another very important tool of international cooperation in antitrust enforcement. The Bundeskartellamt engages in informal discussions of abstract subjects at conferences or in a more formal cooperation and information sharing in specific cases. Such information exchange can take place by either telephone or email, or at face-to-face meetings.

Another form of international cooperation with other competition authorities, which should not be underestimated, is the sharing of knowhow. The Bundeskartellamt is very active in fostering such knowledge exchange at twinning activities, international conferences or bilateral meetings.

¹⁰ See for example the OECD “Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations”, 2005 or the OECD Council Recommendations “Anticompetitive practices affecting international trade”, 1995. It recommends for example that when a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anticompetitive practices (I A. 1.).

Last but not least, informal international cooperation plays a very important role in the day-to-day work of the Bundeskartellamt. Due to informal contacts formed at various international meetings of international organisations such as OECD, ICN and UNCTAD, the Bundeskartellamt has good working relationships with numerous competition authorities worldwide. In the view of the Bundeskartellamt, these contacts provide an excellent basis for international cooperation with other competition authorities within the legal boundaries.

However, the Bundeskartellamt has also encountered some challenges in international cooperation. Only a few shall be mentioned here:

The handling of confidential information in the cooperation process is always the most significant issue. Although the sharing of information between competition authorities is generally to the benefit of the investigatory process, there are some difficulties attached which should not be forgotten. Even though international law provides for some safeguards by prohibiting an exploitation of such information), once the information has been shared it is no longer in the control of the sharing authority what happens to it. Different national procedural rules on access to files and disclosure may lead to further uncertainty on the accessibility of information that was originally confidential. Also in the light of the above mentioned provision in the German Criminal Code, this dilemma between the benefits and concerns of sharing confidential information has induced the Bundeskartellamt to be particularly cautious when sharing information.

Furthermore, international cooperation between competition authorities could lead to a situation where more than one competition authority intends to impose a fine on a certain company. In some cases the envisaged fines could render the company incapable of paying. In such cases a coordinated approach from the beginning through to the conclusion of a case is desirable.

4. Recent experience

In practice, a fair amount of the Bundeskartellamt's international cooperation in cartel investigations takes place within the framework of the ECN. In this formal framework the Bundeskartellamt has frequently exchanged information and cooperated with other competition authorities in the European Union.

Successful examples of Cooperation in the ECN are: The Bundeskartellamt coordinates its activities with the other competition authorities via telephone, email conversations or, if the case so requires, even in face-to-face meetings. The degree and extent of the cooperation will vary according to the circumstances of the given case. The Bundeskartellamt has also conducted either joint dawn raids or dawn raids for other ECN competition authorities. Vice versa it has also requested other competition authorities to conduct dawn raids for the Bundeskartellamt.

There are numerous examples of successful cooperation in the ECN. A recent case deals with the refusal to supply by a German producer, a conduct which may constitute a violation of Article 102 TFEU. The investigation was initiated by another ECN member following a complaint by a company. After initiating the investigation, the other authority requested an investigation by the Bundeskartellamt in accordance with Article 22 (1) Regulation 1/2003. It required the recovery of certain documents (request and evidence to support the allegation). The Bundeskartellamt obtained the necessary search warrants from the local court in Bonn in the beginning of 2011. In spring 2011 officials of the Bundeskartellamt and the other competition authority conducted dawn raids in Germany. Simultaneous dawn raids were conducted in the Netherlands, Sweden and Denmark. The outcome of this case is still pending.

Another example is the cooperation in the so-called *sugar case*. In this case, the Bundeskartellamt cooperated with the Dutch Competition Authority (Nederlandse Mededingingsautoriteit – NMa) and the Austrian Competition Authority (Bundeswettbewerbsbehörde). The authorities exchanged information (such as minutes, evidence, and leniency applications) according to Art. 12 Regulation 1/2003, and NMa Officials participated in interviews in Germany. In the Netherlands no simultaneous dawn raids or investigations were conducted.

Finally, the *mills case* can provide further insight into difficulties which may arise while cooperating in international antitrust enforcement cases. The Bundeskartellamt had conducted dawn raids in 2008. Subsequently, the German, French and Dutch competition authorities all received leniency applications. The three authorities cooperated closely, which resulted in the exchange of documents between the authorities and the presence of a German official during dawn raids conducted in France. In discussions with several companies, the companies indicated that they might plead inability to pay if all competition authorities imposed fines. Therefore the question of “coordinated fines” arose.

5. Conclusion and suggestions

The Bundeskartellamt has benefited from the cooperation in the ECN and it supports the network in every possible way. The formal international cooperation in cartel cases the ECN offers is to the benefit of all the participating competition authorities. When the formal basis for the cooperation was laid down in 2003, it was the best possible path to take at that time. Almost ten years later, not only the benefits but also the shortcomings have become apparent. Therefore, the Bundeskartellamt suggests that it might be time to further fine-tune the system and enhance the focus on questions of procedural convergence.

The Bundeskartellamt also encourages further international cooperation in cartel investigations. International cooperation can have various benefits for the competition authorities, ranging from a sharing of the investigatory burden to more efficient proceedings. A look back on the experience gained with cooperation in international cartel investigations offers a number of potential lessons to be learned:

- In the case of parallel proceedings, a mutual exchange of information might be indicated at several stages throughout the proceedings up to the conclusion of the case.
- Furthermore, the competition authorities need to be careful to coordinate their course of action if more than one competition authority intends to fine a certain company. As mentioned above, this may lead to the competition authorities being confronted with the company’s plead of inability to pay. Close coordination between the competition authorities until the end of the proceedings can minimise the described difficulties.
- Finally, it is important to note that the possibility of cooperation must be exercised carefully. Authorities requesting international cooperation should always be willing to reciprocate. Competition authorities requesting legal assistance should always consider that the request also strains the resources of the responding authority. Requests for cooperation should therefore always be subject to strict scrutiny with regard to their extent and necessity. With these safeguards in mind, international cooperation can help all authorities make the best use of their limited resources.
- The Bundeskartellamt very much welcomes the future work on this subject as one of the Strategic Themes of the OECD Competition Committee.

INDIA

1. Introduction

In the context of globalization, economies are moving ever closer together and becoming more interdependent. Business is expanding itself from national boundaries and is obtaining a transnational character. Globalization has increased reach of the anti-competitive practices including cartels indulged in by the enterprises. The pernicious effects of a cartel are further compounded when such arrangements are amongst undertakings with business operations across countries. Although only in recent years, the extent of harm caused by international cartels has been documented, international cartels are by no means a recent phenomenon or a by-product of liberalisation, as their cross border dimensions would seem to suggest. Liberalisation, however, may indeed have facilitated the success of cartels owing to markets opening up across the world, making it possible to engage in transnational anti-competitive practices on a much larger scale than before, and garner larger profits thereby.

Economic globalization and the spread of **antitrust** laws worldwide are creating a unique set of challenges for competition authorities. It can be said that competition law is national, while markets are increasingly global. In recent years, antitrust enforcers have come to realise that the increasingly transnational character of competition cases clashes with the traditionally territorial scope of domestic antitrust rules. The key question is how can competition authorities manage marketplace conduct that takes place in one nation, but has a harmful effect in another? In practical terms, this means that competition authorities worldwide have to find ways to overcome the jurisdictional barriers inherent in the territorial nature of antitrust enforcement jurisdiction. It is understood that due to increasing geographical reach of business transactions and the international impact of anticompetitive activities in modern globalized markets, cooperation in enforcement is vital. Given the increasingly international nature of cartels, crossing the boundaries of jurisdictions, international co-operation in cartel cases is growing in importance. Such co-operation can involve for instance, coordination of simultaneous searches, raids or inspections, exchange of information, discussions on general orientations regarding investigations, or gathering of information and interviewing of witnesses on behalf of another agency.

The Indian competition law in its current form is of recent origin. While the Indian Competition Act ('the Competition Act') was enacted in the year 2002, the provisions thereof were notified in phases from May, 2009 to June, 2011. Thus, the enforcement experience of the anti-trust watchdog of India is of a limited period. The provisions governing anti-competitive agreements including cartels were amongst the first to be notified. However, the Competition Commission of India ('the CCI') is yet to receive and deal with a matter involving an international cartel. Further, till date there has been no instance of a request for cooperation to CCI from another competition agency in relation to an investigation into an international cartel.

This paper seeks to highlight the legal and policy framework in India for investigation and penalising cartels as well as facilitating international cooperation in investigation of cartels with foreign competition agencies. The paper examines the CCI's approach to international cooperation in investigations. The paper also provides brief account of CCI's limited experience of international cooperation so far which has essentially focused on capacity building in all areas including cartels investigations taking into account experience and best practices followed by other jurisdictions.

2. Provisions regarding cartels in Indian Competition Law

It may be useful at this stage to note some salient features of the provisions relating to cartels in the Indian competition law:

- Any agreement entered into between enterprises engaged in identical or similar trade of goods or provision of services, *including cartels*¹, is presumed to have adverse effect on competition if it *inter alia* directly or indirectly determines purchase or sales prices; limits or controls production, supply, markets, technical development, investment or provision of services; shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way.
- Unlike several other jurisdictions, cartel cases do not entail a criminal enforcement regime in India. However, CCI may *inter alia* pass cease and desist orders and impose penalty on the cartel members. The Act empowers the Commission, in case of cartel, to impose upon each producer, seller, distributor, trader or service provider involved in cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or 10% of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher. It may be noted that the Competition Act provides for a higher penalty in cartel cases.
- The Competition Act also empowers CCI to grant leniency by levying a lesser penalty on a member of the cartel who makes a full and true disclosure in respect of the alleged cartel.² The scheme does not provide blanket immunity and does come with certain riders.
- The Competition Act also empowers CCI to look into anti-competitive practices including cartel related activities taking place outside India and having effect on competition in India (extra-territorial jurisdiction).

3. International cooperation strategy of CCI

CCI recognizes the importance of international cooperation for young competition authorities, who benefit from exposure to best practices from other jurisdictions as well as technical cooperation, capacity-building support and knowledge sharing. Therefore, CCI is developing a comprehensive international cooperation strategy, nuts and bolts of which will be cooperation and partnerships with competition jurisdictions (as well as relevant multilateral organizations) for mutual benefit. Cooperation with other competition agencies should be a win-win situation for both the partners in terms of technical cooperation and more effective/efficient enforcement of competition law including exercise of extraterritorial jurisdiction. There would be indirect benefits as well in terms of fair treatment of domestic companies in outside markets, and the creation of a level playing field between domestic companies and foreign competitors. At the same time, it is realized that cooperation with multilateral organizations like ICN, OECD and UNCTAD, which bring together competition experts from all over the world and provide rich insights into various competition issues, is equally vital. Therefore, CCI is taking a pro-active approach in interactions with these organizations also.

¹ Under section 2 (c) of the Indian Competition Act 2002 (the Act), the term “cartel” is defined as including “an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services”.

² Section 46 of the Competition Act, 2002.

Co-operation in cartel investigations may involve exchange of information, discussions on general orientations regarding investigations, or gathering of information and interviewing of witnesses on behalf of another agency as well as coordination of simultaneous searches, raids or inspections. This requires mutual understanding and trust building between agencies through formal or informal mechanisms before such cooperation initiatives can take place. Therefore, soft cooperation in the form of technical cooperation and experience sharing and consequent understanding between the agencies can be the precursor to developing international cooperation in enforcement including cartels investigations. In view of this, CCI welcomes and is open to enhanced cooperation with other jurisdictions including cooperation in competition law enforcement.

4. Experience of international cooperation

As mentioned earlier, CCI is yet to receive a cartel case which involves cross-border ramifications. However, recognising that co-operation between competition agencies would be essential not only in dealing with international cartels but also cross-border mergers/ acquisitions and abuse of dominance by corporations dominant outside India, efforts to developing formal as well as informal relationships with foreign agencies are already underway. CCI has initiated relationship building with some of the foreign jurisdictions regarding possible arrangements and agreements that may be put in place for this purpose.

4.1 *Capacity building and technical cooperation*

Each jurisdiction has the responsibility to built capacity in order to investigate competition violations including for putting an end to hard core cartels. CCI's focus in international cooperation in the initial years has been on capacity building, technical cooperation and experience sharing with a view to developing India's competition law regime.

4.2 *Technical Cooperation with multilateral institutions*

Over the last three years, CCI has immensely benefitted from its interactions with OECD. India has been regularly invited to the meetings of OECD Competition Committee as well as OECD Global Competition Forum. Apart from this, OECD has been CCI's major supporter in the area of capacity building activities. CCI has received technical assistance support for organizing several events in CCI, which were tailored as per CCI's specific needs. Funded participation in various competition related events organized by OECD at its Regional Centre in Seoul provides CCI officers excellent opportunity to get exposed to latest thoughts and practices on various areas of competition regulation. Apart from OECD, CCI is also regularly participating in events of UNCTAD and ICN, other two important multilateral organizations involved in competition regulation issues. CCI has recently become member of Research Partnership Platform of UNCATD and its engagement with UNCTAD is expected to intensify. CCI is also member of some of the Working Groups of ICN and participates actively in them.

4.3 *Technical Cooperation with mature jurisdictions*

CCI has benefited from technical cooperation with the United States Federal Trade Commission and the EC's Directorate General for Competition (DG Comp). CCI officers visited DG Comp and gained valuable insights in cartel investigations, which proved instrumental in building up knowledge as well as confidence of CCI officers. CCI has also benefited from several workshops arranged by DG Comp and USFTC in CCI. CCI intends to develop several advanced capacity building programmes with both the jurisdictions over next few years to benefit from their long experience in competition law regulation.

4.4 *Informal cooperation*

As mutual understanding amongst the coordinating agencies is a *sine qua non* for an effective and lasting cooperative relationship especially in cartel investigations, CCI is working on developing a comprehensive international cooperation framework by engaging with other competition agencies. While formal instruments for cooperation are important, the informal exchanges with other competition authorities help provide invaluable insights into their experiences helping CCI in building capacity and facilitating enforcement of domestic law effectively. Accordingly, CCI has been developing informal cooperation with foreign jurisdictions, on an ongoing basis to discuss issues of common concern and relevance through various forums. However, such interactions, so far, have not been in relation to any pending investigation or inquiry and the same primarily relate to capacity building and exchange of experience.

4.5 *Formal cooperation*

For the purpose of discharging the duties and performing functions under the Competition Act, CCI may enter into any memorandum/ arrangement, with the prior approval of the Central Government, with any agency of any foreign country³. CCI is using MOUs as a formal framework to develop long term relationships with other agencies. For instance, recently CCI has signed MOU for cooperation with FAS, the Russian Federation. MOUs with some other agencies are also under active consideration. Apart from this, most of the India's multi-lateral and bilateral Free Trade Agreements already negotiated/under negotiations have a Competition Chapter, which provides for cooperation between competition agencies. These formal cooperation arrangements may facilitate development of cooperation in enforcement including cartel investigations involving exchange of information, coordinated investigations, etc.

5. *Information sharing*

Cooperation may take place through formal as well as informal mechanisms. Any information shared by the CCI with agencies of foreign countries and the memorandums or arrangements in this regard have to conform to domestic laws of the respective parties. Even in informal cooperation involving information sharing, confidentiality and the sensitivity of the information are significant considerations. The CCI needs to account for the above factors both while responding to a request for material/ information from another agency as well as when seeking details in relation to investigations or otherwise from foreign agencies. Information sharing must be consistent with the laws of the land and in particular with the duty to maintain confidentiality as provided in the Competition Law. Many agencies use informal cooperation also to exchange information and share experiences in the fight against cartels. These mechanisms may produce good results and enhance cartel enforcement.

6. *International co-operation within other policy areas*

Apart from the framework provided for international co-operation in the Competition Act, the Government of India in its executive and sovereign powers also enters into various Mutual Legal Assistance Treaties (MLATs) / Bilateral and Multilateral agreements / Regional Trade Agreements (RTAs) etc. Besides, courts can send Letters Rogatory through diplomatic channels to seek information from other countries.

³ Section 7 and section 18 of the Competition Act, 2002.

7. Challenges

There may be many impediments in effective and efficient cooperation in the fight against international cartels. The differing legal regimes can be a challenge for international cooperation especially in the area of information sharing for specific cartel cases. The architecture of leniency regimes can have an effect on information sharing. Hence, alignment of leniency regimes coupled with the necessary waivers can facilitate international cooperation in the area of information sharing. In this regard, international forums like the OECD are ideal platforms to facilitate the alignment of leniency regimes. To facilitate cooperation with other agencies, the domestic legal and constitutional frameworks of the contracting parties need to be taken into account. It is also important to identify the potential for friction that may be caused due to the differences in the provisions or methods used by agencies in different countries.

8. Conclusion

CCI fully recognizes the significance of international cooperation in cartel investigations and strives to build a robust information exchange network with other jurisdictions to facilitate seamless flow of information for effective enforcement of competition law provisions (including against cartels). To this end, CCI seeks to engage with developed and emerging jurisdictions to create a sustainable template that will supplement and complement the existing enforcement mechanisms of the coordinating agencies.

Technical cooperation and capacity building leading to mutual understanding may be the key building block in the international cooperation with foreign jurisdictions in investigations against international cartels. Cooperation mechanisms – both formal and informal have proven efficient in the fight against cartels. These mechanisms should be encouraged and promoted in all competition agencies including young jurisdictions in developing countries. Good practices in this area need to be spread largely by ICN, UNCTAD and OECD through various modalities.

INDONESIA¹

Introduction

Cartel in simple term is an agreement between competing enterprises². The existence of an agreement determined whether an action can be classified as cartel agreement or not. In line with increased acknowledgement of international competition law, cartel has become a tacit collusion where enterprises set an agreement over thin air or without any lead to cartel existence.

Antitrust laws in the United States and some other countries expose cartelists to criminal and civil penalties. Due to their severe impacts to consumer, some countries experienced high-profile cartel indictment, including large fines and imprisonment for corporate executives. For scholars, antitrust studies have identified a range of conditions that tend to make forming and defending a cartel harder in particular industries, and practically impossible in some. By analyzing cartel experiences within and across industries, experts have learned that cartels tend to be less likely to form and less likely to endure in industries where (i) numerous small sellers; (ii) low start-up cost for new entrance; (iii) complex sold product; (iv) infrequent purchases by small number of large customers; (v) frequent price negotiation; and (vi) frequent new products³.

Cartel has been gain interest for many countries, especially with their early implementation of competition law. But when we speak of ASEAN, we will learn that not all ASEAN member countries have their competition law in place. Sometime regional cartel is creating intentionally to protect domestic business and consumers. Different variety of their economic structure and development have lead ASEAN member countries to have they own unique competition law that craft based on their past experience, and sometime executed in very short time to meet foreign pressure.

1. Cartel regulation in Southeast Asia

There was news on 2009 in ASEAN which raised interest by certain countries to form cartel in rice production and distribution⁴. This issue was raised by major ASEAN rice-producers from Thailand, Vietnam, Laos, Cambodia and Myanmar (five countries of the Ayeyawady-Chao Praya-Mekong Economic Cooperation Strategy/ACMECS) by their plan to form an association (ACMECS Rice Traders Association) to create a sustainable system for trading and production. The agenda for regional cartel will comprise of price stabilization, food security in the region and rice development, with upcoming objective of price stability in the following year. There was also a view by Indonesia and Malaysia in 2006 to form a joint body to regulate international palm oil (bio-fuel) prices, fight tariff barriers in developed countries

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² In economic sense, cartels define as agreements between most or all of the major producers of a good to either limit their production and/or fix prices (<http://economics.about.com>).

³ Andrew R. Dick, Cartels, the Concise Encyclopedia of Economics.

⁴ Business in Asia Today; ASEAN states plan to establish rice cartel; 19 August 2009.

and promote palm oil as a feedstock for bio-fuel production. This was due to large market share of Indonesia and Malaysia (85%) in the world's palm oil, with 40% lower production costs⁵.

These cartel attempts are indeed show that in many ASEAN member countries, cross border cartel are issues that may take part beyond the implementation of their national competition law. To check how this issue is addressed, this paper will show you how far are cartel regulation in several countries in ASEAN and whether cross-border cartel enforcement cooperation can be made.

1.1 Cartel provisions in Vietnam

First, without any particular reason, let move to how Vietnam sees cartel behavior in their regulation. Vietnam competition law (Law No. 27/2004/QH11) is passed in 2004 by the 6th Session of the 11th National Assembly of the Socialist Republic of Vietnam. Cartel regulations are stipulated by Section I of Article 8 and 9 (Competition Restriction Agreements). Although it is not use term "Cartel", the behaviors are form of cartel agreements. The prohibited behaviors consist of price fixing, market allocation, controlling of production/purchased/sell, restricting innovation and investment, tying sales, entry barrier, abolishing non-cartelist, and bid rigging.

The last three behaviors (entry barrier, abolishing non-cartelist, and bid rigging) are per se illegal, while others are rule of reason by which it should be met combined market share of 30% at minimum. Interestingly, the rule of reason behaviors can be applied for exemption if they meet one of the following conditions:

- Rationalizing the organizational structure, business model, raising business efficiency;
- Promoting technical and technological advances, raising goods and service quality;
- Promoting the uniform application of quality standards and technical norms of products of different kinds;
- Harmonizing business, goods delivery and payment conditions, which have no connection with prices and price factors;
- Enhancing the competitiveness of small- and medium-sized enterprises;
- Enhancing the competitiveness of Vietnamese enterprises on the international market.

Fines on cartel in Vietnam are limited to up to 10% of total turnover earned in fiscal year proceeding the year they violated the law. Since 2007, they only handled 1 (one) cartel case on Vietnam Insurance Association who signed agreement on cargo insurance, vessel insurance, vehicle insurance, and terms on insurance premium rates for physical damage to cars. Most of cases at Vietnam Competition Agency involving unfair competition practices.

1.2 Cartel provisions in Thailand

Then, let's move to Thailand. This country has been implemented competition law called Trade Competition Act B.E. 2542 (1999) since the year of 1999. The law with 57 sections is regulated cartel offences as part of Chapter on Anti Monopoly. The section regulate that any business operator shall not enter into an agreement with another business operator to do any act amounting to monopoly, reduction of competition or restriction of competition in the market of any particular goods or any particular service in several manners. These will include price fixing, bid rigging, market allocation, reducing the quality of

⁵ Asia Sentinel; Indonesia, Malaysia push a bio-fuels cartel; 14 December 2006.

goods/services, selecting sole distributor, and exclusive dealing (tying). As mentioned, all behaviors are rule of reason, where they need to show the impact of monopolization, restriction of competition, or reduction of competition in the market. Any impeachment shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six million Baht or to both, and, in the case of the repeated commission of the offence, the double penalty will be plausible.

In addition to the rule of reason approach, the Law also provides room for business to apply for an exemption to certain business behavior, specifically on market allocation, reducing the quality of goods/services, selecting sole distributor, and exclusive dealing (tying). This application shall meet several conditions by which the applicant must at least explain adequate reasons and specify necessity for the exemption, as well as specify the intended procedures and duration. The Commission then will assess the necessity based on several criteria including its impact to business promotion and potential harm to the economy and consumers.

At the implementation level, the Commission has filed more than 20 cases (complaints) from many sectors such television, processed latex, and cement distribution. However, there are no decision is made to date.

1.3 *Cartel provisions in Singapore*

Singapore has more active enforcement in cartel case than those of Vietnam and Thailand, even though they just implement their competition law in 2007. The Section 34(2) of the Competition Act (Chapter 50B) stipulate list of prohibited agreements, including price fixing; limit or control production, market, technical development, and investment; market allocation; discrimination; and tying sales. These behaviors can be excluded in the Third Schedule and or exempted based on certain criteria⁶. Fines imposed to the cartel impeachment may reach up to 10% of enterprises' turnover for each year of infringement up to a maximum of 3 (three) years.

Exclusion is given to certain enterprises that operate services of general economic interest or having the character of a revenue-producing monopoly. It is also given to specific agreements, namely agreement to implement certain law; agreement related to international obligation; agreement based on compelling reasons of public policy and order by the Minister; IPR; agreement related to clearing house; vertical agreement based on the Minister's order; agreement with net economic benefit; agreement to implement merger; and agreement in essential facilities such postal service, pipe water, wastewater management, scheduled bus, rail services, cargo terminal operation⁷. Block exemption on cartel agreements can be provided as long they meet several conditions of (i) improving production or distribution; and (ii) promoting technical or economic progress.

Enforcement process on cartel infringement at the Competition Commission of Singapore (CCS) is well-defined compare to the previous countries (Vietnam and Thailand). The agency has decided three cartel cases since their establishment, namely bid-rigging case against six pest control companies (procurement of termite treatments project); price fixing agreements by 16 (sixteen) coach operator offering Singapore-Malaysia bus services through their association; and price fixing agreements by 11 (eleven) modeling agencies in coordinating and collectively raising rates for a wide range of modeling services in Singapore.

⁶ Competition Commission of Singapore (CCS) Guidelines on the Section 34 Prohibition, page 3.

⁷ Competition Commission of Singapore (CCS) Guidelines on the Section 34 Prohibition, page 13.

1.4 *Cartel provision in Indonesia*

Indonesia has a very interesting law that sometime beyond international practices, especially for cartel provisions. The competition law No. 5/1999 concerning Prohibition of Monopoly and Unfair Business Practices provides specific provisions for each type of cartel agreements, such price fixing (Article 5), pricing below cost (Article 7), market allocation (Article 9), boycott (Article 10), trust (Article 12), and bid rigging (Article 22). Cartel is specified as single provision (Article 11) separate from other type of cartel agreements. This provision rules that any competing enterprises must not make an agreement to affect price *by controlling production and or marketing* of goods or services which may cause monopolistic practice and unfair business competition. There are some issues can derived from this article. First, the cartel is limited to activity in affecting price by controlling production or marketing, and second, different from many jurisdictions; cartel in Indonesia uses a rule of reason provision. The sanction for any infringement vary from administrative fines (up to IDR 25 billion), compensation, to criminal prosecution by Court.

Exclusion and exemption also largely acknowledge in Indonesia. Among other, exclusions are made to activities to implement certain Law; small medium enterprises; cooperative; agreements related to intellectual property rights, franchise, research and development; and export. Exemption can be made to activities related to public interests which implemented under certain law.

Most of cases by Indonesian competition authority (Commission for the Supervision of Business Competition/KPPU) are related to bid-rigging type of cartel. For the first semester of 2011, the Commission has decided 6 (six) bid-rigging case. Price fixing type of cartel is rather small compared to bid-rigging cases handled by the Commission. To date, the Commission decided price fixing cases in several sectors, including fuel surcharge, pharmaceutical, cooking oil, short text message service, cargo shipping, salt trade, and cement distribution.

2. *Challenges in regional cooperation*

ASEAN member countries clearly agree that cartel agreement is one of the serious infringements to competition law. But each country has different approaches in dealing with one. Some countries put several types of cartel as a per se regulation, while some are need further reason to conclude it. This variety of approaches surely will halt effective competition enforcement between countries. To get clearer picture of how cooperation in cartel enforcement possible in ASEAN member countries, we have identified several challenges that commonly occurs in considering whether cooperation is possible.

2.1 *Different level of competition policy status*

Level of economic system and development sometime plays significant role in deciding whether to adopt competition policy and even, a national competition law. There are some facts that in some developing countries, competition policy is not part of their national priority, and thus leading to a resistance to comply with trade commitment or even trying to bend the commitment by finding a loop hole for take benefit of incomplete agreement or commitment. Moreover for developing countries with competition policy, the benefits of competition policy have yet to emerge visibly, because enforcement has been hampered by lack of resources, reliable data, or sufficient information about production costs, market shares and consumer behavior.

Conditionally, now there are only five ASEAN member countries with their own national competition law. Malaysia, the latest, will implement her competition law in early 2012. Notwithstanding the existence of some issues related competition policy were raised beforehand in several industries, such cement (1999), ferry services (2003), haulage industry (2003-2004), and beef cartel (2007). Interestingly, Malaysia

is the only country establishing national competition law after the ASEAN Leaders agreed to form common market or economic integration in 2007.

In sufficient or imbalance competition statutory provisions in ASEAN member countries may affect the potency to cooperate for competition law enforcement, even an international cartel. Therefore, it is important to ASEAN member countries to swiftly establish their competition policy and or national competition law before 2015 to create precaution or enforcement mechanism to create strong legal condition to all business who doing trade across ASEAN.

2.2 *Trade and investment in ASEAN*

Trade (export and import) between ASEAN member countries until mid of July 2010 showed significant number of USD 376,207 million or 24,5 % of total ASEAN trade⁸. Moreover, intra-ASEAN trade is dominated by Singapore, Malaysia, Thailand, and Indonesia consecutively. Singapore herself occupy 37.4% of intra-ASEAN trade, compare to other three countries that jointly accounted for 48.8%. For investment, most of intra-ASEAN investment goes to Indonesia USD 5,904 million (or 48,8% of direct investment in flow), follow by Singapore (27.9%) and Vietnam (10.7)⁹. Unfortunately, this foreign investment only accounted for not more than 20% of foreign investment by ASEAN member countries.

This indicates that most of international trade from ASEAN member countries goes to non-ASEAN member countries, especially China and United States. Investment also mostly comes from non-ASEAN member countries. Conditionally, trade and investment within ASEAN countries are dominated by Indonesia and Singapore. Therefore, by definition, only these countries are facing larger competition problems amongst ASEAN, and thus, probably only these countries will concern about enforcement cooperation in the region. Other countries at this stage may not benefited by certain enforcement cooperation in preventing cross-border cartel infringement.

2.3 *Different legal system and institutional aspects*

Another problem to cooperation in competition area will be different legal and institutional system among ASEAN member countries. To date, not all ASEAN member countries have their national competition law. Those with national competition law also show different approaches in their competition enforcement for cartel. As mentioned before, each ASEAN member countries show different approach to cartel. Each country uses different scopes and articles on cartel. One cartel agreement by businesses in certain ASEAN member country may not be a violation (or even exempted) in other ASEAN countries. Indonesia put a “quite” different approach by putting cartel agreement as per se rules. Each cartel violation also threatens with different level of sanctions and ways of calculating sanction across ASEAN. Experiences in cartel enforcement are also different. Indonesia who currently placed as the most developed competition regime in ASEAN did not have many experiences on non-bid rigging cartel enforcement.

Institutional aspects, including different tasks and authorities, capacity of human resources, and approaches used will also affect how cooperation shall work. Sanction is one problem, as each country uses different approaches to impose their sanction, including administrative fines. Execution or collecting cross-border fines will be another problem. Even now, other than European Union, I believe there is no room for collecting cross border fines by bilateral agreement as they will be limited by different authority and legal system between agencies in both countries. There is one good sign of business compliance between Indonesia and Singapore. Because there is an example of competition case in Indonesia involving

⁸ ASEAN Statistic on Trade, 2010 (<http://www.aseansec.org/stat/Table18.pdf>)

⁹ ASEAN Statistic on Investment, 2010 (<http://www.aseansec.org/stat/Table25.pdf>)

Singapore's big multinational company where they agreed to pay fines imposed by Indonesian competition agency (KPPU). Certainly, after the case was being decided up to Supreme Court level.

This different cartel regime certainly will increase legal uncertainty for those invested in ASEAN, and thus, without doubt, demand for harmonization of regulation in ASEAN surely will be escalated after the achievement of economic integration objective in 2015.

3. Is there any room to cooperate?

Cooperation in competition between ASEAN member countries is still possible, if each country has common understanding on how to deal with the issues. Even, cooperation in enforcement is still possible, if, member countries have similar needs. Currently, cooperation between ASEAN member countries is conducted through the existence of ASEAN Experts Group on Competition (AEGC), a sectoral body within ASEAN structure. However, the objective is still limited to the promotion of competition policy in 2015, a reasonable target that might be achieved. Cooperation in enforcement between ASEAN countries is hard to achieve without proper harmonization on competition policy and law between member countries, and without proper establishment of regional body to deal with cross-border competition issues.

Then, is there any room to cooperate for cartel enforcement in ASEAN? The answer is yes, for certain countries with certain condition. Considering trade and investment between ASEAN member countries, the existence of effective competition enforcement and potential benefit, then most likely, Indonesia and Singapore can start to consider for cooperation in enforcement. The cooperation can be limited to certain behaviors (such as cartels, mergers, and abuse of dominants) and certain industry that can be monitored or supervised by both agencies. The scope also can be limited due to different legal systems by both countries. This cooperation can be limited to notification, endorsement, and exchange of information in competition enforcement, including cartel. In considering such cooperation, each country shall take prudent consideration on several issues, such as the authorities of each agency, the exemption and exclusion given by each law, and the legal systems and procedures.

4. Conclusion

Cartel in ASEAN is considered one of the harmful business behaviors, that can be identified by each competition law. Currently, there are only five ASEAN member countries with national competition law. Each of those is having its own unique characteristics in treating cartel provisions, including sanctions. Cartel activities in several countries are detected but with uneven cartel enforcement across countries and over time. Other countries are still considering promoting competition policy by 2015. Their common problems are mostly related to low public acceptance and political support to endorse competition principles. However, there is still potency for a cooperation between Indonesia and Singapore, since they both have significant trade and investment among them, and each has national competition law, agency, and experience in handling cartel cases. But still, this potential cooperation shall be taken with prudent consideration on how each agency is able to address cross-border issues.

JAPAN

1. Introduction

When enterprises restrained competition in Japanese markets with an activity such as a cartel, regardless of whether the enterprises are located in Japan or not, the Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) concludes that these activities of the enterprises constitute violations of the Antimonopoly Act (hereinafter referred to as “the AMA”). Recently, the number of cases in which the activity has violated the provisions of competition laws of more than one country is increasing. In consideration of such circumstances, the JFTC co-operates closely with foreign competition authorities in case investigations.

We will describe below the existing mechanisms for international co-operation in cartel investigation (part II) and the case examples where the JFTC co-operated with foreign competition authorities (part III). Furthermore, Part IV explains the problems of the international co-operation in cartel investigation.

2. The Mechanism for international co-operation

2.1 Outline

The JFTC co-ordinates and co-operates on enforcement activities as parts of international co-operation with foreign competition authorities in cartel investigations. These activities are undertaken based on the formal co-operation mechanisms such as the agreements between governments or economies concerning co-operation on anticompetitive activities. Recently, the provision which authorizes the JFTC to provide information to foreign competition authorities was introduced in the amended AMA (2009) and it clarified the legal requirements for providing information to foreign authorities¹.

¹ Article 43-2 of the AMA

(1) The Fair Trade Commission may provide any foreign authority responsible for the enforcement of any laws and regulations of their country that correspond to the equivalent of this Act (hereinafter referred to as a "foreign competition authority") with information that is deemed helpful or necessary to perform their duties (limited to duties that correspond to the equivalent of the duties of the Fair Trade Commission as provided in this Act; the same shall apply in the following paragraph); provided, however, that this does not apply to cases where the provision of such the said information is deemed likely to interfere with the proper execution of this Act or to infringe upon the interests of Japan in any other way.

(2) When providing the information pursuant to the provisions of the preceding paragraph to a foreign competition authority, the Fair Trade Commission shall confirm matters listed in the following items:

(i) That the relevant foreign competition authority is capable of providing information corresponding to the equivalent of the information provided pursuant to the provisions of the preceding paragraph

(ii) That the secrecy of the information provided as a secret pursuant to the provisions of the preceding paragraph and as a secret will be protected under the laws and regulations of the relevant foreign country to a degree that is equivalent to the degree in which the secrecy of such information is protected in Japan

2.2 *The formal mechanism for international co-operation*

2.2.1 *Agreements between Governments or Economies concerning Co-operation on Anticompetitive Activities and Economic Partnership Agreements*

The government of Japan and the government of the United States of America signed the “Agreement between the Government of Japan and the Government of the United States of America concerning Co-operation on Anticompetitive Activities” (hereinafter referred to as “Japan-US Agreement”) in 1999. Japan concluded a similar agreement with the European Community (hereinafter referred to as “Japan-EC Agreement”) (2003) and Canada (2005). These are administrative implementing agreements concluded independent of the Japanese Diet, which stipulate the procedures regarding: the notification of enforcement activities, the co-operation (assistance), the co-ordination of the enforcement activities, the request of the enforcement activities, the consideration to the important interests of other governments, regular meetings between the competition authorities, the handling of information provided, etc. The JFTC does co-operation such as the notification, assistance and the co-ordination of the enforcement activities with competition authorities of the U.S., EU, and Canada based on these agreements.

In addition, the government of Japan concluded 11 Economic Partnership Agreements (hereinafter referred to as “EPA”) after being passed by the Diet, which include Chapters concerning Competition. Moreover, there are concrete provisions on co-operation in the competition area in EPAs between Japan and Singapore (put into effect in 2002), Mexico (put into effect in 2005), Thailand (put into effect in 2007), Indonesia (put into effect in 2008), Switzerland (put into effect in 2009) and Peru (signed in May, 2011, but they have not yet been put into effect), which are similar to provisions of agreements concerning co-operation on anticompetitive activities as described above. The JFTC does co-operation such as the notification, assistance and the co-ordination of the enforcement activities with their competition authorities based on the EPAs.

2.2.2 *Revised Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade (1995)*

Based on the 1995 Recommendation, the JFTC does co-operation such as notification, information exchange and coordination on enforcement with competition authorities of OECD member countries which have not concluded agreements concerning co-operation on anticompetitive activities or EPA with the Japanese government.

2.2.3 *Informal mechanism for international co-operation*

Based on the AMA Article 43 Paragraph 2, the JFTC can also do international co-operation with competition authorities of countries which have not concluded agreements concerning co-operation on anticompetitive activities with the Japanese government and are not OECD members.

(iii) That the information provided pursuant to the provisions of the preceding paragraph will not be used by the relevant foreign competition authority for a purposes other than those that will contribute to perform its duties

(3) Appropriate measures shall be taken so that the information provided pursuant to the provisions of paragraph (1) will not be used for criminal proceedings to be taken by courts or judges of foreign countries.

3. Main cases of international co-operation

	Date of the enforcement	Outline of the case	Main co-operating countries/economies	Types of cooperation conducted (legal basis)
1	December, 2003 (hearing on surcharge payment is pending now)	Price cartel of modifier for vinyl chloride resin	EU	Notification and information exchange (Japan–EC Agreement)
2	February, 2008	Bid-rigging by marine hose manufactures	US EU UK Italy France Korea	Notification and information exchange (Japan–US Agreement) Notification and information exchange (Japan–EC Agreement) Notification (1995 Recommendation) Notification (1995 Recommendation) Notification (1995 Recommendation) Notification (1995 Recommendation)
3	October, 2009 (hearing is pending now)	Price cartel by manufacturers of cathode ray tubes for televisions	EU Korea Thailand Indonesia	Notification and information exchange (Japan–EC Agreement) Notification (1995 Recommendation) Notification (Japan–Thailand EPA) Notification (Japan–Indonesia EPA)

4. Points worth noting about international co-operation in cartel investigations

While the JFTC co-operates formally or informally with foreign competition authorities in international cartel investigations based on the various provisions, some points are worth noting when the co-operation is done. Below, we will introduce (i) exchange of information gained by leniency applications, (ii) co-ordination of the timing of on-the-spot investigations and (iii) gathering evidence of foreign enterprises after opening investigations.

4.1 *Exchange of information gained by leniency applications*

In the international cartel cases, the leniency applications are often made in more than one jurisdiction simultaneously.

If the information gained by leniency applications would include the confidentiality of the enterprise (Article 39 of the AMA), a waiver is required from the applicants when the competition authorities exchange the information. The competition authorities should be careful not to make a leniency application by enterprises atrophied in the future in exchanging information.

4.2 *Co-ordination of the timing of on-the-spot investigations*

When more than one competition authority intends to do an on-the-spot investigation simultaneously, the date of the on-the-spot investigation should be decided appropriately in consideration of the case characteristics and circumstances of the competition authorities.

However, it is difficult to do perfectly simultaneous on-the-spot investigations in more than one country because of a time difference. Therefore, when the competition authorities investigate international cartel cases, the JFTC often co-ordinates the date of the on-the-spot investigation with foreign competition authorities in order to avoid destroying evidence by the enterprises, because if the enterprises located in the country in which the competition authorities have done the investigation provide information about the investigation with relative enterprises located in other countries, destruction of evidence could arise. In addition, such co-ordination of the date of an on-the-spot investigation can make the co-operation of enforcement among competition authorities effective.

4.3 *Gathering evidence of foreign enterprises after opening investigations*

After an on-the-spot investigation, the formal investigation procedure shall be developed. The JFTC has exchanged necessary information for investigations with foreign competition authorities in consideration of legal obligations of confidentiality.

However, it is difficult to exchange the items of evidence or the investigator's record of oral statements that are obtained by the power among the competition authorities of different jurisdictions due to legal obligations of confidentiality.

Under the existing legal system, the JFTC requests relevant foreign enterprises to select and appoint representative attorneys in Japan regarding the case and to co-operate in providing evidentiary materials. However, there is no way to request foreign enterprises directly to provide materials if the JFTC cannot obtain co-operation from them. Therefore, it would be desirable to be able to share the information about investigations among competition authorities of different jurisdictions.

KAZAKHSTAN

1. Existing tools for international co-operation

- 1.1 Please identify any formal mechanisms and/or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of a competition authority from another jurisdiction?*

The Agency of the Republic of Kazakhstan for Competition Protection (“Agency”) has signed the Agreement on cooperation for information exchange (on current legislation, changes in it, etc.), conducting joint training workshops, delegations exchange.

- 1.2 Please describe the informal mechanisms your competition authority has in place for co-operating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections/dawn raids in conjunction with another competition authority?*

The Agency has held in conjunction with the Federal Antimonopoly Service of Russia (“FAS Russia”) joint investigations in relation to the biggest cellular operators of the Republic of Kazakhstan and Russian Federation, the results of which have demonstrated that the international roaming services tariffs concerned were set on the unjustifiably high levels. For instance, the level of tariffs within CIS from 3 to 10 times exceeded analogous tariffs within EU states.

According to the results of the indicated investigations held by antimonopoly bodies of two states, the actions of cellular operators of setting unjustifiably high tariffs for roaming services were qualified as abuse of dominant position, aimed at setting monopolistically high prices.

During the course of the indicated work Agency cooperated with the FAS Russia by means of phone, official and electronic correspondence, as well as meetings.

At the present time, materials of the indicated investigations are undergoing judicial proceedings, however, it is worthy to mention that investigations held by antimonopoly bodies induced Kazakhstani and Russian cellular operators to voluntarily lower the tariffs of international roaming services. Thus, during the investigation Kazakhstani cellular operators decreased the tariffs of some international roaming services, in particular, voice call service – from 1.5 to 2 times, text messages – from 3 to 10 times, GPRS (Internet) – from 6 to 10 times per 1 Mb. Similar tariff cuts of cellular operators’ international roaming services were achieved by FAS Russia.

- 1.3 *To what extent have you used OECD instruments, e.g. the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and the 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, in your investigations? For what purpose were they used and how helpful were they?*

Since Agency was found in 2008, unfortunately, it hadn't applied the indicated OECD acts.

2. Types of co-operation

- 2.1 *What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to the exchange of relevant information, the organisation and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc?*

Primarily, cooperation was exercised by means of information exchange and joint discussion of further investigative actions.

- 2.2 *How does the co-operation take place? For example, is it by telephone, email or through face to face meetings? How successful has the co-operation been? What aspects of co-operation have worked particularly well and what has been less successful?*

Cooperation is conducted by all means, including phone, e-mail, meetings, videoconferences, and the results are thus effective.

3. International vs regional co-operation

- 3.1 *Which competition authorities you co-operate with the most? How often do you co-operate? Do you co-operate more with authorities located geographically close-by?*

The closest cooperation is exercised with the FAS Russia and other states of Commonwealth of Independent States ("CIS"). Cooperation is exercised on the permanent basis, in accordance with Treaty on Implementation of Coordinated Antimonopoly Policy of CIS Member States ("CIS Treaty").

- 3.2 *Are you part of a regional competition network? If so, to what extent has this network assisted in the cartel investigations you have carried out?*

The Republic of Kazakhstan is a member of the CIS Treaty since 1993.

- 3.3 *If you are a new/young agency to what extent do you co-operate with your neighbouring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritise requests received from newer agencies?*

Even though Agency was found in 2008, it is an active member of International Competition Network ("ICN") and cooperates with all antimonopoly bodies of the CIS Member States, the ICN Member States, the OECD, as well as the antimonopoly bodies of the Organisation of Islamic Cooperation Member States.

For instance, for the purposes of training and experience exchange the Agency staff permanently cooperates with the OECD-GVH Regional Centre for Competition in Hungary. Similarly, with the aim of

experience exchange Agency delegation visited the Competition Commission of Singapore and the FAS Russia.

Furthermore, the Agency also invited the staff of Azerbaijan's State Service for Antimonopoly Policy and Protection of Consumers' Rights to training workshop in the Agency.

The Agency responds to all requests sent by the antimonopoly bodies of other states.

4. Identifying gaps and improving the current frameworks

- 4.1 *What are the current challenges faced by your competition authority in cartel investigations which have a cross-border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?*

Cooperation by virtue of interactions and information exchange will be continued within the framework of the current treaties.

- 4.2 *How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and/or intensity of coordination?*

This issue has not been encountered in practice.

- 4.3 *Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?*

There have not been such precedents.

5. Information Sharing

- 5.1 *What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?*

The Agency has not encountered any obstacles for information exchange with other states; cooperation is exercised by means of official correspondence, as well as during meetings.

- 5.2 *Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?*

On the basis of the information given by the FAS Russia, the Agency has detected anticompetitive agreements between national pharmaceutical companies related to sharing consumers of the sales market of scale inhibitors (IOMS-1), produced by Open JSC "Himprom", on the territory of the Republic of Kazakhstan, which led to limiting competition in the relevant market.

- 5.3 *Does your jurisdiction/agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?*

Pursuant to the Law of the Republic of Kazakhstan “On Competition” (“Law”), antimonopoly body of Kazakhstan has a right to make requests and receive information, including information composing commercial and other secrets protected by laws, in the manner prescribed by laws of the Republic of Kazakhstan, which is necessary for exercising its powers, including those for undertaking investigations of the violations of the antimonopoly legislation, provided by Law (subparagraph 18 of Art.39 and paragraph 3 of Art.64 of Law).

However, the staff of the antimonopoly body bears responsibility, prescribed by laws of the Republic of Kazakhstan, for disclosing information composing commercial, professional and other secrets protected by laws.

- 5.4 *What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?*

This issue has not been encountered in practice.

6. International co-operation within other policy areas

- 6.1 *Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?*

No such law enforcement areas are known.

KOREA

1. Overview of global cooperation against cartel

Cooperation mechanisms between anti-trust agencies against cross-border cartels can be categorized according to the following three criteria – i) the nature of the basic framework for such collaboration; ii) types of information to exchange; and iii) investigation phases.

First, according to the nature of its basic instrument, cooperation is classified as a formal type structured under legal provisions or agreements and an informal type formed without any formal instruments or agreement. Second, cooperation mechanisms could also vary depending upon the kinds of information exchanged - whether it is public/ confidential or agency information. Third, each investigation phase - the pre-investigatory phase, investigatory phase, and post-investigatory phase - involves different cooperative methods and scopes as well.

2. KFTC cooperation with other competition agencies

2.1 *Formal/Informal cooperation*

The KFTC has officially built cooperative ties with FTA signatories such as Chile, Singapore and EFTA having Competition Chapter; with the European Union under the intergovernmental agreement; and other nations such as Australia, Mexico, Canada, Russia, Rumania, CIS, and Turkey having agency-to-agency arrangements or Memorandums of Understanding.

In addition, the Commission has expanded its collaboration in line with the “OECD Recommendation concerning co-operation between member countries on anti-competitive practices affecting international trade”.

Informal cooperative structures without formal instrument are also pursued in parallel for more effective cartel investigation and enforcement. For example, Commission officials are telephoning, emailing or interviewing face-to-face with their counterparts in other country agencies to discuss issues from their ongoing investigations

2.2 *The Kinds of information exchanged in cooperation*

The KFTC has no legal ground or agreement authorizing confidential information exchange with other anti-trust agencies as of now. However, such data could be shared if an enterpriser who submitted amnesty/leniency application to at least two competition authorities gives a waiver allowing his/her data to be discussed, exchanged and shared.

2.3 *Investigation phase in cooperation*

In the pre-investigatory phase, preliminary information is exchanged and on-the-spot investigation plans are coordinated, etc. For example, in the investigations into the international air-cargo surcharge cartel as well as the CDT and CRT glass cartel cases, the KFTC conducted dawn-raids simultaneously with its foreign counterparts after consultations.

In the investigatory phase, competition authorities in different jurisdictions but dealing with the same cartel case discuss their prosecution progress and coordinate witness interview schedules with each other.

Immediately after on-spot investigations, related information is notified to the competition agency in the jurisdiction of the investigated. This is to inform the counterpart agency of any development that could affect its national interests, improving the predictability of situation and cooperative ties. The KFTC normally informs the name of its investigating divisions, companies under investigation, case title, ground for investigation, its process, relevant provisions of the Korea Fair Trade Act, etc.

3. Case examples of KFTC cooperation with other agencies

3.1 *International Air-Cargo Surcharge Cartel*

In February, 2006, the KFTC launched on-spot raids simultaneously with Country A and B after consulting with their officials in charge while maintaining information exchange to complete the case effectively in November, 2010.

In March, 2009, The Commission had interviews with Country B officials and discussed the cartel structure in Country B's international air cargo area, applicable laws and regulations, prosecution progress, etc.

In November, 2009, KFTC officials consulted with Country A officials via conference calls about legal issues regarding conflict of jurisdiction and prevention of double surcharge counting.

As the examination report was sent to the company in question, eleven different competition agencies having jurisdiction over the investigated were also notified of the report release in November, 2009.

3.2 *International Copy Paper Cartel*

The KFTC shared information with anti-trust agency officers in Country C which dealt with that same case at the same period of time and closed the case efficiently in December, 2008.

In April, 2007, the KFTC received documentaries from Country C's competition agency which submitted it to its national court. Based on these, the Commission investigated the firm's Korean branches and offices.

In July, 2007, the KFTC received a waiver from the self-informant allowing the exchange of every list and detail of the data he/she submitted originally to the Country C's agency for leniency.

In April, 2008, among the documents submitted to the Country C authority, any material the Commission failed to get was requested and analyzed.

In August, 2008, the Commission requested the self-informant's affidavit turned in to Country C as it was read in court and made public, then carried out further investigation focusing on the Korean market

In October, 2008, discussions went on with Country C officials about investigation progress; evidences; enforcement timing; possible impact of measures, if taken by one side, on the other's prosecution, etc.

3.3 *International CDT(Color Display Tube) Cartel*

In November, 2007, simultaneous and unannounced on-the-spot inspections were carried out in cooperation with Country A and B officials via coordination efforts in advance. With such a joint investigation, the KFTC was able to get the 2nd leniency applicant, who further helped facilitate KFTC investigation. In addition, other controversial issues were also discussed such as indirect sales and internal sales(captive sales) with officials in other jurisdictions.

3.4 *International CRT(Cathode Ray Tube) Glass Cartel*

In December 2011, The Commission investigated enterprises concerned simultaneously (Mar. 2009) via coordination with Country A officials beforehand, closing the case efficiently.

The KFTC notified the start of the investigation and its final results to the competition authority in the jurisdiction of the investigated. Other information was also shared such as possible investigation outcomes, and timing.

4. Conclusion

Formal and legal cooperative mechanisms should be in place to expand cooperation between competition agencies in cartel investigation. More essential aspect, however, is deemed to solidify trust-based network among jurisdictions. The KFTC has experienced itself how effective it was to communicate with other national anti-trust agencies in dealing with cross-border cartel cases.

Considering that, in cross-border cartel cases, the evidence required for conviction is scattered in different jurisdictions, competition authorities are expected to coordinate their dawn-raids simultaneously. Also, it will be a good solution if competition agencies obtain a waiver from self-informants permitting broader intelligence exchange.

In parallel with formal cooperation, the KFTC will further informal cooperation such as phone conversation, email exchange, and face-to-face meetings that are more helpful for actual case handling.

LITHUANIA

1. Existing tools for international co-operation

1.1 *Formal mechanisms*

The primary legal basis for the co-operation between the European Commission, national competition authorities of the Member States (known as the European Competition Network, “ECN”) and the Competition Council of the Republic of Lithuania (“the Competition Council”) is established in the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (“Regulation No 1/2003”). The Regulation No 1/2003 gives grounds for the assistance on carrying out particular investigative actions, such as exchange of information, exercise an inspection in the undertaking concerned and other actions necessary for the investigations of infringements of Articles 101 (prohibition of anti-competitive agreements) and 102 (prohibition of the abuse of dominance) of the Treaty on the Functioning of the European Union (“TFEU”). The Competition Council is a member of the ECN. It is also necessary to mention that the Regulation No 1/2003 establishes such clauses on co-operation that give power the Commission and the competition authorities of the Member States to consult and to provide one another with and use evidence any matter of fact or of law, including confidential information. Additionally, the requested agency may conduct dawn raid on behalf of the requesting national competition authority or the European Commission.

As to the international co-operation, the Law on Competition of the Republic of Lithuania indirectly foresees a right of other specialists and experts to participate in the investigations. Under Article 26 (1)(9), “The authorized officers of the Competition Council, carrying out investigations, shall have the right to enlist the assistance of specialists and experts”. Having regard to this article, it might be deemed that officials, experts and specialists from other countries, whose names are enlisted in the court authorization (the Law on Competition requires a court authorization in order to carry out the inspection) could take part in the inspection.

Moreover, the Competition Council has two bilateral agreements with the agency of the Republic of Kazakhstan for Competition Protection (Antimonopoly Agency) and Antimonopoly Committee of Ukraine.

The agreement with the agency of the Republic of Kazakhstan for Competition Protection was signed in 2010 and concerns mainly cooperation in the area of competition policy and law, such as sharing non-confidential information related to competition policy and law development. It also establishes internship possibilities, trainings and consultancy for the personnel of the Agency in the area of competition law and policy development. It is worth noting that the agreement with the Antimonopoly Agency is drawn in a rather general manner that does not establish any clear basis for co-operation on investigations in cartel cases.

The agreement on co-operation between the Competition Council of the Republic of Lithuania and Antimonopoly Committee of Ukraine is more detailed and contains clauses on both co-operation in the area of competition law and policy, trainings on sharing of experience, and assistance in carrying out investigations of anti-competitive behaviour. The clause on information exchange includes the ability to exchange information necessary for a successful co-operation in cartel investigations. Information being

exchanged includes documents of entities or their approved copies, references, explanations, reports, communications and other written documents needed for investigations to be properly carried out.

None of these bilateral co-operation agreements have so far been used in practice.

1.2 *Informal mechanisms*

The Competition Council has not yet extensively used informal mechanisms of co-operation, particularly in carrying international dawn-raids. The reason for this is that the co-operation in cartel investigation cases is rather formal by its very nature, in particular due to many legal formalities and other procedural issues. For example, during investigations many questions, regarding the protection of confidential and other collected information, its disposal, transmission and sharing, also many procedural questions on the mechanism of co-operation itself, on legitimacy of actions carried out in one country by the specialists of another country, etc. arise, which usually cannot be solved informally. Despite of this, the Competition Council has some experience of informal co-operation too. It should be stressed, however, that any informal cooperation is carried out in compliance with the obligation to protect confidential information and other procedural rules, ensuring legitimacy of the investigations.

Participation of experts of the Competition Council in various working groups and workshops is one of the informal mechanisms for co-operation in cartel investigation cases. For example, experts of the Anti-competitive Agreements Division of the Competition Council regularly attend discussions of the ICN Cartel Working Group and European Competition Network (the “ECN”). While the nature of the discussions varies a lot, some of the most relevant ones include bid rigging, its detection, prevention, etc. Specialists of the Competition Council have also participated in other similar ECN and international projects which substantially contributed to the quality of the investigation of cartel cases, i.e. participation in Forensic IT project which deals with forensic IT tools used in investigations and dawn-raids. Participation in the ECN meetings, trainings, communication with its members might be deemed as other informal means of co-operation in investigating cartel cases.

Moreover, sometimes investigations of anti-competitive behaviour could be initiated due to an informal co-operation as well. For instance, the Competition Council initiated its investigation after receiving some specific non-formal information regarding particular industry sector and problems occurring therein, from another competition authority from a Member State. Similarly, the Competition Council itself is also spotlighting some issues that could be interesting to other competition authorities.

Finally, although it was mentioned, that due to the nature of cartel investigations, most of procedures related with it are formal, it also must be pointed that a lot of preparatory work of the co-operation with another institution in cartel investigations is carried out in an informal manner. For example, the time and date, or other circumstantial details of international dawn-raid are usually arranged through informal inter-institutional communication.

1.3 *The use of OECD instruments*

The following OECD instruments have been applied by the Competition Council in the year 2010.

- Policy Roundtables – Cartel Sanctions, Direct Settlements, Prosecuting Cartels;
- Reports on Hard-Core Cartels;
- Best Practices on Information Sharing in Cartel Investigations;

- Policy Briefs – Prosecuting Cartels without Direct Evidence, Fighting Cartels in Public Procurement, Using Leniency to Fight Hard Core Cartels;

These documents were used to focus cartel investigations. It should be noted that the number of complex cartel cases with indirect evidence has been rising in Lithuania recently, thus, the Competition Council applied OECD instruments which played an essential guiding role and were applied to support some investigations. Secondly, the amount of investigations regarding cartels in public procurement has also increased, therefore, the OECD instruments, opinions, discussions and experience provided by other countries concerning investigations of cartels in public procurement are considered to be very useful when carrying out investigations.

- Policy Roundtables on Market Studies and sector overview were used with the aim to better understand relevant markets and industries. It was, particularly, helpful in handling cases and conducting market researches.

2. Types of co-operation

During its experience with cartel investigations the Competition Council has requested for and received various types of co-operation from other competition agencies, grounding such co-operation on the provisions of the abovementioned Regulation No. 1/2003, as well as co-operating and communicating informally.

The Competition Council assisted in the dawn-raids that were carried out in the Republic of Lithuania on behalf of the Latvian Competition Authority and by the European Commission in their cartel cases investigations. Moreover, experts of the Latvian Competition Authority have assisted the Lithuanian Competition Council by carrying out dawn-raids in Latvia in a case where the undertakings were suspected of behaving anti-competitively both in Lithuania and in Latvia. Although this case concerned abuse of dominant position, co-operation with the Latvian Competition Authority was nevertheless successful and efficient and contributed to the strengthening of mutual institutional collaboration. In another case, Lithuanian Competition Authority experts were assisted by Latvian colleagues in a dawn-raid carried out in Latvia with experts of both institutions participating.

Besides co-operation in dawn-raids, the Competition Council also requested (and was requested itself) for advisory co-operation, especially through the use of requests for information (the “RFI”) of the ECN. RFIs are very useful in many different aspects of cartel investigations, this network enables all the EU competition authorities and the European Commission to share and discuss their experience, give advice and ideas on various topics and problematic issues. There is no limitation on the diversity of topics that can be discussed through the ECN by the RFIs, therefore both substantive issues (like market definition or theory of harm) and procedural aspects (like imposition of fines or disclosure of information, etc.) of the cases can be shared. However, it also must be stressed that the ECN and, more precisely, the RFIs are not intended to be used for exchanging data of particular cases, it is virtually designated to share opinions and/or information of a rather general nature. For information on sharing the data of particular cases, please see Section 5 below.

Usually the co-operation of the Competition Council with other competition authorities takes place in writing in paper or by e-mails. However, sometimes telephone calls can also be made or various issues can be discussed during regional or international meetings.

3. International vs. regional co-operation

The Competition Council principally collaborates with all ECN members (particularly in cases of RFI). In the view of co-operation with specific national competition authority, taking into account the fact that until now the Competition Council has carried out cross-border investigations only with the Latvian Competition Authority and having regard to the frequency of other types of assistance with this agency; it should be deemed that the Competition Council collaborates with Latvian competition authority the most. This phenomenon could be explained by the fact that undertakings which engage in cross-border economic activity usually do it in the region of the Baltic States (typically in Lithuania and Latvia).

As to the cooperation with other authorities, the Competition Council co-operates more with authorities of the adjacent countries compared to countries further away from Lithuania. However, the frequency of co-operation with other countries is hard to define since the Competition Council collaborates every time when it is necessary or receives a request from other national competition authority.

3.1 Regional co-operation

As it was already mentioned above, since the Competition Council is a part of the ECN, the co-operation with the members of this regional network includes various types of assistance necessary to properly exercise the investigations relating to cross-border infringements. It is worth noting that the Competition Council has assisted not only the national competition authorities but also the European Commission: there were two dawn raids exercised in the Republic of Lithuania jointly with the European Commission.

Moreover, in the context of regional co-operation, there are annual conferences organized by the neighbouring countries in the region of the Baltic Sea. The aim of these meetings is to share information and experiences obtained in practice of each of the authorities. The participant states are usually Lithuania, Poland, Latvia, Estonia, Sweden and Finland, with other authorities participating as guests of the conference at times.

3.2 Co-operation with newer agencies

In order to answer if the Competition Council is a mature or newer agency, the facts that Lithuania is a part of the EU and the existence of compliance of Lithuanian competition rules with the EU competition legal order, also the practice of the Court of Justice of the European Union is being applied by Lithuanian institutions and the national courts should be taken into account. Besides, since the Competition Council shares its experience with other agencies from third countries, it might be deemed to be a mature agency.

It is necessary to note that the Competition Council jointly with the German Federal Ministry of Economics and Technology is currently implementing the EU Twinning Project “Strengthening the Enforcement of Competition and State Aid Legislation in Armenia”. Under the auspices of this program, the Competition Council analyses Armenian competition cases and legislation. Additionally, in the beginning of November 2011, the Competition Council organised training sessions for the delegation from the State Commission for the Protection of Economic Competition of the Republic of Armenia. During the training week, the staff of the Lithuanian Competition Council presented the national legislations and its application, as well the peculiarities of the co-operation inside the Competition Council between separate divisions.

Furthermore, there were internships and trainings arranged for the employees of national competition authorities from Ukraine and Kazakhstan.

4. Identifying gaps and improving the current frameworks

As mentioned above, the Competition Council has not yet had much practice in international or regional co-operation regarding investigation of particular cartel cases, so it is difficult to point what are the main challenges we are facing. Until now, there have been no procedural issues during co-operation in dawn-raids. However, one of the substantial issue arising during co-operation of cartel investigations is the insufficient amount of relevant information on a particular case. The situation might have resulted from the fact that the Competition Council was only an assisting authority and did not carry out the investigation itself, therefore, it had only the key information and facts of the particular case and, consequently, any specific knowledge on the details of the case was lacking. Therefore, during the dawn-raids carried out by the Competition Council in Lithuania on behalf of another national competition authority, some details and/or circumstantial evidence might be overlooked. In order to avoid this problem, an expert of the initiating competition authority could be designated in more international dawn-raids who could settle such situations, when questions about the relevance of evidence arise.

Due to the same reason low number of instances of practical application of international co-operation in cartel investigation cases, the Competition Council has not so far had any experience concerning different types of liability in competition cases involved.

As to the co-operation with experts of the European Commission, it should be noted that no problems arose during the dawn-raids, carried together with the Commission in Lithuania. First of all, the reason for this was that all dawn-raids of the Commission were carried out according to the provision of Regulation No. 1/2003, so naturally there were no contradictions with national proceedings. Secondly, national proceedings in competition cases in Lithuania are basically in conformity with the Regulation No. 1/2003. This is due to the fact that prior to the accession of Lithuania to the EU Lithuania had to ensure that its legislation was in compliance with the EU Regulations and laws, and, particularly, to ensure that the practice of application of national laws in this field shall be consistent with the application of the EU law.

5. Information sharing

In all cases of co-operation in cartel investigations, the Competition Council has only collaborated with competition authorities that apply European Union rules on information sharing in competition law cases, i.e. the European Commission and Latvian Competition Authority. Therefore, all the questions that arose or could have arisen as regards the sharing and use of information, gathered during international co-operation, were handled in conformity with Regulation No. 1/2003 Article 12, which reflects the principle of mutual recognition of Member States.

This article provides that for the purpose of applying Articles 101 (prohibits anti-competitive agreements) and 102 (prohibits abuse of dominant position) of the TFEU the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. According to the rules, information exchanged shall only be used in evidence for the purpose of applying Article 101 or Article 102 of the TFEU and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to EU competition law and does not lead to a different outcome, information exchanged under this article may also be used for the application of national competition law. It should also be mentioned that in some circumstances information, shared in conformity with the requirements of this article, can be used against natural persons.

Talking about practical enforcement of the information sharing issue, it should be mentioned that in the case when the Competition Council carried out a dawn-raid in Lithuania on behalf of the Latvian

Competition Authority, the Lithuanian Competition Council was responsible to ensure safe and confidential transportation of the collected data to the Latvian Competition authority. This duty is derived from the Regulation No. 1/2003. However, if the information shared does not fall within the scope of application of the Regulation No. 1/2003, then, according to the Law on Competition of the Republic of Lithuania, article 22, the Competition Council would not have any other legal basis for disclosing of and sharing confidential information.

As to the sharing of information that has been received as a leniency application, the Law on Competition of the Republic of Lithuania does not have a direct provision regulating this issue. Moreover, the practice of all Member States of the EU is also divergent and not harmonized.

6. International co-operation within other policy areas

Considering international co-operation within other policy areas and taking into account the fact that the Competition Council has modest experience in international investigations, the Competition Council is, however, not aware if other law enforcement areas face any specific challenges or problems in international co-operation as those faced by competition authorities in cross-border cartel cases.

Additionally, until now the Competition Council has not had yet any special discussions with other regulatory authorities on common problems that the institutions are facing in international co-operation.

NEW ZEALAND

1. Purpose

The purpose of this paper is to summarise the New Zealand Commerce Commission's (NZCC) experiences of international cooperation in cartel investigations.

2. Introduction

The paper considers various issues relating to international cooperation, following the OECD suggested topic headings:

- Existing tools for international cooperation
- Types of cooperation
- International vs regional cooperation
- Identifying gaps and improving the current frameworks
- Information sharing

3. Key points

- The NZCC has a number of tools for international cooperation. In our view it is best to have a mix of both formal and informal cooperation between agencies.
- We cooperate with other agencies in a number of ways. These include the exchange of information and ideas, and the provision of assistance with investigations and/or litigation.
- We have a high level of cooperation with the Australian Competition and Consumer Commission (ACCC), as Australia is our closest neighbour geographically.
- We have not had an instance where a cartel investigation could have benefited from information or cooperation from a foreign competition agency but we did not receive any assistance. However, there are some improvements that could be made to existing cooperation frameworks.
- The key issue in information sharing is the concern of the investigated party about its information getting into the public domain (and potentially being used against it in any litigation).

4. Existing tools for international cooperation

The NZCC has a number of tools for international cooperation, both formal and informal.

As the majority of our current cartel cases involve conduct by offshore participants (that has affected a market(s) in New Zealand), we actively seek out cooperation with other agencies worldwide. In particular we have a high level of cooperation with the ACCC.

In our view it is best to have a mix of both formal and informal cooperation between agencies, as is the case between the NZCC and the ACCC (detailed below).

Formal mechanisms can provide greater clarity of process and certainty. However, formal mechanisms may take longer or require a certain level of government hierarchy to become involved in any decision to give assistance.

In our experience, where there is good faith between agencies it is possible to have a mutually beneficial relationship based on informal communication. These relationships are often started and fostered at ICN or OECD cartel events.

Set out below are our main formal and informal tools.

4.1 Formal tools

4.1.1 Cooperation with Australia

New Zealand and Australia have a long history of cooperation. The two countries have been working together since 1983 to ensure harmonisation of our trade laws, including competition legislation.¹ Select Committees will take trans-Tasman harmonisation into account when reviewing Bills to be passed into law. The Courts will consider the trans-Tasman implications when interpreting legislation.

There are currently two formal agreements between New Zealand and Australian authorities:

- ACCC and NZCC Cooperation Agreement 2007
- Memorandum of Understanding between the Government of Australia and the Government of New Zealand on Coordination of Business Law

The 'ACCC and NZCC Cooperation Agreement 2007'² provides the framework for cooperation between the two agencies. The 2007 version replaces an earlier agreement signed in 1994.

Under that agreement:

- The NZCC and the ACCC have committed to "provide careful consideration to each other's important interests in the application of their competition, consumer and regulatory functions".
- The agencies agree that it is in their common interest to share information, evidence and documentation (including information on investigations).
- The exchange of general information such as research, speeches and compliance or education programmes is provided for, but not case specific information.

¹ Formalised in the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), more commonly known as Closer Economic Relations (CER) 1983

² Found at <http://www.comcom.govt.nz/international-relations/>

- Any confidential information must be protected, and “no information will be exchanged pursuant to this arrangement which would not be exchanged absent this arrangement.”
- There is provision for regular meetings between the agencies.
- Each agency will notify the other where an investigation is relevant to a particular agency, where one agency is proposing to seek information in the other agency’s jurisdiction, or where one agency is seeking to enforce remedies in that other agency’s jurisdiction.
- There is a framework for co-ordinating enforcement activities.

The ‘Memorandum of Understanding (MOU) between the Government of Australia and the Government of New Zealand on Coordination of Business Law’ provides for coordination between Australia and New Zealand on business law issues. It expressly recognises coordination and cooperation between the two countries in respect of competition laws enforced by the NZCC and the ACCC.³

There are also a number of legislative provisions that are relevant to the relationship between the NZCC and the ACCC:

- Mutual Assistance in Business Regulation Act 1992 (Cth) (MABRA)
- Section 155AAA Trade Practices Act 1974
- Mutual Assistance in Criminal Matters Act 1992 (MACMA)
- Trans Tasman Proceedings Act 2010

4.1.2 *Mutual Assistance in Business Regulation Act 1992 (Cth) (MABRA)*

This Act passed by the Australian Government allows business regulators (including the ACCC) to assist the NZCC with evidence gathering, such as enforcing production notices. However, it does not allow the business regulator to release information to us.

Under MABRA the NZCC makes a formal request for assistance, which is then considered by the ACCC and referred to the Australian Government. The Attorney General will then authorise the assistance if it is in Australia’s best interests and consistent with international law and comity. The available assistance can include compelling the production of documents and requiring a person to give oral evidence.⁴

4.1.3 *Section 155AAA Trade Practices Act 1974*⁵

The Australian “Trade Practices Act 1974”⁶ was amended in 2007 to give the ACCC discretionary powers to share information (with few barriers) with any international enforcement agency, including the NZCC.

³ Available online at: http://www.med.govt.nz/templates/MultipageDocumentTOC____43982.aspx

⁴ Reciprocal legislation to the MABRA is currently before the New Zealand Parliament, the Commerce Commission (International Cooperation and Fees) Bill 2008; which is discussed further below.

⁵ Inserted into the then Trade Practices Act 1974 in 2007

The amendment remedies what happened in the 2005 Koppers Arch wood chemicals cartel case, in which the NZCC and the ACCC brought parallel proceedings. In that case, some ad hoc assistance was given by the ACCC and the NZCC to each other's investigation, but issues of confidentiality stopped us from being able to share anything meaningful or assist each other with information gathering. Some witnesses agreed to waive confidentiality so that the agencies could transfer information, but the agencies' enabling arrangements did not then permit it.

Section 155AAA has been utilised on several occasions by the NZCC. A recent example of this was in an Air Ambulance cartel investigation in late 2010. Both countries had begun similar investigations, and the NZCC was interested in obtaining the confidential interview transcripts of some common witnesses.

The NZCC officially requested and obtained the transcripts under s 155AAA. The ACCC specified conditions on the disclosure of any information from these transcripts during our investigation, which the NZCC agreed to in the form of a signed undertaking.

4.1.4 *Mutual Assistance in Criminal Matters Act 1992 (MACMA)* ⁷

This Act enables the New Zealand Government to authorise the NZCC to take steps in support of enforcing criminal investigations on behalf of overseas agencies. Steps taken may be such things as locating persons, taking evidence or obtaining document production orders. While New Zealand currently does not have criminal sanctions for cartels, the Act allows us to provide assistance to those jurisdictions that do.⁸

4.1.5 *Trans Tasman Proceedings Act 2010*

In relation to enforcement, in 2008 Australia and New Zealand signed a treaty (the Trans Tasman Treaty on Court Proceedings and Regulatory Enforcement) under which both countries committed to introducing legislation to minimise impediments to trans-Tasman enforcement. In line with the Treaty, the New Zealand Parliament has now enacted the Trans Tasman Proceedings Act 2010. When an Order in Council is made bringing this Act into force, the Act will allow for the enforcement in Australia of New Zealand-ordered injunctions and civil pecuniary penalty orders (which are currently imposed on cartels), and for the service in Australia of civil proceedings initiated in New Zealand.⁹

4.1.6 *Cooperation with other countries*

New Zealand, together with Australia, also has formal agreements for cooperation with Canada, the UK and Taiwan.¹⁰ These formal cooperation agreements provide for:

⁶ Now the Competition and Consumer Act 2010.

⁷ Australia has a reciprocal Mutual Assistance in Criminal Matters Act 1987.

⁸ Legislation has been introduced to criminalise cartel conduct in New Zealand – see the Commerce (Cartels and other matters) Amendment Bill 2011.

⁹ This is also reciprocated in accordance with the Australian Foreign Judgments Act 1991 (Cth), with some limitations.

¹⁰ The ACCC, NZCC, and Taiwan Fair Trade Commission- Cooperation Arrangement 2002, the ACCC, NZCC, and OFT - Cooperation Arrangement: Application of Competition and Consumer Laws 2003, and the Canadian Competition Commissioner, ACCC and NZCC – Cooperation Arrangement: Application of Competition and Consumer Laws. Copies of these agreements listed below can be found at: <http://www.comcom.govt.nz/international-relations/>

- exchange of information, documents, research and guidance
- an agreement to keep information confidential, as far as possible
- exchange of staff
- regular meetings to discuss enforcement activity and to exchange information and ideas.

These agreements are based on the cooperation agreement between the ACCC and the NZCC. They provide for general information exchange but do not allow New Zealand to disclose compulsorily acquired information or any information that is confidential.

New Zealand's Parliament is shortly expected to enact legislation which will enable the NZCC to use its powers on behalf of other international agencies. This is discussed in more detail at paragraphs 55 to 61 below.

4.2 *Informal tools*

The NZCC also has informal tools to discuss cartel investigations and litigation between agencies.

Investigators have their own contacts in other agencies and will contact these on an ad hoc basis.

In addition, we have informal arrangements with different agencies for regular telephone conferences with officials of the Australian, Singaporean, Canadian, European and US agencies.

4.2.1 *OECD and ICN*

In our view, both the OECD and ICN play an important role in international cooperation. As noted above, we find participation in OECD and ICN events useful for fostering good relationships with other agencies.

We find OECD papers and publications to be extremely useful. In particular they enable us to avoid “reinventing the wheel” when creating process guidelines and carrying out cartel investigations. In our cooperation agreements with other agencies, the NZCC and other parties acknowledge the OECD recommendations and guidelines.¹¹

The NZCC follows international best practice in cartel enforcement wherever possible, with reference to OECD and ICN resources. For example the current proposed Bill to criminalise cartels adopts the OECD definitions of “hard core cartel” offences. We also recently updated our leniency policy to take into account international best practice, such as having a marker system.

5. *Types of cooperation*

Cooperation between the NZCC and other agencies usually takes place by telephone and email. Face to face meetings are unlikely given the distance of New Zealand from most agencies.

The types of cooperation that the NZCC requests from other agencies are:

¹¹ For example, see Cooperation Agreement between ACCC and NZ CC 2007 Found at <http://www.comcom.govt.nz/international-relations/>

- Assistance with investigations – information gathering, interviewing witnesses and coordinated search warrants.
- Exchange of information and ideas, either formally or informally. This may involve discussions of the theory of the case in a particular investigation or at the litigation stage. It may also involve intelligence sharing about potential investigations.
- Provision of information, whether compulsorily or voluntarily supplied.
- Assistance with enforcement of civil penalties in other jurisdictions.

We have requested information or assistance at various stages of an investigation or litigation. We generally receive the assistance requested, unless that particular agency's country does not have enabling legislation allowing it to share certain information. For example, not all countries allow the release of compulsorily acquired information, although many do.

Many investigation teams have semi-regular conversations with other agencies about specific investigations. And, as stated above, we have regular informal catch ups with various agencies about general matters.

Even at the litigation stage, the NZCC receives helpful cooperation from other agencies. An example is one international cartel case, where the NZ CC 's investigators were in close contact with the US Department of Justice (DOJ) as the agencies shared a mutual immunity applicant and had prioritised the same potential defendants. The DOJ and the NZCC took part in fortnightly discussions about the agencies' approaches to settlement and the way each was calculating commercial gain in order to determine penalty. Both the DOJ and NZCC filed at the same time with the courts in their respective jurisdictions and settled with the same parties at the same time.

We consider that co-ordination of litigation has been very successful. In particular it has been useful to assist with determining the theory of the case in a particularly complex investigation.

On the other hand, the exchange of information is sometimes problematic. Some agencies can be reluctant to release confidential leniency information because it may later be subject to the discovery process, exposing the leniency applicant to third party litigation overseas.

6. International vs regional cooperation

The NZCC cooperates most often with the ACCC, as Australia is our closest neighbour geographically. This is followed by the Canadian Competition Bureau, the Competition Commission of Singapore, the European Commission (EC) and the DOJ.

Conference calls are held monthly with the ACCC, every two months with Singapore, and quarterly with Canada. The EC and DOJ are contacted on a case by case basis. We also have occasional contact with the Japan Fair Trade Commission, Bundeskartellamt, and the Brazilian and Chilean agencies.

We are not part of any formal regional network but have an informal network with Singapore and Australia, with who we are in regular contact.

The NZCC often cooperates with multiple agencies in relation to one cartel investigation. For example, in the Air Cargo case, the NZCC was assisted by the ACCC, the Canadian Competition Bureau, the South African Competition Commission, the EC and the DOJ.

7. Identifying gaps and improving the current frameworks

The NZCC is pleased to report that we have not yet had an instance where a cartel investigation could have benefited from information or cooperation from a foreign competition agency but we did not receive any assistance.

However, the following improvements could be made to the existing frameworks:

- increased ability to obtain evidence from other jurisdictions
- more jurisdictions enacting reciprocal information sharing legislation and entering into treaties
- streamlined tools for cooperation

These suggested improvements are discussed in more detail below.

The NZCC's biggest challenge in investigating global cartels is our lack of ability to obtain evidence from a party overseas unless they cooperate. Any notice we send requiring information cannot be enforced overseas; therefore we are essentially requesting a voluntary reply. We often have to rely completely on a leniency applicant to provide full information. This could be mitigated if it were possible to obtain evidence from other jurisdictions.

The current international cooperation system for cartels could be improved by ensuring more jurisdictions enact reciprocal information sharing legislation, and enter into treaties which provide for such legislation.

Finally, international cooperation could be improved by streamlining tools for cooperation. For example, with international leniency applicants, a standard waiver letter used by all jurisdictions would be more efficient than agencies each having to negotiate the terms each time. Markers or immunity being granted on a multi-jurisdictional basis is another possibility, although this would also depend on each agency's prioritisation of investigations.

We note that although we have yet to encounter any issues, there is potential for conflict to arise due to the fact that in New Zealand the cartel offence still only attracts civil liability. If a criminal jurisdiction was requesting information or evidence from us in relation to a cartel investigation we would need to keep in mind the different evidential requirements, as well as certain privileges, such as the privilege against self-incrimination.

8. Information sharing

The main barrier to information sharing that the NZCC has encountered when requesting information from another jurisdiction is concern from the party providing the information about how that information will be used in the future.

The key issue is that parties who provide information to agencies are typically unwilling to agree to further disclosure, as they are concerned about the information finding its way into the public domain (and potentially being used against them in any litigation). This can be addressed, at least in part, by the possibility of negotiating a 'limited waiver' which allows the other jurisdiction to control how the information is then used once received.

Once information is disclosed outside the initial agency a large measure of control is lost, even if the recipient agency agrees to treat the information as confidential. Different jurisdictions have different rules

on disclosure and/or discovery. It may therefore be much easier for the owner of information to resist disclosure in some jurisdictions than others. Further, a person may be able to bring proceedings to prevent disclosure in New Zealand or make submissions on disclosure to the ombudsman, but this may not be an option or may be difficult in other jurisdictions. Therefore parties are often resistant to the NZCC sharing their information with overseas agencies.

The NZCC often requests waivers from a leniency applicant to receive information from other agencies that they have applied to. Waivers are an important part of any investigation as they streamline the information sharing process. We often have to negotiate extensively on the terms of the waiver, and ensure that the information is dealt with appropriately after it's received.

The new Commerce Commission (International Cooperation and Fees) Bill 2008 (the Bill) described below, is intended to make it easier for NZCC to share information with other agencies and for agencies with which we have a cooperation agreement to share information with us.

The NZCC takes into account international trade concerns when disclosing information, and the Bill provides that we will consult with the New Zealand Ministry of Foreign Affairs and Trade in some circumstances, before responding to a request.

8.1 *The Commerce Commission (International Cooperation and Fees) Bill 2008*

New Zealand's Parliament is shortly expected to enact legislation which will enable the NZCC to use its powers on behalf of other international agencies. The Bill authorises the Commerce Commission to assist and be assisted by "recognised overseas regulators" which are defined as agencies with which the NZCC has entered into a cooperation agreement.

This Bill has as its stated purpose:

... to authorise the Commerce Commission **to assist and be assisted** by equivalent overseas regulators.

The Bill's primary focus is better information sharing across all jurisdictions, but it is likely that this will be used in relation to the ACCC most often.¹²

The Bill will give the NZCC a similar power to provide investigative assistance to overseas regulators, including carrying out search warrants and enforcing information notices. It will also enable us to share information sharing with recognised overseas agencies.

The Bill applies to compulsorily acquired information only (ie warrant, compulsory interview, notices). It will not affect our ability to share voluntarily provided or public information.

A "recognised overseas regulator" will be able to request any compulsorily acquired information that the Commission holds. Regulators that fall within that definition are overseas bodies that have competition law functions corresponding to those of the NZCC, and have a cooperation arrangement with the NZCC.

The Bill envisages that the conditions upon which the information is provided will be set out in each respective cooperation arrangement.

¹² The Bill and explanatory materials can be found on the internet at http://www.legislation.govt.nz/bill/government/2008/0293/latest/DLM3379900.html?search=ts_bill_Commerce_resel&p=1&sr=1

THE NORDIC CARTEL NETWORK: A REGIONAL MODEL FOR COOPERATION BETWEEN CARTEL UNITS OF COMPETITION AUTHORITIES

*Joint contribution by Denmark, the Faroe Islands, Finland,
Greenland, Iceland, Norway and Sweden*

The Nordic Competition Authorities established in 2000 a model for cooperation between their respective units for cartel investigation, the Nordic Cartel Network (NCN). The purpose of the cooperation was solely practical: Discussing cases and case collaboration, investigating techniques and other cartel and investigation issues of mutual interest. The model has required very limited administrative resources. This paper gives a brief overview of the cooperation model, its organization and recent developments.

1. Origins

The NCN traces its origins to an informal meeting in Copenhagen in 2000 between the cartel units from the Nordic Competition Authorities. The purpose of the meeting was to discuss cases and the potential for further collaboration.

It should be noted whereas Denmark, Finland and Sweden are members of the European Union (EU), the remaining countries have different legal agreements with the EU. A formal agreement on the exchange of confidential competition related information exists between the authorities of Denmark, Iceland, Norway and Sweden.

2. Organization model

Since the founding meeting in 2000 the NCN has followed a pattern where the designated contact persons in the respective countries (1 - 3 persons from each country) meet once a year in a lunch-to-lunch meeting with rotating hosts. The meetings include representatives from Denmark, Faroe Islands, Finland, Iceland, Norway, Sweden, and, from 2010, Greenland.

The meetings follow a regular pattern with review of cases from the past twelve months, ongoing cases and forward plans. Experiences with cases, project management, investigating techniques, IT-forensics, etc., are discussed in detail and candor, and two or three topics of current interest are usually presented with prepared contributions.

The NCN has made an important contribution to the low threshold in cartel cases and cartel matters in getting in touch and obtaining assistance and advice from colleagues in other Nordic countries, on a bi- or multilateral basis. Important factors enabling this are:

- The Nordic Countries have many cultural similarities
- The Nordic business communities also have many similarities, i.e. large international companies often have a common Nordic office situated in one of the Nordic capitals
- The competition legislations of the Nordic countries are mostly based on EU-legislation and have many similarities

- Many common investigating techniques and challenges
- Low turnover of many of the contact persons, thus enabling a large degree of "corporate and cooperation memory"

Members of the NCN will often confer on a bi- or multilateral basis with Nordic colleagues prior to making investigations in a business with possible links to other Nordic countries. The contact persons will also routinely notice each other shortly before a coming dawn-raid.

3. Recent developments and future

Since the founding of the NCN in 2000 the cooperation within the network has increased and become even more intense over the recent years. The cartels units in each Nordic country are for example instructed to always evaluate if there is a Nordic dimension in a national case. The increased early information exchange between the Nordic Competition Authorities also enables coordination of different investigative measures and decreases the risk of under enforcement in each country.

As already mentioned the members of the whole network meet at least once a year but the interaction has been intensified over the last year when multilateral telephone conferences twice a year between all participating countries have been introduced. The telephone conferences enable the members to keep each other more updated regarding plans and national cases that could be of interest for the other countries between the yearly meetings. The use of and the frequency of the telephone conferences should however be evaluated after two years according to an agreement between the Nordic Director Generals in 2010.

Apart from the multilateral meetings and telephone conferences there have also been both bilateral and trilateral meetings in specific cases. These meetings have shown to be especially fruitful if the suspected companies operate in more than one Nordic country. A joint leniency case between Sweden and Norway is also an example of a more case oriented cooperation although the cooperation between the Nordic countries also enhances exchanges of views regarding different investigative techniques like for example IT-forensics.

Some of the Nordic countries like Finland, Sweden and Denmark are members of the ECN and can via the legal basis of the EU Council Regulation 1/2003 of 16 December 2002 conduct investigative measures on behalf of other member states. Since the regulation came in to force 1 May 2004 especially the Swedish and Danish authorities have assisted each other in numerous inspections and written requests for information. As regards Sweden such assistance to the Danish Authority stands for a majority of the investigative measures taken for other EU Competition Authorities under Regulation 1/2003.

Many of the contact persons have worked together for many years as members of the NCN. During their cooperation within the network the members have built up a mutual trust between the authorities. This has proven invaluable in the exchanging of important, confidential and sensitive information which has been beneficial to each of the authorities. On these grounds alone it is likely that the cooperation within the NCN will continue for the foreseeable future.

PERU

1. Existing tools for international co-operation

1.1 Please identify any formal mechanisms and/or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of a competition authority from another jurisdiction?

In recent years, the Peruvian National Institute for the Defense of Competition and Protection of Intellectual Property Rights (Indecopi) has greatly improved its relations with antitrust authorities abroad by signing Inter-institutional Cooperation Agreements (ICA) and by incorporating to regional or international cooperation associations. In particular, between 2007 and 2011 Indecopi has signed ICAs with competition agencies from Chile, Colombia, Costa Rica, El Salvador and Panama¹.

ICAs are written agreements between Indecopi and a foreign peer aimed at creating a mutual relation involving three main activities:

- Information exchange; including the commitment to absolve queries about the ways their respective competition laws are enforced and to send relevant documents like resolutions, decisions, technical reports, guidelines, directives, etc.
- Enforcement activities of competition laws; including the possibility to coordinate and collaborate with their enforcement activities and the commitment to notify the other party about the enforcement activities that could have an effect on their interests.
- Technical assistance; allowing each party to benefit from the experiences of the other party, including the possibility of meetings, conferences, seminars, courses, workshops, visits and internships, etc.

These activities are carried out in harmony with each party's respective legal systems and according to their financial possibilities. Any information exchanged is considered as delivered in a confidential manner and if any information has been declared as confidential (like personal information or trade or industrial secrets), the owner of such information must first authorize its delivery to the other party.

Also, in 2009 Indecopi signed a Memorandum of Understanding (MOU) with the United Nations Conference on Trade and Development (UNCTAD) and the Swiss Secretariat for Economic Affairs (SECO) in order to continue the development of the Program for Competition and Consumer Protection Policies for Latin America (COMPAL).

¹ The agreements were signed with Fiscalía Nacional Económica (FNE), Superintendencia de Industria y Comercio (SIC), Ministerio de Economía, Industria y Comercio (MEIC), Superintendencia de Competencia (SC) and Autoridad de Protección al Consumidor y Defensa de la Competencia (ACODECO), respectively.

In addition, Indecopi is part of the Inter-American Competition Alliance and the International Competition Network (ICN). Also, within the framework of trade or integration agreements signed by Peru, Indecopi is responsible for coordinating and cooperating with competition authorities from the other parties of such agreements. Peru has signed trade agreements with the Andean Community, Canada, Chile, the European Union, Japan, México, South Korea and the United States of America, among others.

Nevertheless, Indecopi has not yet had the opportunity to apply the provisions of these agreements into specific investigations and to effectively engage in cooperation activities to enforce its competition law with competition agencies abroad.

1.2 Please describe the informal mechanisms your competition authority has in place for co-operating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections/dawn raids in conjunction with another competition authority?

Indecopi has not yet conducted joint inspections or dawn raids in conjunction with another competition authority. However, Indecopi has a Technical Cooperation Department that has been specifically established to create bonds with other agencies in the pursuit of joint purposes. In this regard, Indecopi is fully committed with the creation of bonds with competition authorities abroad.

1.3 To what extent have you used OECD instruments, e.g. the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and the 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, in your investigations? For what purpose were they used and how helpful were they?

Indecopi has used those OECD instruments as a reference to elaborate its ICAs and as an element to be considered in the negotiations of trade agreements.

2. Types of co-operation

2.1 What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to the exchange of relevant information, the organisation and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc?

Indecopi has not yet conducted a joint cartel investigation or related activities like joint dawn raids or the discussion of market definition, fines, corrective measures or other substantive issues. Indecopi expects to have the opportunity to engage in these activities in the near future.

3. International vs. regional co-operation

3.1 Which competition authorities you co-operate with the most? How often do you co-operate? Do you co-operate more with authorities located geographically close-by?

Indecopi is currently developing bonds primarily with other competition agencies in America, but is also willing to engage in negotiations with countries from other continents. Indecopi expects to engage in cooperation activities with other countries independently of their geographic location.

3.2 *Are you part of a regional competition network? If so, to what extent has this network assisted in the cartel investigations you have carried out?*

Indeed, Indecopi is part of Inter-American Competition Alliance along with Argentina, Barbados, Brazil, Canada, Chile, Colombia, the Caribbean Community, Costa Rica, Ecuador, El Salvador, the United States of America, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

The Alliance is an initiative from the Mexican competition authority, the Federal Competition Commission (CFC), “aimed at addressing competition enforcement and fostering cooperation among agencies within the hemisphere”². The Alliance has started its activities by having monthly discussions via conference calls. Nevertheless, Indecopi has not yet had the opportunity to engage in cartel investigations within the frame of the Alliance.

3.3 *If you are a new/young agency to what extent do you co-operate with your neighbouring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritise requests received from newer agencies?*

As a relatively young agency, Indecopi is currently developing bonds with other competition agencies and expects to engage in cooperation in the near future. No significant activity of cooperation has been conducted yet.

4. Identifying gaps and improving the current frameworks

4.1 *What are the current challenges faced by your competition authority in cartel investigations which have a cross-border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?*

Only recently Indecopi has had the opportunity to identify a possible cross-border cartel and is currently investigating that case. Indecopi expects that the near future will show how international cooperation could be useful in such cases.

4.2 *How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and/or intensity of coordination?*

Indecopi has not yet had the opportunity to engage in cooperation activities that encompass both criminal and civil enforcement regimes.

4.3 *How do you think your current system could be improved in relation to the way in which international cartels are investigated? In what way could liaising with competition authorities in other jurisdictions be improved?*

² See: <http://www.cfc.gob.mx/index.php/en/CONTENIDOS/acerca-de-nosotros.html>. Please refer to this website for more information.

Indecopi expects to see how international cooperation activities operate in the near future. Cooperation could be improved by the effort of nations to have an appropriate legal framework in order to cooperate with efficiency and transparency, respecting each others' legal systems and the rights of the defendants and companies or persons under investigation.

4.4 *Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?*

As stated before, only recently Indecopi has had the opportunity to identify a possible cross-border cartel that is currently under investigation. In this case, Indecopi could benefit from information exchange and cooperation from a foreign competition agency.

5. Information sharing

5.1 *What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?*

Indecopi has not yet had the opportunity to engage in information exchange or other cooperation activities. However, confidentiality is a main issue to take into consideration, since it not only affects the development of investigations but could also harm legitimate interests and rights of defendants and persons or companies under investigation.

5.2 *Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?*

The "Personal Data Protection Act" (Act 29733) has been recently enacted in Peru. The Act explicitly provides that cross-border flow of information is conditioned on the recipient country having similar measures to the ones provided in the Act in order to ensure the protection of the information exchanged (article 15). This is a minimum guarantee to the owners of information and to persons or companies under investigation, and therefore it does not constitute a strong constraint to the development of joint activities of cooperation and investigation.

5.3 *To what extent can your authority rely on information gathered in another competition authority's investigation in your own investigation?*

Indecopi has not yet had the opportunity to engage in information exchange or other cooperation activities. However, since Indecopi is strengthening bonds with reputable agencies, as a principle, it could rely on the information gathered by those authorities.

5.4 *Does your jurisdiction/agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?*

ICAs contain provisions regarding the protection of confidential information. As mentioned before, any information exchanged is considered as delivered in a confidential manner and if any information has been declared as confidential (like personal information or trade or industrial secrets), the owner of such information must first authorize its delivery to the other party.

- 5.5 *What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?*

Indecopi has not yet had the opportunity to exchange information with other jurisdictions in the framework of a leniency programme. However, the Peruvian Competition Act contains provisions regarding waivers for effective cooperation in the framework of a leniency programme that could eventually be applicable to cross-border investigations.

Specifically, according to the Peruvian Competition Act, the first economic agent (person or company) that provides evidence of the existence of an anticompetitive behaviour will be benefited by an exemption of punishment. The subsequent agents that provide such evidence could benefit by a reduction of their fines if their collaboration is in some way useful. Nevertheless, those provisions have not been applied yet. These provisions do not exclude the applicability of the benefits within the framework of a joint investigation with agencies abroad.

6. International co-operation within other policy areas

- 6.1 *Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?*

In 2007, the Peruvian Financial Intelligence Unit (UIF) was created as an agency aimed at receiving, analyzing, discussing, evaluating and communicating information for the detection of money laundering and terrorist financing, as well as at contributing to the implementation of a system that detects suspicious transactions of money laundering or terrorist financing. Nowadays, UIF is engaged in cooperation activities within the framework of the Financial Action Task Force (FATF-GAFI), the Financial Action Task Force on Money Laundering in South America (GAFISUD) and Egmont Group.

In its turn, Peru has signed Agreements for the Avoidance of Double Taxation with Brazil, Canada, Chile and Spain as a cooperation mechanism between nations and its tax authorities in order to prevent undue taxation. Such mechanisms are also often included in trade agreements.

- 6.2 *Does your authority liaise with any other regulatory authorities to discuss common problems/solutions? Please provide examples.*

Indecopi is permanently conducting coordination activities with other national regulatory agencies where they discuss common problems. For instance, Indecopi is developing bonds with the Peruvian Procurement Agency (OSCE) in order to address bid rigging practices in a more effective manner.

Also, Indecopi permanently absolves questions from authorities (especially Regulators, Ministries and Congressmen), regarding the effects of its proposals in the market.

Indecopi is also willing to collaborate with agencies abroad to discuss and address common problems and expects to improve its cooperation activities and mechanisms within the near future.

RUSSIAN FEDERATION

1. Introduction

Development of the international cooperation plays an important role in the process of advocacy and competition protection as it promotes creation of the favorable legal, institutional and information environment for realization of a competitive policy, and in particular in joint cartel investigation.

Realization of the international cooperation in cartel investigations allows to provide improvements of the national legislation and practice of its application on the basis of the advanced international experience, and also gives the chance to stop more effectively violations having the international (trans-boundary) character increase of cooperation between competition authorities of foreign countries.

Realization of these issues isn't possible without active interaction between the leading international organizations in the field of competition policy as well as competition authorities of different countries.

The FAS Russia instituted special Department to fight against cartels¹ that already investigated some prominent cases is created. In regards to participants of cartels, some criminal cases have already been initiated by law enforcement authorities. The FAS Russia actively fights cartel². Unfortunately practically in all sectors of the Russian economy there are cartels and some of them have trans-boundary character. In this regard the importance of the international cooperation during cartel investigation is difficult to overestimate.

2. Existing tools and mechanisms for realization of the international cooperation

2.1 *Formal mechanisms of cooperation*

FAS Russia cooperates with competition authorities of other countries within the frameworks of 44 agreements on cooperation.

The basic forms of interaction in the field of a competition policy in such agreements are:

- exchange of non-confidential information on perfection of the legislation and business management;
- organization of educational visits and training of experts;
- participation in conferences, symposiums, seminars and other activities organized by the Parties;

¹ In 2010-2011 the FAS Russia in cooperation with RF Ministry of Internal Affairs discovered large cartels in the market of chlorine, of power-generating coal, in the insurance market, at a bid rigging on pharmaceuticals etc.

² In Russia there is a per se prohibition on cartels. Recently, serious sanctions for participants of a cartel were implemented, that is a large “turnover fine” and criminal liability up to 7 years of prison. A leniency program for the participation in a cartel for the first person who voluntarily discloses a cartel and its participants to the FAS Russia is provided for.

- meetings of experts or consultation between experts of the Parties by e-mail which provide prompt communication for an exchange of non-confidential information on issues of mutual interest;
- organization of meetings (visits) for discussion of perspectives and directions of the further bilateral cooperation;
- exchange of documents, results of researches and other publications of the Parties.

The need and urgency of cooperation of competition departments during investigation of particular cases of infringement of competition legislation with trans-boundary character, defined the necessity for the FAS Russia to conclude absolutely **new type of bilateral agreements** on cooperation in which mechanisms of information interchange are accurately registered during investigations and control over economic concentration, allowing to proceed to qualitatively new forms of co-operation.

At present the following “new type” agreements of are signed:

- The agreement between the Federal antimonopoly service (Russian Federation) and the Federal commission on a competition of the Mexican United States about cooperation in the field of a competitive policy Paris, 06.15.2010;
- Cooperation Agreement in the field of competition policy between the Federal Antimonopoly Service (the Russian Federation) and the Hungarian Competition Authority Moscow, 28.09.2010;
- Cooperation Agreement in the field of competition policy between the Federal Antimonopoly Service of the Russian Federation and the Austrian Federal Competition Authority, Moscow, 19.05.2011;
- Memorandum of Understanding on Competition between the FAS Russia and DG Competition of the European Commission, Brussels, 10.04.2010;
- Memorandum of Understanding in the field of competition policy between the Federal Antimonopoly Service and Spain’s National Competition Commission, Madrid, 11.12.2011 r.

The FAS Russia has a number of tools and mechanisms, both formal, and informal during the process of cooperation with its international partners.

Within the limits of bilateral agreements of new type the following mechanisms of cooperation of the Parties are prescribed:

- carrying out of consultations on particular case with rendering of the fullest assistance.
- requests for information.
- the mutual account of interests during investigation of particular cases, having trans-boundary character.
- coordination of activities during investigations of particular cases of competition legislation violation.

It is necessary to mention that the given agreements assume exchange possibility only non-confidential information.

2.2 *Tools for interaction*

2.2.1 *Working Group on Oil Products with Austria*

Working group on research of the issues of pricing in the markets of oil and oil products and methods of their functioning was created on the initiative of the FAS Russia the Austrian Federal Competition Authority. In January 2012 in Moscow the first meeting of this Working group was held, in which heads and specialists of the Competition Agencies of Austria, Bulgaria, Germany, Kazakhstan, Latvia, Portugal, Russia, Romania and the Ukraine took part.

The basic directions of activity of the Group are information exchange, carrying out of consultations, joint investigations of infringements of the antimonopoly law made in the trans-boundary markets.

Participants of the meeting exchanged views and experience of monitoring the markets of oil and petroleum products, as well as experience of preventing violations of the competition legislation in these markets in their countries, discussed the proposals on the further joint work of the group, assign certain Competition Authorities - members of the Working group to coordinate certain areas of work to make it more productive, as well as each Competition Authority to appoint a contact person for operational interaction within the Working group, as well as on the development of harmonized methodologies for the prevention of violations of the competition legislation in the markets of oil and oil products. As the results of the meeting further activities of the Working group were agreed.

2.2.2 *Interaction with the European Commission*

Currently the FAS Russia is actively cooperating with the Directorate General for Competition of the European Commission in the framework of the Memorandum of understanding in the sphere of cooperation between the Federal Antimonopoly Service of the Russian Federation and the Directorate-General for Competition of the European Commission (Brussels, 10.03.2011), and the Plan of Interaction for 2011-2012 is annexed to the Memorandum. The Plan identifies economic sectors with high priority in terms of interaction, and the format and methods of implementation of such interaction.

It is necessary to mention that in 2009 the FAS Russia interact with the European Commission on the merits of consideration of the transaction on acquisition of Sun Microsystems by the company Oracle Corporation. Application for carrying out of this transaction was submitted to Competition Authorities of many countries in the world, including Russia, as well as the European Commission. Taking into account the world experience in the field of cooperation of foreign competition authorities when considering transactions, execution of which may have an impact on competition in the markets of several countries, the FAS Russia organized the mentioned consultations, which in case of necessity were to be continued in 2010.

According to the rules of the European Commission basic condition for holding of such consultations is receiving from the company-subject of the consultations the official letter of refusal of confidentially (waiver), in which the company confirms its agreement to hold consultations between the European Commission and Competition Authorities of other countries on transaction with possibility of exchange of confidential data (submitted by this company to the relevant Competition Authorities). In the frame works of consultations of the FAS Russia with the European Commission the latter carried out the procedure for obtaining a "waiver".

It should be noted that the FAS Russia for the first time became a participant in the process of application of this mechanism, which should become the most acceptable form of settlement of issues arising from impossibility of confidential information exchange according to the national legislation of the

parties during investigation of specific cases of violations of the competition legislation and control over transactions involving economic entities of Russia and the EU.

2.2.3 Operating headquarters on interaction with foreign competitive departments

With a view of maintenance of practical interaction with foreign competition authorities within the limits of existing agreements, the FAS Russia in 2011 the Plan of the organization of work on interaction FAS of Russia with foreign competitive departments has been confirmed during investigation of cases of antimonopoly law violation in several directions:

- cartels;
- abusing dominant position;
- transactions (activities) within the limits of economic concentration.

Moreover with a view of realization of the aforementioned Plan in 2011 in FAS Russia the Operating Headquarters on interaction with foreign competition authorities has been created for investigation of cases of competition law violations that includes as members employees the FAS of Russia responsible for interaction with foreign competition authorities.

In particular, in conformity with specified Plan FAS of Russia develops under the reference with the information with state structures of the foreign states at investigation of cases of infringement of the antimonopoly law in development of available Instruction FAS of Russia about the reference with the confidential information.

2.3 Regional cooperation

International and regional integration is gaining more momentum; transnational corporations are spreading their influence worldwide that increase of number of M&A transactions and violations of competition legislation by economic entities striving to maximize their profits that are not within national jurisdictions. Such a phenomenon rises before all the antimonopoly authorities of the world, and Russia *inter alia*, the issue of necessity to strengthen interaction between competition authorities and to continue elaboration of harmonized approaches towards implementation of competition policy.

Thus, international cooperation in protection of competition is playing more important role that under current circumstances is assessed as an important factor of protection of competition in the internal market of the Russian Federation, as well as creation of conditions for broadening trading and economic relations with foreign partners, creation of favorable investment climate and support of Russian exporters and investors to get access to external markets.

The basic platform for interaction of antimonopoly bodies of the CIS countries is the Interstate Council on Antimonopoly Policy (ICAP), which has been created in 1993 according to the Agreement on carrying out of the coordinated antimonopoly policy from 12/23/1993 (new edition of the Agreement from 1/25/2000) (further – the Agreement) for the purpose of coordination of activity of the states-participants CIS on creation of legal and organizational basis for the prevention, restriction and suppression of monopolistic activities and an unfair competition in the Common Economic Space of the CIS.

The structure of ICAP includes Heads of Antimonopoly authorities of the CIS countries. Moreover there are observers present in ICAP – representatives of competition authorities of Hungary, Romania and Mongolia.

Practical interaction of competition authorities of the CIS countries which result is strengthening of economic interaction and deepening of economic integration of the CIS countries is carried out according to Provision on cooperation of the CIS states on suppression of monopolistic activities and unfair competition which is an integral part of the Agreement.

The Provision contains the mechanisms, allowing competition authorities of the CIS countries to cooperate during consideration particular cases of competition law violation; to participate in crossing of transnational anticompetitive actions and to play an active role in the course of protection of domestic commodity producers in the international and internal markets.

With a view of development of practical cooperation of competition authorities of the CIS countries, ICAP members took the decision on carrying out of joint investigations of anticompetitive practices of the companies operating in the joint markets within the CIS.

For this purpose the ICAP creates the Headquarters on joint investigations of competition law violations in the CIS countries (further – the Headquarters), thus objects of the analysis are those markets which successful functioning provides creation of the infrastructure that serve as the basis of formation of the Common Economic Space within the limits of the CIS, and also directly impact well-being of citizens of the CIS states.

The markets of passenger air service, telecommunications, grains, combustive-lubricating materials, retail trade, and the pharmaceutical markets are the markets in question. Improvement of methods of cartel fighting became one of the priorities of work of the Headquarters. But so far there were no joint investigations of cartels.

One of lines of activity of the Headquarters in where positive results were reached is the investigation of international telecommunication market of the CIS states.

In the course of the investigation conducted by two Antimonopoly Authorities of Kazakhstan and Russia the signs of violation of the antimonopoly legislation were revealed on formation of roaming tariffs for telecommunication services. In the framework of national legislation and implementation of coordination of actions of national competition authorities of Russia and Kazakhstan relevant investigations were conducted and proceedings were instituted in respect of the dominant operators of Russia and Kazakhstan.

In particular during the investigations regular consultations between representatives of the Antimonopoly Authorities of Russia and Kazakhstan were carried out. During these consultations the algorithm of joint actions was elaborated and the FAS Russia conducted the same verification activities that were carried out by the Kazakhstan authority.

At the end of October 2010 the Antimonopoly Authorities of both countries have completed consideration of these cases and court proceeding were initiated simultaneously. During the investigation of the case the Russian mobile operators announced reduction of rates on telecommunication services in international roaming in certain areas (lowered 1, 5 to 4 times). Kazakhstan operators also announced a sharp reduction of rates.

2.3.1 Customs Union and Single Economic Area

At present within the framework of formation of the Common Economic Space of the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation, the Agreement on Common Principles and Rules of Competition was signed on 9 December 2010 (came into force 1 January 2012), which provides tools of cooperation between the Parties of the Agreement by sending requests of information,

requests and orders for carrying out of separate procedural actions, exchange of information, coordination of enforcement activities of the Parties, as well as law enforcement at the request of one of the Parties.

According to this Agreement, the Parties give each other any information on anticompetitive actions which they have if such information is relevant to the case or can form the basis for law enforcement activities of the other Parties. Though there were no precedents as yet, there exists the legal basis of the given format of the international cooperation allows to exchange the confidential information.

It is necessary to notice that that information and the documents given within the frameworks of cooperation which have confidential character, can be used exclusively with a purpose defined in the given Agreement, thus use and transfer to the third parties of the information for other purposes are possible only with the written approval of the authorized body of the Party which has provided information. Moreover each Party provides protection of the information, documents and other data, including the personal data given by authorized body of other Party.

At present the standard legal acts regulating such type of interaction are drafted.

3. Constraints for efficient information exchange

International cooperation in cartel investigation is not possible without exchange of information, in particular, confidential information requested in the course of investigation from economic entities of another state, between Competition Authorities of different jurisdictions, which is often a big problem not only for the Russian Antimonopoly Authorities, but also for competition authorities of a number of jurisdictions.

Restrictions on granting the information to competition authorities of other countries are stipulated by the FAS of Russia's duty of observance of requirements of the legislation of the Russian Federation on information protection.

4. Improvement of information exchange mechanism

At the present moment the FAS Russia participates in the several projects (the Project on information exchange within the frameworks of APEC Forum and the project on information exchange within the frameworks of the ICN Cartel Working Group, which purpose is to work out mechanisms of information exchange among competition authorities, including exchange of confidential information.

4.1 APEC

Within the frameworks of APEC the FAS Russia has developed the mechanism of information exchange and, in the long term, securing of closer cooperation of competition authorities of the APEC countries during investigation of the antimonopoly law infringements. For elaborating of the mechanism of information exchange the comparative analysis of legislative, technical and administrative possibilities of the APEC countries economies on information exchange during the application of the antimonopoly law was carried out.

This analysis was carried out by means of elaborating and sending to APEC economies of the questionnaire and by analyzing of the received answers. Further it is planned to make classification of the APEC countries economies in accordance with their potential readiness and exchange possibilities on exchanging of certain types of information, including on affairs of the antimonopoly law infringements.

The given classification will allow to generate the information interchange mechanism between relative APEC economies with closer characteristics.

4.2 ICN

Within the frameworks of the ICN Cartel Working Group the best practices are elaborated by the best experts, in particular, concerning hard cartels. Here also are elaborated methodical materials and the analysis of carried investigations is fulfilled.

All of this is much of use both by experienced antimonopoly authorities, and by rather young antimonopoly authorities of different countries.

5. Conclusion

Competitive authorities of many countries face necessity of expansion of the international interaction in investigation of infringements of the antimonopoly law, in particular in cartel investigations. According to the FAS Russia the following basic conditions is necessary to for competition authorities to expand practical interaction with foreign competitive departments presence to have:

- trust from competitive departments-partners;
- authority of department among the international competitive community, confirmed with practical activities;
- presence of corresponding legal base;
- maintenance of due degree of protection of confidentiality of the information given within the limits of interaction

SENEGAL^{*}

By Mr. Malick Diallo

Senegal is a West African country with a twelve million population living in 196 722 km². After two years marked by the effects of the global financial and alimentary crisis, the Senegalese economy began to recover in 2010 thanks to the global economic recovery and measures taken by the authorities to boost national economic activity. Gross domestic product (GDP) was estimated to have grown from 2.2% in 2009 to 4.2% in 2010, and reach 4.5% in 2011. This is largely due to the performance of the three sectors of the economy – primary, secondary and tertiary – which respectively accounted for 14.7%, 20.4% and 64.9% (including administration) of GDP in 2010.

The average annual rate of inflation (-1.0% in 2009) was 1.2% in 2010. In 2011 inflation measured by the GDP deflator is forecast at 3% largely as a result of higher energy prices.

Senegal's total import trade flows (merchandise) from the world totaled \$4,782,239,577 in 2010. This gives a wide view of how international cartels may affect consumers and harm the economy more generally. The government should strongly take into account the necessity to improve the fight against illegal practices both national and international that may affect the normal functioning of the market. The ongoing national strategy plan called "economic and social policy document 2012-2015" has identified the improvement of business environment and the promotion of private sector as important objectives. Market transparency and competition rules enforcement should play an important role in the achievement of those objectives.

In this regard, big steps have been taken by the national competition commission to reform the institutional framework and the competition law, in parallel with the ongoing reforms undertaken on the WAEMU regional level, in order to improve the effectiveness of the enforcement of the competition law and the fight against cartels in particular.

When I was asked to take part to the OECD 2012 GFC, I had some hesitation to what could I say about international cooperation in cartels investigations. The question was however, not inappropriate if you look into our enforcement activities since the creation of the authority in 1994.

Only one cartel case has been prosecuted and the decision of the commission has been canceled by administrative tribunal which decided that the competence of the commission is limited to agreement on price fixing. It was indeed an astonished decision showing the need for national judges to be trained in competition law.

But if you have a closer look at the subject, it is easy to see that even if some developing countries have few activities in cartel enforcement given the scarcity of resources and the lack of political will to spend money in competition enforcement, there is now many changes in developing countries during the last decade.

^{*} Contribution submitted by Mr. Malick DIALLO, General Secretary and Government Commissioner, Senegalese Competition Commission.

On one hand competition law have been adopted in many young jurisdictions and is taking a central place in regional organization treaties in West Africa particularly in ECOWAS and WAEMU. On another hand enforcement activities in the WAEMU sub region is going greater and interesting perspectives are expected from the ongoing WAEMU reform project, which will give back to national competition authority the power to fully investigate anticompetitive practices and to make decisions.

So what can be needed for national and regional authorities in term of cooperation among themselves and with third part jurisdiction in cartel investigation in particular? What are the pre-requisite for this cooperation and how can it be implemented? What are the impediments in international cooperation in cartel investigation and what are the possible solutions to overcome those obstacles.

These are some of the questions this paper will address from the perspective of younger jurisdiction with limited practical experience.

1. The need for young agencies in developing countries to cooperate in cartel investigations

As mentioned earlier cartel enforcement in jurisdictions like Senegal is not very developed due to several reasons. However, in many economic sectors in Senegal, the market is very concentrated. It is commonly admitted that concentrated market may facilitates cartels. Cement, telecommunication, milling (wheat flour) are few of concentrated markets in Senegal. Almost all of the enterprises in these sectors are subsidiary of multinationals and are present in at least four countries in the WAEMU. After brief investigations, I have numbered almost thirty multinational with subsidiaries in Senegal which are active in many sectors (distribution, mining, milling, transportation, insurance, banking, cement, medicament, etc...). They often set up and execute common commercial policy which may correspond to the politic of the group. Market sharing and price fixing may result from such situation.

Many studies have showed the spread of international cartels in a globalized economy particularly in the 1990. In many sectors, food and feed ingredients, vitamins, chemical products etc. international cartels have been uncovered in many jurisdictions. The document published in 2003 “contemporary international cartels and developing countries: economic effects and implications for competition policy” shows the effects of international cartels on consumers, producers and more generally on the economy of developing countries.

The EU Commission and the French Autorité de la Concurrence have imposed fines to corporates (Unilever, Colgate Palmolive, Procter &Gamble, Henkel) for their participation in an international cartel by fixing prices for their products. Those products are imported by Senegal.

Senegal has imported \$4,782,239,577 of merchandises in 2010. In 2008, the repartition of the importation was Mineral fuels, oils, distillation products, etc. (27.7%); Cereals (13.1%); Boilers, machinery, nuclear reactors, etc. (8.9%); Vehicles other than railway (5.9%); Electrical and electronic equipment (5%).

The top three countries which export merchandise to Senegal, along with percentage of imports, are France (19.7%); United Kingdom (15.2%); China (6.7%).

This export structure shows that food price volatility (such as cereals) and oils volatility will affect the economic growth and the welfare of the consumers. Price increase in international markets is often an opportunity for corporate to cartelize and fix prices sometimes with the “passive complicity” of the Government.

Secondly an international cartel in these merchandises in these countries may affect the national market and harm the consumers.

There is consequently a huge need for competition agencies in WAEMU and ECOWAS to cooperate in the fight against cartels. The national markets structure is quite similar and since 2003, the same law is applicable in all member states with the adoption of the regional competition law.

Nowadays, there are neither cooperation agreements between member states agencies nor informal cooperation in cartel enforcement.

Nevertheless there is a consultative committee set up by the regional law which regroups all member states agencies and the Competition Directorate of the WEAMU Commission. This committee is in charge of studying all drafts of decisions to be taken by the WAEMU commission and to give an opinion. Furthermore, when investigating in national markets, there is a narrow cooperation between the WAEMU Commission and the national competition agencies. National procedures are followed in these circumstances, warrants are delivered by national judges and investigative teams are composed by the regional and national staffs. The cooperation mechanism is organized by the Regulation n°03/CM/UEMOA relating to the procedures in cartels and abuse of dominant position.

Another reason for national agencies and regional authorities (ECOWAS and WAEMU) to cooperate in cartel investigation and more largely in competition law enforcement with other jurisdiction and EU in particular relates to the progress made in the Economic Partnership Agreement with the UE. The ongoing negotiations between ECOWAS and EU have placed competition issues in the agenda and will be fully negotiated later namely called “clause de rendezvous”. Instead, the principle of cooperation has been already considered so far in the Cotonou Agreement through article 45. It states that “ *to eliminate competition distortions with due consideration to the different levels of development and economic needs of each ACP country, parties undertake to implement national or regional rules and policies including the control and under certain conditions the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. They accept also to prohibit the abuse by one or more undertakings of a dominant position ... in the territory of ACP States.* ”

More decisively, article 45(3) deals with the obligation of the EU and the ACP countries to cooperate “with a view to formulating and supporting effective competition policies *with the appropriate national competition agencies* that progressively ensure the efficient enforcement of the competition rules by both private and state enterprises.

At the end of the day, the need for cooperation will be more necessary since the competition authorities in West Africa are doing their best to set up and implement competition policies and laws to fight against restrictive competition practices.

2. What are the requirements for an effective cooperation in the fight against cartels

The third report of the OECD in the implementation of the 1998 council recommendations on the fight against hard core cartel gives very useful information about international cooperation. Many strategies have been developed by competition agencies to improve their cooperation mechanism in order to enhance the fight against international cartels. We will not develop this matter but we'll insist on their limits and we'll try to make some proposals as how to improve cooperation particularly for the benefit of younger agencies and LDC.

Some of these strategies include formal cooperation with provisions as exchange of information, coordinated investigations, etc... Many agencies use informal cooperation, too, to exchange information and share experiences in the fight against cartels. These mechanisms may produce good results and

enhance cartel enforcement. However there are many impediments for effective and efficient cooperation in the fight against international cartels.

3. Limits and impediments to effective international cooperation

First, for many reasons (poor enforcement activities in cartels, lack of resources etc...in LDC agencies), international cooperation agreements are concentrated in developed countries and emerging countries. Young agencies in many less developed countries have limited human and financial resources. They are not involved in international cooperation with more advanced jurisdictions. So the fight against international cartels may not be effective in those countries. It is true that each jurisdiction has the responsibility to build capacities in order to investigate and put an end to hard core cartels, but solutions must be found to better involve young agencies in less developed countries affected by international cartels.

Secondly, in many cooperation mechanisms (formal or informal) exchange of confidential information or exchange of evidence are not possible.

Thirdly, new investigative tools or case resolution mode such as leniency programs, amnesty plus and settlement are complicating more and more the issue of exchange of information between agencies. Indeed, information gathered through these procedures are confidential and cannot be used in civil action and for the need of international cooperation despite waivers allowing their sharing. Even when exchange of information is possible, it is closely monitored and their use may be very restricted.

4. What solution for an effective cooperation in cartel enforcement

Cooperation mechanisms developed by agencies in formal and informal way have proven efficiency in the fight against cartels. These mechanisms should be encouraged and promoted in all competition agencies including young agencies in less developed countries. Good practices in this area should be spread largely via international conferences and workshops as it is done in ICN, UNCTAD and OECD.

In addition, regional cooperation agreement such as WAEMU, ECOWAS, SADC, EU etc...constitute examples of formal cooperation in cartel enforcement which need to be developed and implemented effectively. For that purpose, national competition agencies and national laws should include the possibilities to exchange non confidential and confidential information and the possibility to exchange evidences in less restrictive conditions. We hope that the final text of the EPA between EU and ECOWAS will contain modalities of cooperation including mutual exchange of information.

International cartels begin to be more pernicious and more widespread around the world. The harm caused to consumers, producers and economy of less developed countries may be very immense. There is consequently an urgent need to look at the possibility to insert provision in leniency programs or settlement agreements in the EU, US and other advanced jurisdictions which will allow exchange of information or the inapplicability of confidentiality when international cartels affect less developed countries markets. The ICN cartel working group, the UNCTAD IGE and the Competition Division of the OECD may examine the feasibility of such proposal.

Finally, information about international cartels must be available for competition agencies around the world. Non confidential information and decisions taken by agencies in international cartels cases may be published in the ICN web site or elsewhere in order to inform other agencies. This can be a way to improve the international cooperation in cartel enforcement.

SINGAPORE

Introduction

In an increasingly globalised world, many businesses now carry out their activities across borders,¹ resulting in the exponential growth in international trade and investment flows and consequently the potential for illegal cross-border cartel activities. In this regard, the OECD has long recognised this phenomenon and has, as early as 1995, encouraged cooperation between agencies in the enforcement of competition law.²

Since its formation in 2005, the Competition Commission of Singapore (CCS) has been involved in cooperation at international and regional levels. In this submission, CCS hopes to discuss some of the benefits of international and regional cooperation as well as the challenges in the area of information sharing in order to facilitate greater enforcement cooperation in cartel investigations.

1. Benefits of international and regional cooperation

1.1 *Capacity building and technical assistance*

CCS' experience in international cooperation in the early years was focused on capacity building and technical assistance. When CCS was first formed, it concentrated on the larger process of putting in place a sustainable competition policy framework and processes with the objective of developing Singapore's competition law and policy regime. As such, CCS was the beneficiary of technical cooperation from agencies with well-established competition regimes including the United States Federal Trade Commission ("US FTC"), UK's Office of Fair Trading, UK's Competition Commission, Australia Consumer and Competition Commission ("ACCC") and New Zealand Commerce Commission ("NZCC"). In 2010, CCS officers benefited from attachment programs with the US FTC and the EC's Directorate General for Competition ("DG Comp"). These attachments and visits proved invaluable for CCS in the early years in learning and building up know-how and technical knowledge on what was then a new area of law for Singapore.

As CCS grew in experience and case-handling, CCS was pleased to be able to share our experiences in agency formation with other young competition agencies. In 2009, officers from CCS were sent at the invitation of the Competition Commission of Mauritius to assist with capacity building. CCS has also worked informally with newly formed competition agencies and shared our experience with them. CCS has also hosted visiting authorities from countries such as Kazakhstan, Norway, Malaysia, Sri Lanka and Malta during which invaluable experiences and cross-fertilisation of ideas took place.

Within Singapore, CCS is involved in coordination efforts with the regulators of the carve-out sectors in the media, infocomms and the energy markets. CCS has also established a strong network of

¹ See the OECD Economic Globalisation Indicators 2010: measuring Globalisation. See also OECD Science, Technology and Industry Scoreboard 2011: Innovation and Growth in Knowledge Economies.

² Refer to Recommendation C95 130, 'Cooperation between member countries on anticompetitive practices affecting international trade', 27/28 July 1995.

relationships with other law enforcement agencies in Singapore to facilitate informal information and intelligence sharing, where necessary. CCS is also part of the Community of Practice for Competition and Market Regulators which serves as a platform for dialogue between experts in competition regulation. This is carried out with a focus on market and competition regulation across various sectors in Singapore through ongoing dialogue and sharing of experiences so as to promote an overall culture of competition throughout the Singapore economy.

In South-East Asia, there is a regional grouping known as the ASEAN Experts Group in Competition (“AEGC”) formed in 2007 which focuses on competition policy and law. CCS was the first chair of the AEGC and has been a key participant in the AEGC Capacity Building Workshops which addresses various topics, including investigation techniques and enforcement in cartel investigations. In 2010, the AEGC launched the Handbook on Competition Policy and Law in ASEAN for Business and the ASEAN Regional Guidelines on Competition Policy. As competition law is fairly new in ASEAN with only 5 out of 10 countries having enacted competition laws, it is envisaged that regional cooperation will mainly take the form of technical assistance and capacity building for the near future.

1.2 Exchange of information

1.2.1 Formal cooperation

The extent and scope of CCS’ international and regional cooperation is guided by the provisions in Singapore’s multi-lateral and bilateral Free Trade Agreements relating to competition. These provisions require the signatories to cooperate in the development of any new competition measures and exchange information. Within the terms of these agreements, CCS has sought to cooperate with our trading partners.

The Singapore Competition Act provides a mechanism by which CCS may enter into arrangements with foreign competition bodies.³ The Act allows CCS to enter into arrangements whereby each party may, *inter alia*, provide assistance and furnish to the other party information required by the other party for the purpose of performing its functions. The Act also provides that CCS need not furnish any information to a foreign competition body pursuant to such arrangements *unless* it requires of, and obtains from, that body an undertaking in writing by it that it will comply with terms specified in that requirement.

1.2.2 Informal cooperation

CCS has been utilising informal cooperation mechanisms to facilitate its work in the areas of technical expertise, policy development and case-work. In particular, CCS holds frequent dialogues with the ACCC and NZCC to facilitate general information sharing between the agencies. These close links enable the agencies to deal with competition issues across the Asia Pacific region more effectively through the sharing of ideas and capacity building initiatives. In the area of enforcement, valuable leads have been generated through such information sharing initiatives.

CCS is also a regular participant at international conferences and workshops on cartel enforcement held by the OECD, the International Competition Network, BRICS and ASEAN countries, sending staff at both the senior and working levels to share knowledge and build relationships. CCS finds it important to keep close links with foreign authorities and establish close personal contacts which help in building up trust and rapport at all levels.

CCS has also cooperated with foreign competition agencies in other policy areas. For example, in CCS’ review of its Block Exemption Order for Liner Shipping Agreements, CCS engaged the EC’s DG

³ Refer to Section 88 of the Competition Act.

Comp and the US Federal Maritime Commission on views in relation to liner shipping agreements, regulatory developments, current shipping trends, data collection/filing. This allowed CCS to better assess the international and regulatory landscape for its review.

Most importantly, CCS has engaged in both regional and international cooperation with other competition authorities on a case-by-case basis when investigating international cartels with cross-jurisdictional elements. Of note would be CCS' international cooperation with an established foreign competition agency against multi-national companies by sharing information to coordinate dawn raids. This proved useful in evidence preservation. In other cases, CCS has shared general information such as theories of harm and general categories of information within the possession of that competition authority. Information is shared to the extent that such information is not confidential and where waivers have been granted to CCS to discuss the matter with the other authority and vice-versa. This is especially crucial where information is provided by leniency applicants, bearing in mind the likelihood of private actions, discovery obligations that a leniency applicant may be subject to and the varying regimes in which other jurisdictions operate (civil as opposed to criminal regimes).

2. Challenges in information sharing

Given that competition authorities operate within different legal regimes, the challenge arises when similarity of legal standards are used as a pre-condition for information sharing.

In CCS' experience, one area in which this has arisen is in the area of the privilege against self-incrimination. For instance, section 66 of the Singapore Competition Act provides that in the course of an investigation, a person is not excused from disclosing any information to CCS on the ground that the disclosure might incriminate him. However, such information or document is not admissible in evidence in *criminal proceedings* brought under provisions falling outside of the Competition Act, though still admissible in *all* civil proceedings. Thus, a foreign competition authority, which may operate a criminal or civil enforcement regime differing from Singapore's civil enforcement regime, may have reservations about sharing information with CCS where there are differences in the manner and extent to which the privilege is extended to persons under investigation. One way to work around this would be to ensure that the necessary waivers are given so as to allow all information to be shared.

At the same time, allowing for a greater level of information sharing between competition authorities may yield potential effects in other areas, such as the efficacy of leniency regimes. For instance, the ease of information sharing across jurisdictions and varying regimes may also potentially serve as a disincentive for leniency applicants if the revelation of incriminating information in a leniency application in one jurisdiction may result in the applicant being exposed in another jurisdiction, *a fortiori* if the latter jurisdiction has more severe sanctions (e.g. criminal sanctions) for cartel conduct. This may deter companies from applying for leniency in the first jurisdiction. Nonetheless, the waiver mechanism allows leniency applicants to be precise and nuanced as to which jurisdictions he or she is willing to allow the authority to share the information with and the extent to which information is shared. In practice, CCS would ensure that all necessary waivers from leniency applicants are obtained before it proceeds to discuss the information with other authorities.

Going forward, notwithstanding the differing criminal and civil sanctions for cartel conduct, there is something to be said for competition authorities to align their approaches to leniency, for instance, with regard to marker policies and leniency grants. Existing differences in leniency regimes lead to uncertainty, as potential leniency applicants will be unsure of the extent of information required to obtain a grant of leniency/marker in each jurisdiction and engage in "forum shopping" in deciding which jurisdictions to apply for leniency in. For instance, in some regimes, even if the applicant has fully cooperated and furnished all the necessary information, there is still no guarantee of leniency (and therefore full immunity)

from the competition authority. An alignment of these leniency requirements will aid the cooperation process as applicants would be more willing to grant substantial waivers for authorities to share information which will speed up the investigative process.

3. Conclusion

Capacity building and technical cooperation are the key building blocks in the fight against international cartels.

At the same time, the differing legal regimes can be a challenge for international cooperation especially in the area of information sharing for specific cases. The architecture of leniency regimes can have an effect on information sharing. Here, alignment of leniency regimes coupled with the necessary waivers can facilitate international cooperation in the area of information sharing. In this regard, international fora like the OECD are ideal platforms to facilitate the alignment of leniency regimes.

SOUTH AFRICA

1. Introduction

The detection, investigation, prosecution and eradication of cartels are a priority for the Competition Commission South Africa (“the Commission”). During the 2010/2011 financial year the Commission completed 18 investigations in which it found cartel related activity and received 33 applications in terms of the Corporate Leniency Policy (CLP)¹. Many of these cases have been in the Commission’s priority sectors of construction, food and agro-processing and industrial products.

Given the global dimension of competition issues and the harm of international cartels, cooperation between competition agencies has become increasingly important. It is undeniable that cooperation between competition agencies can facilitate cartel investigations and prosecutions however this kind of cooperation is yet to realise its full potential – in particular for newer agencies and agencies from developing countries. From a South African perspective, while cooperation in cartel investigations has taken place in a small number of cases – the benefits of cooperation have been significant.

2. Existing tools for international cooperation

The importance of cooperation amongst competition agencies has been highlighted recently with more and more agencies formalising this cooperation through bilateral agreements with their foreign counterparts. To date the Commission has not entered into any formal cooperation agreements with other competition agencies. The Commission is in the process of finalising a Memorandum of Understanding (MoU) with the Namibian Competition Commission which we envision will strengthen case cooperation between the two agencies. Key elements of this MoU will include technical assistance, sharing of methodologies and substantive analysis, joint research and information exchange. The OECD’s 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade was consulted extensively during the drafting of the MoU.

From a regional perspective the need for cooperation between competition agencies in Southern Africa has been reflected in the 2002 Southern African Customs Union (SACU) Agreement², the 2004 COMESA Competition Regulations and the 2009 Southern African Development Community (SADC) Declaration on Regional Cooperation in Competition and Consumer Policy.³ Actual cooperation in cartel

¹ In 2008, South Africa amended its previous Corporate Leniency Policy (CLP) that was issued in February 2004 to allow for provisions relating to the acceptance of oral statements and marker applications. In terms of the CLP, a self-confessing cartel participant may be granted immunity from prosecution if, among other things, it is first to approach the Commission and provides it with information that will be sufficient for the Commission to successfully prosecute remaining members of the cartel.

² Article 40: Southern African Customs Union (SACU) Agreement between the governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland (2002).

³ SADC Declaration on Regional Cooperation in Competition and Consumer Policies between the governments of the Republic of Angola, the Republic of Botswana, the Democratic Republic of Congo, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mauritius, the Republic of Mozambique, the

investigations between competition agencies in member states from these regional organisations has occurred on a small but gradually increasing scale due to the large number of newly operational competition agencies in the region. The SADC secretariat has embarked on a project to facilitate cooperation among competition agencies in the region and South Africa regularly cooperates with its counterparts in the region be it in the form of capacity building, case discussions or the provision of technical assistance.

3. Types of cooperation

For the Commission international cooperation in cartel investigations has mostly taken place through informal case discussions between lead investigators from various jurisdictions via conference calls, physical meetings and email correspondence. During the investigation of a suspected cement cartel in 2009 South African investigators held discussions with the Brazilian Secretariat of Economic Law; the European Commission and German Cartel Office. In this case the consultations took place during the initial phases of the investigation and the information provided to the Commission in these engagements shed new light on the modus operandi of cement cartels which greatly assisted the investigation in South Africa. International cooperation contributed to the success of the South African investigations into the cement cartel.

Given the secretive nature of cartels, early notification and discussions on investigations or potential investigations can be an invaluable source of information in the detection of international cartels – especially for newer agencies which have not yet developed strong detection methods. In 2007, following discussions, the Commission conducted raids in coordination with its counterparts from the European Commission and the US Department of Justice. The raids were conducted simultaneously between the three competition jurisdictions for maximum impact on a cartel involving freight forwarding companies whose reach was believed to be international. As a result of the coordination of efforts the investigation in South Africa was concluded with the signing of settlement agreements with two of the cartel members. Good working relationships are necessary to build the trust needed to facilitate this type of cooperation. The Commission's participation in international forums such as the International Competition Network, the OECD Competition Committee, UNCTAD's International Group of Experts on Competition Law, and the newly formed African Competition Forum has afforded Commission's leadership, senior managers and investigators the opportunity to create and maintain these important relationships.

Cooperation involving the sharing of methodologies used to address cartel behaviour in similar markets and the lending of technical assistance has proved to be useful to the Commission. In 2010 the Commission embarked on a major investigation into bid-rigging in the construction sector and for the first time initiated a special project in which firms were invited to make applications to enter into settlement discussions via a fast track procedure. In formulating an appropriate fast-track system the Commission drew lessons from the experiences of agencies in other countries such as the Netherlands and UK where fast track systems in the same industry had been utilised in previous years. As part of its advocacy to government to gain support for the project, the Commission invited the head of the Dutch Competition Agency (NMa), to share his experience with the fast-track settlement process in construction in the Netherlands with South African government Ministers and Directors General. The Commission then put together a team and developed the approach for the fast track settlement process. This included representatives from the NMa which travelled to South Africa (with the assistance of the OECD's outreach program) to provide intensive workshops on running the fast track-settlement process and related investigations. Subsequent to this a senior legal advisor from the NMa was seconded to the Commission to act as a consultant on this case for a few months. The Commission's construction investigation is still ongoing and so far the fast-track process has been a major success.

Republic of Namibia, the Republic of Seychelles, the Republic of South Africa, the Kingdom of Swaziland, the United Republic of Tanzania, the Republic of Zambia and the Republic of Zimbabwe (2009).

4. Challenges and opportunities for improved cooperation

Effective enforcement cooperation, especially with newer competition agencies and agencies from developing countries is challenged by a number of factors including the divergence of substantive rules and institutional approaches; legal restrictions with regard to the exchange of information and the lack of adequate safeguards for the protection of confidential information.

One particular challenge the Commission is currently facing in prosecuting members of an international cartel it has investigated is the difficulty in serving and enforcing Tribunal orders on cartel members which are not physically located within the borders of South Africa. In this case information on the cartel was brought to the Commission's attention through a leniency application. The leniency applicant complied with the Commission's information requests and provided information on all other jurisdictions in which it had applied for leniency. This enabled investigators to hold useful discussions on the strategies used by these other jurisdictions including Chile, USA, EC and Canada. However the absence of cooperation agreements enabling the Commission to serve and enforce legal orders in jurisdictions where respondents are physically located is frustrating the effective prosecution of successfully investigated international cartels.

Information sharing is one of the most important aspects of cooperation however the ability of agencies to exchange information with foreign agencies is sometimes restricted by national laws preventing the sharing of information. In South Africa, section 82(4) of the Competition Act 89 of 1998, as amended stipulates:

“The President may assign the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of the Act, to exchange information with a similar foreign agency.”

At present South Africa has entered into a few international agreements wholly dedicated to or containing provisions relating to competition namely the SADC Declaration, the SACU Treaty⁴ and the Agreement on Trade Development and Cooperation with the European Commission.⁵

The Commission's investigation of cartel activity has largely been driven by the Corporate Leniency Policy (CLP). Most leniency applications received translate full cartel investigations. Leniency applications are undertaken on a confidential basis, in that the Commission will guard as confidential any information received from the leniency applicant, unless the applicant grants its consent for such a disclosure through the signing of a waiver. The Commission is obliged under the law⁶ to treat as confidential any information that the Competition Tribunal has determined to be confidential or that is the subject of a confidentiality claim. The Commission may, however, refer the claim to the Competition Tribunal in order to determine whether or not the information is confidential. Any person who seeks to have access to information that has been claimed to be confidential may apply to the Tribunal to make an appropriate order for the access of confidential information. Therefore the Commission cannot disclose confidential information to foreign agencies unless the Tribunal makes an appropriate order for the access of such confidential information or the owner of such information signs a waiver of the confidentiality claim.

⁴ Article 40.

⁵ Section D: Article 35 – 40: Agreement on Trade, Development and Cooperation between the European Community and its Member States and the Republic of South Africa (1999).

⁶ Section 44 of the Competition Act stipulates that the Commission is bound by a confidentiality claim. Section 45 deals with the disclosure of confidential information.

The use of waivers has the potential to be a valuable tool for cooperation in international cartel cases where parties have applied for leniency in the cooperating jurisdictions. The insurance of safeguards for the treatment of confidential information facilitates the signing of waivers in these cases as does coordination in substantive analysis or remedies imposed. UNCTAD notes that cooperation in cartel cases is more effective if the jurisdiction with which information will be exchanged has a leniency programme.⁷ This is based on the premise that a leniency applicant may be more likely to grant a waiver of confidentiality of its information, if the information is likely to be shared with another jurisdiction where it has applied for leniency. Thus leniency programmes can be an important driver of cooperation between competition authorities, in particular where agencies have the ability to coordinate efforts.

5. Conclusion

While cooperation in the investigation of cartel cases has come a long way, there are still major gaps. The conclusion of cooperation agreements allowing for mutual legal assistance including the serving and enforcement of orders in foreign jurisdictions; jointly coordinated raids; notifications and discussions on investigations and the encouragement of waivers by leniency applicants have the potential to greatly contribute to the eradication of international cartels. However all these measures will remain inadequate in an era of global multinational enterprises. A system of treaties enabling global enforcement will eventually need to emerge to fill the gaps. Such treaties may be at a regional level as we have seen in Europe and East and Southern Africa with the establishment of the COMESA Competition Authority.

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UNCTAD's 'Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level' TD/B/CJ/CLP/10 at paragraph 67 and 68, page 14 specifically gives the example of Brazilian competition authority's inability to secure the same level of cooperation from cartelists in the Vitamins case due to it not having a leniency program at the time.

SWITZERLAND

Version Française

Introduction

La coopération internationale, sous toutes ses formes, en matière de concurrence est aujourd'hui une nécessité tant entre les pays industrialisés qu'entre ces pays et les pays émergents. En effet, l'internationalisation des pratiques anticoncurrentielles en général et des pratiques cartellaires en particulier a rendu le renforcement de cette coopération inévitable en raison de la nécessité de mieux identifier et réprimer les cartels internationaux. La problématique de l'amélioration de la coopération internationale en matière de lutte contre les cartels est un thème d'importance pour la mise en œuvre de la politique de la concurrence en Suisse en raison de l'ouverture de son économie à l'international et du volume de ses échanges commerciaux avec son environnement européen.

1. Types et instruments de la coopération suisse en matière de lutte contre les cartels internationaux

1.1 La coopération informelle avec d'autres autorités de concurrence

La Commission de la concurrence (Comco) soigne des contacts informels avec d'autres autorités de la concurrence en dehors de tout accord de coopération. Elle est aussi très active dans l'International Competition Network (ICN) et participe aux réunions du Comité de la concurrence de l'OCDE. De même, la Suisse participe aux sessions régulières du Groupe intergouvernemental d'experts (GIE) de la CNUCED sur le droit et la politique de la concurrence. Le GIE représente en effet un forum de plus en plus important pour l'échange d'expériences en matière d'application du droit de la concurrence entre pays de l'OCDE et pays en développement. De manière générale, ces *fora* offrent l'occasion de nouer et développer des contacts bilatéraux avec d'autres autorités de concurrence.

Les contacts informels établis lors de ces diverses rencontres internationales peuvent donner lieu à des échanges ultérieurs concernant tant des questions d'ordre général que des questions relatives à des cas concrets. Cependant, aucune information confidentielle ne peut être échangée dans un tel cadre. La Comco entretient de tels échanges notamment avec la DG COMP (UE), le Bundeskartellamt (Allemagne), et l'Autorité de la Concurrence (France). Les contacts se font soit par téléphone soit par messagerie électronique. Cette coopération informelle a aussi permis de coordonner des perquisitions au niveau international à la suite de demande de participation au programme de clémence déposée par une entreprise auprès de plusieurs autorités, dont la Comco.

Les activités d'assistance technique et de renforcement des capacités sont aussi une source de rapports informels entre l'autorité suisse et les jeunes autorités étrangères de concurrence auxquelles elle prête son concours pour mettre en place des régimes de concurrence conformes aux normes internationales (par ex. Amérique du Sud, Vietnam). Ces activités permettent également à la Comco de s'informer sur les régimes et pratiques d'application du droit de la concurrence à l'étranger tout en offrant une assistance aux autorités étrangères. Tel est le cas par exemple du programme COMPAL avec l'Amérique du sud.¹

¹ La Comco accueille, chaque année dans le cadre de ce programme, 2 à 3 stagiaires des autorités de concurrence du Nicaragua, Costa Rica, El Salvador, Pérou, Bolivie, Colombie, Équateur, Paraguay, Uruguay, et de la République Dominicaine.

1.2 La coopération formelle avec d'autres autorités de concurrence

1.2.1 La coopération sur la base de Mémoires d'accord

En 2011, la Suisse a signé un Mémoire d'accord avec l'Ukraine. Cet instrument va permettre la coopération entre les autorités de concurrence des deux pays au moyen de l'échange d'informations non confidentielles sur les procédures et états de fait similaires. Dans le cadre de cette coopération, l'autorité suisse aidera notamment l'Ukraine à mettre en place son programme de clémence.

1.2.2 La coopération sur la base d'accords de libre-échange (ALE)

Les accords de libre-échange conclus par la Suisse bilatéralement ou dans le cadre de l'AELE incluent toujours des dispositions en matière de concurrence. Ce lien repose sur le fait que les bénéfices de la libéralisation commerciale sont susceptibles d'être entravés par des pratiques anticoncurrentielles et qu'il est donc nécessaire de prévoir dans le contexte d'un accord de libre-échange des mécanismes de coopération permettant d'éviter ou de mettre fin à de telles pratiques. Le contenu et la formulation de ces dispositions sont variables et vont d'une simple coopération formulée en des termes généraux à une réglementation détaillée de la coopération et de la transmission d'informations. Ces dispositions sont en général inspirées de la recommandation de 1995 de l'OCDE. Ainsi, certains accords de libre-échange, p. ex. les accords AELE-Chili et AELE-Canada, prévoient une notification de certaines activités de mise en œuvre du droit de la concurrence ainsi que des consultations. Certains accords, p. ex. l'accord AELE-Colombie, réglementent également les requêtes demandant à l'autorité de concurrence de l'autre partie de prendre certaines mesures (*positive comity*) et prévoient la prise en compte par l'autorité de concurrence d'une partie des intérêts de l'autre partie dans ses mesures d'application du droit de la concurrence (*negative comity*). Enfin, un échange d'informations non confidentielles est prévu et réglementé dans plusieurs accords. Le régime le plus complet à cet égard est l'accord bilatéral de libre-échange et de partenariat économique entre la Suisse et le Japon qui comporte un chapitre détaillé sur la concurrence, inclus dans l'accord de mise en œuvre de l'ALE. Cet accord ne prévoit cependant pas un échange d'informations confidentielles.

2. Les limites et perspectives de la coopération suisse en matière de concurrence

2.1 Limites de la coopération actuelle de la Suisse en matière de lutte contre les cartels internationaux

Le droit suisse offre des garanties en matière de protection du secret professionnel, des secrets d'affaires, données personnelles et autres informations confidentielles. Or dans le domaine de la coopération en matière de concurrence ces protections légitimes en faveur des personnes physiques et morales peuvent constituer des obstacles objectifs au besoin des autorités de concurrence de s'informer et ou d'échanger des informations concernant une procédure anticartellaire. En effet, faute d'une base juridique ou du consentement des parties concernées, l'échange d'informations confidentielles est exclu. Les possibilités offertes par les instruments internationaux en vigueur pour la Suisse à ce jour sont limitées à l'échange d'informations non confidentielles ou n'impliquant pas des secrets d'affaires. Quant à la coopération informelle, elle trouve ses limites dans l'absence d'obligation pour les autorités concernées de coopérer, mais aussi parfois dans le caractère général des informations auxquelles l'échange donne accès. Par ailleurs, la LCart ne contient pas de disposition permettant la transmission d'informations confidentielles à des autorités étrangères. Ainsi, lorsque des informations confidentielles sont échangées, elles le sont sur la base d'un *Waiver* de confidentialité, par lequel les parties à la procédure autorisent l'autorité de concurrence à transmettre des informations les concernant. De tels *Waivers* sont essentiellement octroyés par les parties en matière de contrôle des fusions, domaine dans lequel il est de l'intérêt des entreprises d'accepter cet échange d'informations.

L'impossibilité d'échanger des informations confidentielles, notamment avec les autorités des pays limitrophes, peut présenter des inconvénients dans les procédures concernant des cartels internationaux menées par les autorités suisses en matière de concurrence. Ces inconvénients se révèlent surtout lorsqu'une autorité étrangère agit parallèlement contre un cartel international dont certains membres sont actifs en Suisse. Dans ce cas de figure, la Comco est généralement prise de vitesse par les entreprises visées qui s'empressent de détruire les preuves qui auraient permis d'établir l'existence de la ramification cartellaire en Suisse. Comme souligné dans cet extrait de son rapport d'activité 2010², ce problème s'est posé à la Comco dans certaines de ses procédures relatives à des cartels internationaux.

Dans les quatre décisions ci-après de la Comco concernant des cartels contre lesquels la DG COMP avait également ouvert des enquêtes, la possibilité d'une coopération renforcée aurait permis une plus grande efficacité dans l'identification et la répression des cartels concernés.

"Le 13 février 2006, la COMCO a ouvert une enquête à l'encontre de plusieurs compagnies aériennes pour accords dans le domaine du fret aérien. Ceux-ci concernaient différentes surtaxes en matière de fret aérien, par exemple celles grevant le carburant, celles touchant à la sécurité, celles relatives au risque de guerre et celles prélevées sur le dédouanement. L'enquête en Suisse n'est pas close. L'enquête ouverte dans l'UE a pris fin par la décision du 9 novembre 2010, qui inflige une sanction de 799 millions d'euros aux entreprises participantes.

Le 18 juillet 2007, la COMCO a ouvert une enquête contre plusieurs entreprises pour accords dans le domaine des ferrements pour fenêtres et portes-fenêtres. Les entreprises participantes étaient actives aux niveaux suisse et international. L'enquête a pris fin le 18 octobre 2010 ; la sanction prononcée par la COMCO se monte à quelque 7,6 millions de francs. Trois entreprises ont attaqué la décision de la COMCO. La procédure parallèle ouverte dans l'UE est toujours en cours.

Le 10 octobre 2007, la COMCO a ouvert une enquête contre l'association Spedlog Swiss et différentes entreprises de transport et de logistique actives à l'international. Elle soupçonne l'existence d'accords illicites dans la fixation de surtaxes, de taxes et de tarifs de transport dans le cadre de prestations de transport. Les procédures suisse et européenne sont toujours en cours.

Le 16 décembre 2008, la COMCO a ouvert une enquête à l'encontre de plusieurs entreprises actives sur le plan international, spécialisées dans les composants d'installations sanitaires (gestion de l'eau), de chauffage et de climatisation. L'enquête s'est achevée le 10 mai 2010 ; la COMCO a prononcé une sanction de 169 000 francs. La décision est passée en force de chose jugée. La procédure parallèle ouverte dans l'UE se poursuit.

Deux des quatre enquêtes, c'est-à-dire celles menées dans les domaines des ferrements et de la gestion de l'eau sont closes en Suisse. Une coopération formelle avec la Commission européenne aurait facilité ces deux procédures à la fois en Suisse et dans l'UE (...) la COMCO en a fait le constat, des indices et des pièces suggérant l'existence d'ententes sur les prix convenues et mises en œuvre dans l'UE figuraient dans l'état de fait des deux enquêtes. Il y a tout lieu de penser que les indices et pièces relatifs aux ententes mises en pratique en Suisse se trouvent dans la procédure européenne. L'échange ou la transmission des indices et pièces concernant respectivement l'autre enquête aurait sans doute facilité, voire accéléré, les procédures. Qui plus est, deux autodénoncations étaient à l'origine de l'une des deux procédures menées en Suisse, alors qu'il y en avait une seule dans la procédure européenne. La communication de la seconde dénonciation ou, à tout le moins, des parties de celle-ci concernant la procédure européenne aurait permis à l'UE de clore, comme en Suisse, plus rapidement la procédure.

Deux enquêtes, celles concernant le fret aérien et les prestations de transport, sont encore en suspens en Suisse, alors que la procédure liée à l'affaire du fret aérien est close dans l'UE. On peut se demander pourquoi la procédure suisse est si longue et pourquoi on n'a pas pu mettre un terme à une affaire plus ou moins en même temps que la Commission européenne. La raison tient essentiellement au manque de possibilité de coopération avec cette institution (...) Qui plus est, lorsqu'une procédure parallèle est menée par la Commission européenne, les autorités suisses en matière de concurrence, sans coopération formelle, ne savent pas avant le terme de cette procédure quels faits l'UE va précisément interpréter en droit et punir par des sanctions (...) Dans ces conditions, les autorités suisses en matière de concurrence sont contraintes d'attendre la décision de l'UE pour pouvoir délimiter avec suffisamment de précision leurs compétences et les faits en cause, ce qui implique inévitablement des procédures longues et insatisfaisantes pour les entreprises. Sans accord de coopération avec l'UE, on ne peut discuter de ces questions centrales, ni en décider, au début ou au cours de la procédure. Il n'est pas possible non plus de coordonner les délais de procédure".

²

Rapport annuel de la Comco 2010, pages 5 à 6, sur <http://www.weko.admin.ch/org/00143/index.html?lang=fr>

Le constat de ces limitations rend donc nécessaire de rechercher des alternatives de renforcement de la coopération entre autorités de concurrence, sous peine de ne pas pouvoir découvrir et réprimer efficacement les cartels internationaux.

2.2 *Les perspectives de la coopération suisse en matière de lutte contre les cartels internationaux*

Afin d'améliorer la coopération, l'option de la création d'une base légale interne pour la coopération en matière de lutte contre les cartels avait été envisagée lors de la première consultation initiée par le Conseil fédéral dans le cadre de la révision de la LCart en juin 2010. Il avait été proposé d'introduire dans la LCart un nouvel article 41 pour servir de base légale autorisant la Comco à coopérer étroitement avec les autorités étrangères, à leur communiquer des informations confidentielles, y compris les secrets d'affaires et à coordonner avec ces autorités des actes d'enquêtes en matière de lutte anticartellaire. La procédure de révision est encore en cours mais les chances d'approbation d'une telle disposition - donnant une large marge de manœuvre à la Comco en matière de coopération - ne sont pas élevées.

La conclusion d'accords de coopération de 2^e génération, permettant l'échange d'informations confidentielles, avec les principaux partenaires commerciaux de la Suisse est aussi une voie actuellement privilégiée. C'est le cas de l'accord de coopération Suisse-UE en matière de concurrence, actuellement négocié, qui pourrait faciliter la coopération en matière de lutte contre les cartels et contribuer ainsi de manière significative à la lutte contre les cartels internationaux, en raison du nombre de procédures similaires potentielles visant des restrictions à la concurrence.

SWITZERLAND

English Version

Introduction

International co-operation in all its forms in the area of competition is today a necessity as much among industrialised countries as between those countries and the emerging economies. In fact, the globalisation of anticompetitive practices in general and of cartels in particular has made the strengthening of such co-operation unavoidable as a means of identifying and combating international cartels more effectively. The issue of improving international co-operation against cartels is an important one for the enforcement of competition policy in Switzerland, given the international openness of its economy and the volume of its trade within Europe.

1. Types and instruments of Swiss co-operation in combating international cartels

1.1 *Informal co-operation with other competition authorities*

The Competition Commission (Comco) maintains informal contacts with other competition authorities, regardless of any formal co-operation agreement. It is also very active in the International Competition Network (ICN) and participates in meetings of the OECD Competition Committee. As well, it takes part in the regular sessions of the UNCTAD Intergovernmental Group of Experts (IGE) on Competition Law and Policy. The IGE in fact represents an increasingly important forum for sharing experience in the enforcement of competition law between OECD members and developing countries. Generally speaking, these forums offer the chance to forge and develop bilateral contacts with other competition authorities.

The informal contacts established during these various international encounters can give rise to subsequent exchanges concerning general issues as well as questions relating to concrete cases. However, no confidential information can be exchanged in this framework. The Comco maintains such exchanges with the DG COMP (EU), the *Bundeskartellamt* (Germany), and the *Autorité de la Concurrence* (France). Contact is made either by telephone or by e-mail. This informal co-operation has also made it possible to coordinate searches and inspections at the international level, when a company files a request with several authorities, including Comco, to participate in a leniency programme.

Technical assistance and capacity building activities are another source of informal contact between the Swiss authority and those newly established foreign competition authorities which it is helping to establish competition regimes in accordance with international standards (for example in South America and Vietnam). These activities also permit Comco to keep informed about regimes and practices for enforcing competition law abroad, while offering assistance to foreign authorities. This is the case, for example, with the COMPAL programme in South America.¹

¹ Under this programme, Comco accepts two or three trainees every year from the competition authorities of Nicaragua, Costa Rica, El Salvador, Peru, Bolivia, Colombia, Ecuador, Paraguay, Uruguay, and the Dominican Republic.

1.2 *Formal co-operation with other competition authorities*

1.2.1 *Co-operation based on memorandums of understanding*

In 2011 Switzerland signed a memorandum of understanding with Ukraine. This instrument provides for co-operation between the two countries' competition authorities through the exchange of non-confidential information on procedures and similar topics. Through this co-operation, the Swiss authority will also help Ukraine to institute its leniency programme.

1.2.2 *Co-operation based on free-trade agreements (FTA)*

The free-trade agreements negotiated by Switzerland bilaterally or in the EFTA context always contain competition provisions. This reflects the fact that the benefits of trade liberalisation can be impeded by anticompetitive practices, and consequently any free-trade agreement must contain co-operation mechanisms to avoid or do away with such practices. The contents and formulation of these provisions will vary, ranging from simple co-operation described in general terms to detailed regulation of co-operation and the transmission of information. These provisions generally draw upon the 1995 OECD recommendation. Thus, some free-trade agreements, for example the EFTA-Chile and EFTA-Canada ones, provide for notification of certain competition law enforcement activities as well as consultations. Other arrangements, such as the EFTA-Colombia agreement, regulate requests asking the competition authority of the other party to take certain measures (positive comity) and require the competition authority of one party to take account of the other party's interests in its competition law enforcement measures (negative comity). Lastly, several agreements provide for and regulate the exchange of non-confidential information. The most complete regime in this regard is the bilateral free trade and economic partnership agreement between Switzerland and Japan, which has a detailed chapter on competition included in the FTA implementation agreement. That agreement does not however provide for the exchange of confidential information.

2. *Limitations and outlook for Swiss co-operation in competition matters*

2.1 *Limitations on current Swiss co-operation in combating international cartels*

Swiss law guarantees the protection of professional secrecy, business secrets, personal data and other confidential information. When it comes to co-operation in the area of competition, this legitimate protection for natural or legal persons may pose obstacles to the competition authorities' efforts to keep themselves informed or to exchange information concerning a cartel investigation. In fact, without a specific legal basis or the consent of the parties concerned, the exchange of confidential information is precluded. The possibilities offered by the international instruments in force for Switzerland at the present time are limited to exchanging non-confidential information or data that do not involve business secrets. In terms of informal co-operation, this is limited when there is no obligation for the authorities concerned to co-operate, but it can also be hampered by the general nature of the information to which the exchange gives access. Moreover, the LCart (Cartel Act) contains no provisions for transmitting confidential information to foreign authorities. Thus, when confidential information is exchanged this is done on the basis of a waiver of confidentiality, whereby the parties to the proceeding authorise the competition authority to transmit the information concerning them. The parties will grant such waivers essentially in cases of merger control, an area where it is in the interest of the companies to accept this exchange of information.

The impossibility of sharing confidential information with the authorities of neighbouring countries can pose a problem when the Swiss competition authorities are investigating international cartels. These problems appear particularly when a foreign authority is taking parallel action against an international cartel that has active members in Switzerland. In this case, Comco generally finds that the companies

targeted have beaten it to the draw by destroying evidence that would demonstrate the existence of cartel ramifications in Switzerland. As noted in this excerpt from its 2010 annual report², Comco has encountered this problem in a number of international cartel investigations.

In the four Comco decisions described below concerning cartels, where the DG COMP had also opened an investigation, the possibility of enhanced co-operation would have made for greater efficiency in identifying and eliminating the cartels concerned.

"On 13 February 2006, Comco opened an investigation against several airline companies for collusion concerning air freight. This related to various airfreight surcharges, for example those on fuel, security, war risk and customs clearance. The Swiss investigation is not closed. The EU investigation ended with a decision of 9 November 2010 imposing a penalty of €799 million on the participating companies.

On 18 July 2007, Comco opened an investigation against several firms for collusion in the area of window and door fittings. The participating companies were active both in Switzerland and internationally. The investigation ended on 18 October 2010; the penalty imposed by Comco amounted to some fr.7.6 million. Three firms have challenged the Comco decision. The parallel procedure opened in the EU is still underway.

On 10 October 2007, Comco opened an investigation against the Swiss Spedlog Association and various transport and logistics companies active internationally. It suspects unlawful collusion in the setting of surcharges, charges and tariffs in the provision of transport services. The Swiss and European proceedings are still underway.

On 16 December 2008, Comco opened an investigation against several firms active internationally in components for sanitary installations (water management), heating and air-conditioning. The investigation was wrapped up on 10 May 2010; Comco imposed a penalty of fr.169,000. The decision has been confirmed by the courts. The parallel procedure opened in the EU is continuing.

Two of the four investigations, i.e. those involving window and door fittings and water management, have been closed in Switzerland. Formal co-operation with the European Commission would have facilitated these two investigations both in Switzerland and in the EU (...). Comco notes that both investigations revealed indications and documents suggesting the existence of price-fixing cartels in the EU. There is every reason to think that indications and documents concerning the cartels established in Switzerland are to be found in the European investigation. The exchange or transmission of indications and documents concerning the other inquiry would no doubt have facilitated and even accelerated the proceedings. Moreover, one of the two proceedings conducted in Switzerland was sparked by two instances of self-reporting, while only one self-report was filed in the European procedure. The communication of the second report or, at least, the portions thereof concerning the European procedure would have allowed both the EU and Switzerland to complete the investigation more quickly.

Two investigations, those concerning air freight and transportation services, are still suspended in Switzerland, while the airfreight investigation in the EU has been closed. One may ask why the Swiss proceeding is taking so long and why it could not be wrapped up at more or less the same time as the European Commission's investigation. The reason lies essentially in the impossibility of co-operating with that institution (...). Moreover, when a parallel proceeding is conducted by the European Commission, the Swiss competition authorities, in the absence of formal co-operation, have no way of knowing before that investigation is completed what deeds the EU is going to prosecute and punish (...). Under these conditions, the Swiss competition authorities must await the EU decision in order to determine clearly their jurisdiction and the facts in question, which inevitably makes for lengthy and unsatisfactory proceedings for the companies. Without a co-operation agreement with the EU, there can be no discussion or decision on these key questions, at the beginning or during the course of the procedure. Nor is it possible to coordinate the scheduling of the procedure."

²

Comco Annual Report 2010, pages 5 to 6, at : <http://www.weko.admin.ch/org/00143/index.html?lang=fr>

In light of these limitations, then, alternatives need to be sought for reinforcing co-operation among competition authorities, if international cartels are to be effectively discovered and prosecuted.

2.2 *The outlook for Swiss co-operation in combating international cartels*

As a way of enhancing co-operation, the option of creating a domestic legal base for co-operation in cartel investigations was considered during the first consultation initiated by the Federal Council as part of the review of the LCart in June 2010. The proposal was to introduce in the LCart a new article 41 to provide a legal basis for Comco to co-operate closely with foreign authorities, to communicate confidential information to them, including business secrets, and to coordinate cartel investigations with those authorities. The review procedure is still underway but there is not much chance that such a provision, giving broad leeway to Comco in co-operation, will be approved.

The conclusion of second-generation co-operation agreements allowing the exchange of confidential information with Switzerland's principal trading partners is another preferred route. An example is the Switzerland-EU agreement on co-operation and competition matters, currently being negotiated, which could facilitate co-operation in cartel investigations and thereby contribute significantly to combating international cartels, given the number of potentially similar investigations concerning restraint of competition.

UKRAINE

1. Improvement of international cooperation in cartel investigation

This day, successful economic development of the countries in the world directly depends on availability and implementation efficiency of the national competition legislation. However, under the conditions when the trading policy, due to the functioning of the World Trade Organization, left the competition policy behind and taking into consideration certain difficulties, which arise from unilateral enforcement of the competition law limited to the national jurisdiction, the establishment of cooperation in the area of competition policy becomes of particular importance.

The Antimonopoly Committee of Ukraine is committed to using in the proceedings various instruments of international cooperation on the matters of competition. Depending on the specific objectives, all these instruments belong to the following areas.

2. Development of bilateral cooperation with foreign competition authorities on voluntary grounds

The experience of such cooperation is highly valued by experts, in particular, the principle of positive comity which has recently been put to the foundation of international cooperation in the area of competition, is deemed to show more promise in order to ensure interaction and mitigate the tension between the trading policy and the competition policy compared to the other forms of cooperation.

In 2011, international treaty framework of the AMCU's bilateral cooperation in the area of competition policy is formed by 4 intergovernmental agreements (with Russia, Armenia, Azerbaijan and Georgia) and 11 inter-agency agreements (with Austria, Belarus, Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia, Hungary, Czech Republic and Switzerland).

In evaluation of the AMCU's bilateral agreements on cooperation in the area of competition policy in their entirety, attention shall be drawn to 3 important factors as follows:

- Firstly, it is a bilateral basis that enables the best consideration of the interests of each party and provides versatile instruments of their complete implementation.
- Secondly, such cooperation is provided on voluntary grounds and based on the principle of sovereignty of the parties by taking into account the actual degree of their economic and political integration.
- Thirdly, the instruments of bilateral cooperation contain accessible for the parties and feasible interaction procedures in relation to prevention and termination of transnational anti-competitive practices and providing control of economic concentration, when the national economic interests of the member states are at stake.

We should note that in drafting of the said bilateral documents we managed, in our opinion, to achieve the utmost consideration of the said 3 factors. They are oriented towards achievement of several mutually related specific objectives that is to say, harmonization of competitive laws of the parties, provision of the

instruments for interaction in relation to prevention and termination of practices having negative impact on competition in markets of the parties and provision of conditions for efficient functioning of the parties' commodity markets.

The intergovernmental bilateral agreements of the Committee provide for both traditional and new ways and methods for achievement of the objectives specified therein. The traditional forms should include sharing of experience, information, holding of expert consultations. That being said, they specify the approaches towards cooperation, which are based on the principle of positive comity. This principle, known worldwide in international cooperation practices in the area of competition policy, finds increasingly broader application in the international legal documents, which govern the relations between the member countries of the Commonwealth of Independent States. The principles of positive comity essentially means that one of the parties is able to apply to the other party with a request to initiate or expand of actions intended against anti-competitive practices that exist in the territory of such Party and affects important interests of the applying Party. That being the case, taking the relevant action is voluntary. In addition, the applying Party, also reserves the right to initiate or reinstate own law enforcement procedures.

In all 4 intergovernmental agreements, the principle of positive comity is implemented via such forms of bilateral interaction as sending notices on behavior, which would have a negative impact on competition and joint investigations in certain sectors of the economy, if they show indications of behavior, which negatively impact the competition.

The inter-agency agreements provide for information exchange, internship, training visits, organization of common events, such as conferences, workshops, round tables, and the like. One of the key provisions of such agreements is sharing information by the parties on cases investigation in relation to violations of competitive laws. Nevertheless, we should note that the interaction under those agreements has been so far limited to general information exchange and holding of conferences, workshops and the like.

In addition to the said agreements, bilateral cooperation mostly takes the form of joint informal training sessions with some countries, without the framework documents. The most active cooperation is conducted with the USA taking into consideration the long-term relations with the experts at the Federal Trade Commission of the USA.

An important instrument of the AMCU's international co-operation is its participation in the implementation of multilateral international agreement on cooperation in the field of competition: the Agreement on Conducting Coordinated Antimonopoly Policy of the CIS Member States.

This day, the said Agreement, the original wording of which was revised in 2000, is a document, built on the modern conceptual framework. The Agreement takes into consideration the relevant OECD recommendations, the provisions of the UN Set of Principles on Competition, experience and approaches of the countries with well-settled market traditions. The objective of the Agreement is to facilitate the establishment of conditions for successful social and economic development of the member states, formation of full-fledged market relations among the CIS countries based on the principles of fair competition, improvement of the competition culture, convergence of national laws in the area of competition protection.

The Agreement contains the specific procedure of interaction of the Parties in order to prevent and terminate transnational anti-competitive practices and provide control of economic concentration, where the national economic interests of the parties are at stake. The application of such procedure makes it possible to improve efficiency of economic competition protection in the territory of the Agreement's

member states and facilitates termination of competition distortion in the cases, which go beyond the jurisdiction of the national antimonopoly legislation.

For implementation of the multilateral Agreement on Conducting Coordinated Antimonopoly Policy and on its basis, the Intergovernmental Council on Antimonopoly Policy (ICAP) was set up as early as in 1993. Since the formation of the ICAP, 35 meetings have been held. The experience gained in the 20 years of proceedings of the Intergovernmental Council on Antimonopoly Policy is seen as extremely important, as it provides the conditions for systematic expert information sharing between the anti-monopoly agencies of the CIS countries, thus providing development of agreed principles of competition policy, the capability of forming comprehensive mutual understanding and prompt resolution of possibly problematic situations.

In May 2006, the Headquarters on joint investigations of violations of the antimonopoly legislation in the CIS member states was established within the framework of the said Agreement for the purposes of joint investigations in certain markets within the CIS in order to detect and terminate the transnational anti-competitive practices.

The task forces are set up in the Headquarters for market research of passenger air transportation, telecommunications, electric power engineering, grain, retail chains and some others. Based on the findings of the said research, the Headquarters prepares analytical reports in relation to the situation of competition in the said markets of the CIS member states and propositions in relation to improvement of the relevant antimonopoly regulation.

It is important to note that at the initiative of Ukraine, a task force on cartel investigation was also set up within the proceedings of the Headquarters. With a view to specifying the capacity of the CIS member states in relation to joint investigations in the said area, the task force based on specially designed questionnaire examined the provisions of the national laws and practices relevant to cooperation in cartel investigations.

Two objectives were set for the examination. Firstly, to look into the level of compliance in the approaches towards the legal regulation of the institution of concerted action by business entities in the laws of the member states as this is important to specify those types of concerted action and the assessment criteria of their wrongfulness or lawfulness, which would serve as the basis of joint investigations. Such compliance to the extent of substantive provisions of the law considerably determines the capacities and success of cooperation between the competition authorities in cartel investigation in 2 or more CIS countries. Secondly, to compare the laws and practices that were deemed to be required in order to determine the degree of readiness for holding of joint investigations and detection of possible problems, which would lower the efficiency of such investigation.

The specification of specific features of the national treatment in the legal regulation of concerted action also became an important factor of the examination. In their entirety, the results of the examination demonstrated availability of sufficient legal prerequisites to cooperation of the CIS member states in investigation of many types of violations manifested as anti-competitive concerted action.

That being said, we should note that a number of important aspects, which would affect the efficiency of prospective cooperation, were identified in the course of the examination.

The first aspect is institutional, that is to say, the matters pertaining to government authorities, interaction with which will be required in cartel investigation. In some cases, investigation of anti-competitive concerted action in the CIS countries is included completely in the competence of the competition authorities (Armenia, Ukraine), while the others distribute the competence among several government authorities. By way of example, in the Russian Federation some functions in the area of

combating anti-competitive concerted action, at a stage of decision making and application of penalties are assigned to courts within the framework of administrative and criminal processes; in Kazakhstan these may include the antimonopoly authority, the Ministry of Interior, the prosecution and the court. Therefore, parallel or mutually exclusive competence of 2 or more national authorities in investigation of anti-competitive concerted action might lead to certain specifics in the interaction pattern at the international level.

Liability is also an important aspect. By way of example, where, along with the administrative responsibility of legal entities to be determined, as a rule, by the competition authorities, certain national treatment provides for criminal responsibility of individuals pertaining to the competence of the Ministry of Interior, the prosecution and the court, the problem of institutional interaction would re-appear. If we imagine a situation that a business entity applies to competition authorities of one country and furnishes information on cartel in hopes for amnesty and such cartel affects the interests of another country, which would also initiate an investigation, should the former country take such surrender into consideration? Where the business entity has no guarantees, they would hardly so surrender even in a single country. A conclusion is that taking into consideration the necessity to interact at various stages of cartel investigation, such interaction shall always go beyond the level of anti-monopoly authorities.

The problem of information exchange undoubtedly remains a key aspect efficient of international co-operation in cartel investigations. Even at a stage of preliminary inquiry into possible violations, risks and problems arise in relation to obtaining and sharing of information on detection (suspicion) of cartel and the intents in relation to initiate an investigation on the part of every country. At that stage, information on the market structure, its participants and their possibly anti-competitive behavior may be needed, evaluation of the concerted action type in light of the impact on the interests of other countries shall also be provided, and the coordinated strategy of investigation, the instruments of evidence gathering and the like shall be determined.

Based on the aforesaid, Ukraine proposed to put to discussion at the ICAP the capacity to govern expert information sharing by drafting a special international agreement on interaction of the competitive authorities of the CIS in the area of information exchange. In particular, such agreement would provide for an instrument of information exchange on requests of the competition authorities of the CIS, types of information and scopes of its disclosure, requirements in relation to ensuring the storage of the received information and responsibility for its unauthorized disclosure. That being the case, the agreement, in compliance with the requirements laid down in the national laws, shall have the status of international regulatory act, binding in the territory of the CIS member states.

The Agreement on Conducting Coordinated Antimonopoly Policy dd. 25 January 2000 establishes the opportunity of information exchange. However, the agreement specifies only the general provisions, which pertain to information, which can be shared among the competition authorities.

Therefore, a decision was made to compile a list of information, which the authorities would be able to share. Such information can be classified as general or pertaining to specific investigation. In particular, general information might include the results of market analysis, information in relation to court decisions on cases with the participation of competition authorities, information in relation to commencement of proceedings on violations of competitive laws, and the like. Preparation of such information shall adhere to confidentiality, i.e. the information shall contain only general indicators.

Information in relation to a specific investigation can be provided as a notice or furnished upon request. That being the case, the competition authorities, which provide such information, might set some limitations of its dissemination (degree of disclosure, publicity and the like). Within the framework of sharing in relation to a specific investigation, the competition authorities may share information in relation

to the stage of investigation, application of leniency program, methods used in order to determine penalties and in relation to the time frames of the investigation.

With a view to efficiently examining the cases on violations of competitive laws, which affect the interests of several member states of the Agreement, the procedure of information exchange needs to be improved. The regulations, which form an annex to the Agreement on Conducting Coordinated Antimonopoly Policy contain a requirement that a country may refuse to provide information if such information is confidential for the purposes of their national law.

Therefore, the notion "confidential information" is likely to differ depending on their definition in the national laws of the Agreement's member states. This produces inequality in sharing of the relevant information between the competition authorities and might result in violations of reciprocity, one of the principles of international law.

Taking into consideration the above, the Antimonopoly Committee of Ukraine proposed the following amendments to the Regulations:

- Firstly, as the notion "confidential information" is broad by contents and covers various areas of life and activity of a nation, the contents of confidential information, which the competition authorities may provide upon the relevant request of the competition authorities of another country, shall be specified.
- Secondly, a condition precedent shall be set that a permit shall be obtained from the party, which provided the confidential information to the competition authority of the Agreement's member state for the investigation, to provide such information to the competition authorities of another country.
- Thirdly, the relevant protection of information disclosed to another member state of the Agreement under the Regulations shall be provided.

Interaction at a stage of decision making is another important issue. In relation to every subject of violation, every nation, the interests of which are affected by the violation, shall make decision and impose penalties, proceeding from the national criteria. The examination showed that national laws may provide for penalties in the form of fines, compulsory reimbursement of damages, and/or seizure of unjust profit; in addition, some countries also set criminal responsibility. Therefore, the ratios between the applicable penalties require more consideration.

Unavoidability of punishment is extremely important element of cartel enforcement. With this in mind, provision of instruments for enforcement of decisions made by anti-monopoly authorities and courts has a significant role to play in development of cooperation in investigation of international cartels. The AMCU's examination shows unavailability of legal documents, which would provide enforcement of decisions made by anti-monopoly authorities and enforceability of the decisions made by courts on enforcement of decisions made by the anti-monopoly authorities.

UNITED KINGDOM

The United Kingdom Office of Fair Trading's (OFT) cartel enforcement regime is designed to uncover, investigate and deter cartels, which can seriously harm consumer welfare and impede economic efficiency. The OFT believes that increasing international co-operation in cartel enforcement facilitates its work and that of other competition authorities, thus strengthening cartel enforcement on a global basis.

This paper gives a short overview of the UK cartel enforcement regime (part 1) and the mechanisms for international co-operation (part 2). It then provides an example of practical international co-operation through the Marine Hose Cartel case (part 3). Finally it suggests some challenges and opportunities for international co-operation (part 4).

1. OFT's cartel enforcement regime

The OFT has a dual civil and criminal cartel enforcement regime, with powers granted under the Competition Act 1998 (the 'Competition Act') and the Enterprise Act 2002 (the 'Enterprise Act') respectively. The various powers and safeguards differ between the civil and the criminal aspects of the regime.

The Competition Act provisions are aimed at enforcement against undertakings and prohibit agreements between undertakings, decisions by associations of undertakings or concerted practices, which have as their object or effect the prevention, restriction or distortion of competition (the Chapter I prohibition).

The Competition Act gives the OFT a wide range of powers to investigate cartels, including requiring companies to produce information and the ability to enter business or domestic premises to conduct a search. The Act also gives the OFT a range of potential sanctions for breaches of the Act, including the power to impose a penalty on undertakings of up to ten per cent of their total worldwide turnover and to make a court application to disqualify individuals from acting as company directors for up to fifteen years.

As a complement to the OFT's powers under the Competition Act, the Enterprise Act makes it a criminal offence for individuals to commit the cartel offence (that is, broadly, making an agreement dishonestly to fix prices, share markets or engage in bid-rigging, where that agreement is made or implemented in the UK). Under the Enterprise Act, those found guilty of criminal cartel behaviour are liable to a maximum penalty of up to five years' imprisonment, an unlimited fine, disqualification from acting as company directors for up to fifteen years and confiscation orders.

2. Overview of OFT's international co-operation

Alongside its involvement in the OECD, the OFT is an active member of various international competition organisations and other collaborative bodies, such as the International Competition Network (ICN), the European Competition Network (ECN) and UNCTAD. The OFT believes that the work of these organisations has greatly increased international contact, collaboration and co-operation between the various competition authorities around the world.

In addition to its engagement in various international organisations, the OFT also has a number of bilateral or multilateral arrangements with overseas competition agencies, including the Australian Competition and Consumer Commission (ACCC), the National Development and Reform Commission of China and the United States Federal Trade Commission. The various arrangements provide for the exchange of information on the policies, laws and rules regarding competition. However, in some cases, co-operation is not limited to an exchange of rules and policies and can extend to a practical level, allowing for the co-ordination of enforcement activities on a case-by-case basis.

3. The Marine Hose Cartel—an example of practical international co-operation

3.1 Background

Marine hose, a type of rubber hose, is a product used in the oil and defence industries for transporting crude oil between tankers and storage facilities. A number of marine hose suppliers, based in Japan, UK, Italy and France, participated in a global cartel in marine hose and ancillary products, which was aimed at price-fixing, market-sharing, customer allocation, restricting supplies and bid rigging. One of the participants in the cartel, an independent consultant, based in the UK, acted as a full-time co-ordinator to organise meetings, co-ordinate bids on individual contracts and to prepare and circulate monthly market share reports.

The cartel lasted from 1986 until 2007, when several competition authorities, including the OFT, the European Commission (EC), the US Department of Justice (DOJ) and the Japan Fair Trade Commission (JFTC) took co-ordinated enforcement action.

3.2 International co-operation

The Marine Hose case involved a number of competition authorities co-operating with one another, both during their initial investigations and subsequently.

3.2.1 Co-ordination of investigations and other action

The DOJ arrested three UK businessmen, together with five nationals from other countries, in Houston, Texas, in May 2007. The arrests were timed to coincide with searches carried out by the OFT at both business and domestic premises in the UK, as well as on-site inspections by the EC.

The three UK businessmen were allowed subsequently to return to the UK and face charges as part of plea bargain agreements with the DOJ. The ‘UK three’ were arrested on arrival in the UK and charged with the cartel offence.

3.2.2 Information disclosure

Following the completion of the OFT’s enforcement action (further details of which follow), the ACCC approached the OFT to enquire about the possibility of requesting relevant information from the OFT in relation to the Marine Hose cartel which would be of use in its own civil investigation in Australia. A formal request for the information was made by the ACCC in accordance with the relevant Memorandum of Understanding between the ACCC and OFT (amongst others) and pursuant to Part 9 of the Enterprise Act.

Part 9 of the Enterprise Act provides that the OFT may disclose information to overseas competition authorities, subject to a number of conditions and safeguards, including equivalent protections on self-incrimination and data protection principles. The Secretary of State may also in certain circumstances direct that a disclosure must not be made.

Having complied with the principles and procedures under the Enterprise Act, the OFT was able to disclose the requested information to the ACCC.

The ACCC commenced formal proceedings in the Australian Federal Court against a number of suppliers of marine hose in relation to the cartel's effects on Australian territory. As part of these proceedings, the ACCC used in evidence material disclosed to it by the OFT. Following the conclusion of these proceedings, Graeme Samuel, then chairman of the ACCC said, "*ACCC investigators were greatly assisted by both the United States Department of Justice and the United Kingdom Office of Fair Trading in the provision of documents and information located overseas.*"

3.3 *Successful outcomes*

Following the arrests, searches and inspections in relation to the Marine Hose cartel in May 2007, global co-ordination and enforcement action resulted in a number of successful prosecutions and other actions in a number of jurisdictions, including the United States, Australia, Japan, the UK and the European Union.

3.3.1 *UK*

In 2008, three UK businessmen – the full-time co-ordinator of the cartel and two senior employees of one of the companies involved – pleaded guilty to the cartel offence and were sentenced to terms of imprisonment of between two and a half to three years. (These sentences were subsequently reduced on appeal to periods of between twenty months and two and a half years). Under the terms of the plea agreements with the DoJ, the UK sentences had the effect of extinguishing the prison sentences that the UK defendants had agreed to serve in the US. All three were also disqualified from acting as company directors for periods of between five and seven years and confiscation orders (under the Proceeds of Crime Act 2002) were made against two of the three individuals.

3.3.2 *Australia*

In the proceedings brought by the ACCC against several marine hose suppliers involved in the cartel, the Federal Court in Melbourne ordered four companies to pay penalties exceeding AUS\$8 million for engaging in cartel conduct affecting Australian territory. The chairman of the ACCC acknowledged the role played by co-operation between competition authorities, in saying that "*international cooperation was key to this successful court outcome*".

3.3.3 *Other jurisdictions*

In the European Union, the EC brought proceedings against five companies involved in the Marine Hose cartel, fining them a total of Euros 131 million.

In the United States, a number of individuals, including the non-UK-national executives arrested in Houston, Texas in 2007, were charged with offences relating to their involvement in the Marine Hose cartel and a range of sanctions, including prison sentences, was imposed. In addition, a number of the companies involved in the cartel were fined for their involvement.

'Cease and desist' orders were also imposed in Japan by the JFTC on a number of companies which had participated in the cartel. One of the companies was also fined for its involvement.

4. Challenges and opportunities for international co-operation

Although international co-operation in cartel enforcement has led to a number of successful outcomes, competition authorities still face a number of challenges in co-operating on a practical level. Principal challenges include:

- Differing requirements for co-ordination as between competition authorities. There are a large number of competition authorities operating around the world, with new authorities still being formed as different jurisdictions implement competition regimes. Given the different stages of development between the new authorities and more mature authorities and in view also of the various legal and governmental systems under which the competition authorities operate, there can be differences in the ability to co-ordinate between competition authorities, due to legal or practical requirements. Within this, challenges may also arise through inconsistent or complicated processes under domestic law for sharing information with other competition authorities.
- Tension between information disclosure and protection. The exchange of information is pivotal to effective practical co-ordination between competition authorities in global cartel enforcement. However, there is an inherent tension between such exchanges of information and ensuring the adequate protection of sensitive or confidential information. This tension has become particularly apparent in relation to the protection of information provided by leniency applicants. The balance must be struck between preserving the policy incentives in applying for leniency and the appropriate disclosure of information to other competition agencies, allowing public enforcement measures to be taken around the globe.
- Differing interests of domestic competition authorities and parties. With the spread of competition regimes and increased detection of international cartels, while domestic authorities are keen to prosecute within their own jurisdiction, parties are keen to ensure that the overall “case” and consequential liabilities are managed: this may adversely impact the ability to resolve, or resolve quickly, individual domestic cases.

Notwithstanding these and other challenges, cooperation can also bring benefits in terms of reducing investigatory burdens, shortening timescales and encouraging parties to settle or plead guilty. Efforts are also underway to support international cooperation: for example the ICN’s Cartel Working Group is developing a set of charts to facilitate international cooperation on anti-cartel enforcement cases. The charts will set out each competition authority’s formal and informal mechanisms for information sharing, enabling members to quickly view and assess which mechanism is most appropriate for their needs.

5. Conclusion

Although various challenges remain, the OFT believes that there are powerful incentives to increase international co-operation in cartel enforcement, given in particular the following factors:

- Significant cross-border trade can facilitate the formation of cross-border cartels; international co-ordination in cartel enforcement can help to combat this.
- Competition regimes are being adopted by more and more jurisdictions. Whilst this is beneficial in terms of enforcement, it can also increase the risk of inconsistency and duplicative procedures as between the different regimes, which can lead to unnecessary costs and burdens (both for the authorities and for those being investigated).
- In the current global economic climate, many competition authorities are facing budgetary freezes or restrictions, meaning that they have to continue to operate effectively, but with fewer resources. Efficient international co-operation should help to temper the effects of these restrictions to some degree.

UNITED STATES (DOJ)

1. Existing tools for international co-operation

- *Please identify any formal mechanisms and/or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of a competition authority from another jurisdiction?*
- *Please describe the informal mechanisms your competition authority has in place for co-operating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections/dawn raids in conjunction with another competition authority?*
- *To what extent have you used OECD instruments, e.g. the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and the 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, in your investigations? For what purpose were they used and how helpful were they?*

The United States is a party to approximately 70 mutual legal assistance agreements (MLATs), which are treaties of general application pursuant to which the United States and another country agree to assist one another in criminal law enforcement matters. The specific provisions of each treaty vary, but generally provide for such assistance as the conduct of searches, taking of witness testimony, and service of documents. The United States is also a party to an antitrust-specific mutual legal assistance agreement with Australia, an agreement authorized by domestic legislation. *See* International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 *et seq.* This agreement also provides, in appropriate circumstances, for the conduct of searches, taking of testimony and service of documents. *See* <http://www.justice.gov/atr/public/international/docs/usaus7.htm>

In addition, the United States (or, in some cases, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission, the U.S. antitrust agencies) is a party to “soft” antitrust cooperation agreements with Australia, Brazil, Canada, Chile, the European Union, Germany, Israel, Japan, and Mexico. The U.S. antitrust agencies also entered into memoranda of understanding with the competition authorities of China and Russia. *See* <http://www.justice.gov/atr/public/international/int-arrangements.html>. Through consultation, notification provisions and the like, these agreements serve as a catalyst for cooperation but are not necessary for cooperation to take place. These agreements, however, do not change the signatories’ laws, including the laws with regard to the treatment of confidential information. These agreements, therefore, do not allow for the sharing of confidential information that could not otherwise be exchanged.

The DOJ cooperates with other competition authorities on a regular basis in cartel investigations. In general, this type of cooperation has included, where not restricted by confidentiality rules, the sharing of leads and background information about the relevant industry and actors, notification of initial investigative actions which can facilitate later specific investigative requests for assistance, and the

coordination of inspections and interviews. The DOJ also engages in cooperation facilitated by waivers from applicants under DOJ's leniency programs.

Cooperation based on the 1995 OECD recommendation is helpful. It allows the DOJ at times to learn about potential anticompetitive activity affecting the U.S. market and other jurisdictions' enforcement intentions. It has also facilitated notifications of our enforcement activities to other jurisdictions. In the DOJ's experience, the 2005 Best Practices remain useful in setting forth the parameters for potential exchange of confidential information in cartel cases.

2. Types of co-operation

- *What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to the exchange of relevant information, the organisation and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc?*
- *How does the co-operation take place? For example, is it by telephone, email or through face to face meetings? How successful has the co-operation been? What aspects of co-operation have worked particularly well and what has been less successful?*

DOJ engages in both formal and informal cooperation in cartel investigations. As described above, at the pre-investigative stage, this cooperation has included, where not restricted by confidentiality rules, the sharing of leads and background information about the relevant industry and actors, notification of initial investigative actions and the coordination of inspections and interviews. At the investigative stage, much of the cooperation DOJ engages in takes the form of formal requests for assistance pursuant to MLATs or letters rogatory. Such requests usually seek corporate documents and, less frequently, witness interviews. DOJ has occasionally been requested to provide information in the post-investigative stage. This has involved providing copies of public court filings after we have filed a case and, in some instances, providing access to non-public information that is not statutorily protected or otherwise entitled to confidential treatment. DOJ has also cooperated with other agencies on the filing of charges.

DOJ's experience has been that cartel cooperation is useful in an enforcement context. For example, in May 2007, while eight executives from the United Kingdom, France, Italy and Japan were arrested in the United States for their role in a conspiracy to rig bids, fix prices and allocate markets for United States sales of marine hose used to transport oil, competition authorities from the Office of Fair Trading (OFT) in the UK and the European Commission were also executing search warrants in Europe. Three of these executives, British nationals, entered plea agreements in the United States in December 2007, agreeing to jail sentences and fines, and were then escorted in custody back to the United Kingdom to allow them to cooperate with the OFT. Also, in August 2007, when announcing British Airways Plc.'s agreement to plead guilty and pay a \$300 million criminal fine for its role in conspiracies to fix the prices of passenger and cargo flights between the United States and the United Kingdom, DOJ acknowledged that this enforcement action represented successful coordination between U. S. law enforcement authorities and the UK's Office of Fair Trading.

2.1 International vs regional co-operation

- *Which competition authorities you co-operate with the most? How often do you co-operate? Do you co-operate more with authorities located geographically close-by?*

- *Are you part of a regional competition network? If so, to what extent has this network assisted in the cartel investigations you have carried out?*
- *If you are a new/young agency to what extent do you co-operate with your neighbouring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritise requests received from newer agencies?*

The United States is not part of a regional competition network. DOJ cooperates frequently with competition agencies from around the world, including both new/young and more established agencies.

3. Identifying gaps and improving the current frameworks

- *What are the current challenges faced by your competition authority in cartel investigations which have a cross-border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?*
- *How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and/or intensity of coordination?*
- *How do you think your current system could be improved in relation to the way in which international cartels are investigated? In what way could liaising with competition authorities in other jurisdictions be improved?*
- *Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?*

The greatest challenge in investigating and prosecuting cross-border cartels is obtaining evidence and information located in other jurisdictions. Cooperation with other jurisdictions has at times been effective in overcoming this challenge.

The United States has a criminal cartel enforcement regime enforced by the DOJ. When not restricted by confidentiality rules, the DOJ may, in the pre-investigative stage, engage in the type of cooperation outlined above, such as sharing of leads and background information and coordination of inspections and interviews, even with agencies with civil or administrative enforcement regimes. With the exception of its antitrust-specific mutual legal assistance treaty with Australia, the United States generally cannot provide assistance under MLATs to jurisdictions that are pursuing civil investigations. Subject to resource constraints, the DOJ is generally able to share publicly available information with other competition agencies, regardless of the form of their enforcement regime.

While challenges remain in the area of international cooperation, cooperation among jurisdictions in anti-cartel enforcement continues to become more robust, sophisticated, and effective. As agencies

continue to develop relationships with each other, DOJ believes that such cooperation will continue to evolve.

4. Information Sharing

- *What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?*
- *Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?*
- *To what extent can your authority rely on information gathered in another competition authority's investigation in your own investigation?*
- *Does your jurisdiction/agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?*
- *What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?*
- *Do you have any particular safeguards in place for information that has been given under an amnesty/leniency programme?*

The primary barrier to information sharing encountered by DOJ when requesting information from other jurisdictions generally relates to the legal and practical constraints faced by those other jurisdictions in providing the requested information. In some instances, those constraints have prevented the DOJ from obtaining certain information located outside the U.S. Specific examples cannot be provided in light of confidentiality constraints.

DOJ also faces legal constraints when presented with requests for information from other jurisdictions. Much of the information gathered by DOJ in the course of a criminal investigation is statutorily protected from disclosure, by, for example, Rule 6(e) of the Federal Rules of Criminal Procedure. In addition, certain confidentiality protection is afforded to information provided to the DOJ under its corporate and individual leniency programs. Such information cannot be exchanged absent appropriate court orders or waivers, respectively.

In order to be introduced as evidence in a criminal trial in the United States, information must meet the requirements of relevant federal rules of criminal procedure and evidence. Information received in response to a formal assistance request will, in many instances, satisfy some or all of these requirements. Information received through informal channels will usually not be in a form, at least initially, in which it would satisfy such requirements. However, DOJ is very interested in obtaining information through

informal as well as formal cooperation, since even lawfully obtained information that would not, at least initially, be admissible as evidence in a criminal trial could be useful in advancing an investigation.

The MLATs to which the United States is a party and the antitrust-specific mutual legal assistance agreement entered into with Australia include provisions relating to confidentiality. The confidentiality provisions in the MLATs vary among treaties. The confidentiality provisions in the agreement with Australia can be found in Articles VI and the Annex. See <http://www.justice.gov/atr/public/international/docs/usaus7.htm>.

The DOJ's policy is to treat as confidential the identity of leniency applicants and any information obtained from the applicant. The DOJ will not disclose a leniency applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Further, in order to protect the integrity of the leniency program, the DOJ has adopted a policy of not disclosing to other authorities, pursuant to cooperation agreements, information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure. Notwithstanding this policy, the DOJ routinely obtains waivers to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. In addition, leniency applicants may issue press releases or, in the case of publicly traded companies, submit public filings announcing their conditional acceptance into the DOJ's Corporate Leniency Program, thereby obviating the need to maintain their anonymity.

5. International co-operation within other policy areas

- *Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?*
- *Does your authority liaise with any other regulatory authorities to discuss common problems/solutions? Please provide examples.*

Other law enforcement agencies in the United States also face the challenge of obtaining evidence and information located in other jurisdictions. The Antitrust Division consults with other components in the DOJ and other U.S. government law enforcement agencies about meeting these challenges. Because of confidentiality concerns, specific examples cannot be provided.

ASEAN¹

By Ms. Thitapha Wattanapruttipaisan

International co-operation in the development of competition policy in Asean: Introductory remarks

Competition policy is comparatively a new area in regional and international cooperation among the ten-member Association of Southeast Asian Nations (ASEAN). But cooperative initiatives and activities have progressed well so that a significant momentum has now been gained and sustained in the development of competition policy within ASEAN. This has combined with the implementation of region-wide commitments and initiatives in other sectoral policy areas to have helped underpin the scheduled formation of the ASEAN Economic Community (AEC) in 2015. ASEAN aims to be an open and highly competitive regional grouping with broad-based and people-centered development and transformation.

Progressive cooperation in competition policy owes much to the hard-work and goodwill of ASEAN Member States (AMSs) -- especially given the different levels of socio-economic advancement, needs, and resources availability in the region. Another equally important stimulus to such cooperation has been the generous support, both in funding and in-kind, from many of ASEAN's Dialogue Partners and donor organizations. Specifically, several integrated, multi-year programs on competition policy have been implemented regionally since mid-2008. These programs are driven directly by beneficiaries' needs and the detailed assessments of these needs.

Section A of the following note provides an overview of the impulses and imperatives in regional and international cooperation in the development of competition policy, and the specific approach toward such cooperation in the context of ASEAN. Section B contains details on the nature, patterns and outcomes in such cooperation, including the main sources of supportive technical and financial assistance for ASEAN. The medium-term agenda in regional and international cooperation in competition policy development is then briefly mapped out in the last section of this paper.

1. Overview

Change is the only constant in this world.
Heraclitus, Greek philosopher, c. 535-475 BC.

Cooperation initiatives, programs and activities in competition policy are developed and implemented by the ASEAN Experts Group on Competition (AEGC). This inter-governmental body was established by the ASEAN Economic Ministers in August 2007. It comprises Heads of Offices or Agencies in charge of,

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or with responsibilities relating to, competition matters in AMSs.² The AEGC was inaugurated in March 2008 and has since met twice a year, excluding AEGC retreats or other special meetings.³ The ASEAN Secretariat provides technical and administrative support to all the initiatives and work programs of the AEGC.⁴

1.1 *Rationale*

Competition policy is a critical pillar of the market economic system.⁵ It serves to foster a level playing field for businesses and industries, and to ensure open markets for entry and exit on the merits. There are significant short-term (static) gains in economic efficiency and consumer welfare, through the application of competition policy. Such gains will underpin, in an interactive and compounding manner, successively higher trajectories of dynamic growth in creativity and innovation, risk-taking entrepreneurship, productive employment, and living standards in the long term. Globalization then transmits and multiplies these positive achievements and outcomes to firms and consumers in markets, industries and communities across borders.

² The Offices and Agencies in AMSs which constitute the AEGC are (a) Brunei Darussalam: Department of Economic Planning and Development, Prime Minister's Office; (b) Cambodia: Legal Affairs Department, Ministry of Commerce; (c) Indonesia: Commission for the Supervision of Business Competition (KPPU); (d) Lao PDR: Department of Domestic Trade, Ministry of Industry and Commerce; (e) Malaysia: Malaysian Competition Commission (MyCC); (f) Myanmar: Directorate of Investment and Company Administration, Ministry of National Planning and Economic Development; (g) Philippines: Office for Competition, Department of Justice; (h) Singapore: Competition Commission of Singapore (CCS); (i) Thailand: Department of Internal Trade, Ministry of Commerce; and (j) Viet Nam: Viet Nam Competition Authority (VCA).

³ Earlier, the ASEAN Consultative Forum on Competition had served as an informal and non-official mechanism for competition-related discussions and exchanges of information and policy experiences within ASEAN, and between AMSs and non-ASEAN countries and international organizations. Formed in June 2004, this Forum originated from a multi-year technical assistance program on competition policy and law for ASEAN supported by the U.S. Federal Trade Commission and the U.S. Department of Justice.

⁴ The rendered support ranges from developing collaborative linkages, especially with extra-regional competition regulatory bodies, to coordinating with external donors of financial and technical assistance. Such coordination extends from backstopping regional needs assessment to assisting in consensus building in the selection, prioritization, design and implementation of donors' programs and projects. The ASEAN Secretariat also monitors implementation of donors' programs and projects and takes part in the evaluation of their outcomes and impact.

⁵ Competition policy includes laws, regulations, administrative procedures and (non-enforceable) guidelines and other soft-law measures as well as the related judicial institutions. It prohibits business conduct by persons, firms or groups of undertakings (whether private or statutory) which, by design or in effect, prevents, restricts or distorts competition in the relevant and/or related markets. Such a conduct may relate to (a) exploitative or exclusionary abuses of single or collective market dominance; (b) horizontal or vertical arrangements and concerted (formal or informal) practices as well as decisions of trade and industry associations, whether or not binding, so as to set prices and non-price elements, to share markets, and to limit production and entry involving competitors operating at the same, or at a different, stage of the value chain; and (c) proposed mergers and acquisitions and proposed agreements in dispute settlement, especially among competitors, to the detriment of open markets. In many countries, moreover, competition policy also covers consumer protection and, on strategic grounds, may provide for total or partial exclusions or exemptions (safe harbors) to specific business operators or transactions and/or to the whole markets or industries. These "natural monopolies" typically comprise public utilities or essential facilities such as multi-modal communications and transport services; the generation, transmission or distribution of water and energy; etc.

But a culture of healthy competition and business rivalries cannot be taken for granted. There is the typical presence of a variety of market and non-market failures and inadequacies both within and outside ASEAN. Besides, domestic and external factors and forces in development, globalization and integration are changing continually, often in a disruptive manner. Many of these factors and forces have a strong, and evolving, impact on competition policy and markets, directly by design or indirectly in their effect.

In particular, trade, investment and the movement of productive resources has been subject to widespread liberalization and deregulation at the global and regional levels. This contributed to, among other things, the rapid expansion and deepening of competition-related norms and obligations at the multilateral, plurilateral and bilateral levels.⁶ Meanwhile, the self-reinforcing acceleration in knowledge generation and technological advances has induced a synergic evolution and innovation in industrial structures and organizations, and in business models and practices as well.⁷

But those positive development trends have also been accompanied by a significant increase in cross-cutting problems and sectoral collisions at the policy interface or intersection, e.g., the (more ambiguous) the boundary between a legal monopoly (such as an intellectual property right) and an economic monopoly (e.g., the refusal to deal, supply, license or transfer).⁸ There have emerged, in addition, many cross-border issues relating to competition policy (e.g., mergers and acquisitions in relation to the diverse grounds for efficiency defenses as part of dominance and merger laws among different jurisdictions).⁹ Not

⁶ A good illustration is the import tariffs on intra-ASEAN trade which was worth US\$ 519 billion in 2010. Through trade liberalization under the ASEAN Free Trade Area, the average tariff on such trade fell from 12.8 per cent in 1993 to less than 1 per cent as a whole in 2011. Globally, despite the absence of an international agreement on competition policy, competition-related obligations can be found multilaterally in the TRIPS Agreement, the GATS, the Agreements on Safeguards and on Anti-dumping, and the GATT itself. At the bilateral and plurilateral levels, competition disciplines are present in a large number of free trade agreements or free trade areas (FTAs) – especially those concluded between developed countries or developed-country groupings and their developing-country counterparts. Several AMSs are a contracting party to a large number of FTAs involving the developed countries and regions.

⁷ Most notable in this context is the self-reinforcing technological progress in information processing, and in multi-modal communications and multi-modal transport and logistics. Such progress has made possible, and has induced further, (a) the flatter (horizontal) decentralization and greater (vertical) dispersion of sourcing, production and distribution of goods and services; (b) the multiplication of high-density regional and global supply chains and production networks whose component enterprises are interlinked on-line backward and forward across the value chain; and (c) the just-in-time management of supplies, shorter cycles of design and production, and quality assurance. The commoditization of manufactures (including the associated trade, investment and off-shoring of production and services) is an outstanding outcome of the innovative modalities in industrial organization and of innovative business models and operations.

⁸ In theory, a legal monopoly may not equate to an economic monopoly. In practice, however, legal interpretations and rulings on this principle show considerable variations among different jurisdictions. They have often tested the limits of the interface between competition policy and intellectual property laws in many of these jurisdictions, the United States and the European Union included. Indeed, a broad consensus exists on the principles for pursuit by competition policy generally. But it is also well recognized that there is no universal regime on competition which would fit all economies across space and through time. Indeed, the diversity among jurisdictions is observable as regards, for instance, (a) the types of unilateral or collusive conduct for prohibition and regulation, (b) the market power thresholds for liability, (c) the relationships between conduct and dominance, and (c) the consequent need to minimize total harm from policy under-reach or over-deterrence. See Avishalom Tor, 2010, “Unilateral, Anticompetitive Acquisitions of Dominance or Monopoly Power”, *Antitrust Law Journal*, vol. 76, no.3, Fall/Autumn. This paper is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531745.

⁹ Take market dominance, for example. American courts rarely find monopolization offenses by firms sharing less than 70 per cent of the properly defined market for five years preceding the complaint. Most recent cases dismiss claims as a matter of law involving firms with a market share of less than 50 percent.

infrequently, moreover, some of the strategies and practices responsively deployed by industries, businesses, and other vested or special interest groups may not be wholly pro-competition (e.g., those aimed at gaining or protecting market share, and at maintaining high profit margins through collusive, abusive and exclusionary conduct and measures).

1.2 *Approach*

All in all, the critical and positive contribution of competition policy to the outward-looking, market-driven and people-centered process of regional development and integration has been acknowledged at the highest political and other levels in the region. In adopting the AEC Blueprint in November 2007, ASEAN Leaders have committed to “*endeavour to introduce competition policy in all Member States by 2015.*”

To unlock cooperatively the rich and wide-ranging opportunities associated with competition policy development, ASEAN will also have to manage and resolve collectively the many related challenges and problems in development, globalization and integration noted earlier. A compounding factor in this context is the acute shortage of competition-related resources and experiences, and the uneven socialization and advocacy of competition policy among stakeholders. In varying degrees of seriousness, this has prevailed, virtually across ASEAN.

In addition, economy-wide competition policy and competition regulatory bodies are in place in most, but not all, AMSs. At present, there are national competition policy and competition regulatory bodies in Indonesia (since 1999), Singapore (since 2004), Thailand (since 1999) and Viet Nam (since 2005). Comprehensive legislation on nation-wide competition policy, approved by Malaysia’s Parliament in 2010, is expected to be in force in 2012. In the mean time, the Malaysian Competition Commission has been set up and its internal regulations and guidelines are being prepared. The Philippines established the Office for Competition under the Department of Justice in June 2011. Other AMSs are in the process of drafting their national competition laws and regulations or are planning to introduce national competition policy soon. They have in the meantime relied on sector-level policies and regulations to achieve competition policy objectives.

As such, AMSs have designed, introduced, and implemented collectively their own approach to move forward in regional cooperation and integration. Among other objectives, such an approach has served to build up a higher level of confidence among the regional economies in the integrity, capabilities in advocacy and implementation, and transparency of their institutions, processes and procedures in competition policy.

ASEAN will, therefore, move progressively towards the agreed goals and commitments in competition policy as a Community without compromising the varying levels of development in, and the specific conditions and circumstances of, its Member States. Over time, regional cooperation and the AEGC initiatives and work programs can be expected to evolve in parallel with the increasing maturity as well as with the wider and deeper development, acceptance and outreach at the intra- and extra-regional levels of competition policy in ASEAN.

Comparatively in the European Union, 40 per cent is the lowest market share (maintained over a three-year period) for which a company could be judicially found to be dominant. Meanwhile, unilateral dominance by firms is judicially considered unlikely at market shares of up to 25 per cent, and actual dominance is judicially presumed for those with shares of 50 percent and higher. See Alison Jones and Brenda Sufrin, 2008, *EC Competition Law—Text, Cases and Materials*, third edition, Oxford, Oxford University Press; and Keith N. Hylton, 2010, “The Law and Economics of Monopolization Standards” in Keith N. Hylton and Paul J. Liacos, eds., *Antitrust Law and Economics*, Northampton, Massachusetts, Edward Elgar Publishing.

2. Direction and focus in cooperation

The journey of a thousand miles begins with one step
Lao Tzu, c. 6th century BC

Subject to the capacity and readiness of individual AMSs, confidence building can be achieved in various ways. Among these are (a) the collaborative assessment and prioritization of various areas in regional needs; (b) the joint design and implementation of competition-related initiatives, programs and activities; (c) the collective determination of selected best approaches and practices which can be feasibly transposed or modified for regional adoption; and (d) the initiation and strengthening of multi-pronged linkages with each other as well as with extra-ASEAN stakeholders and other entities.

2.1 Development cooperation

The above considerations and processes have combined to determine the nature, patterns and sequence of competition-related cooperation among AMSs as well as between ASEAN and its Dialogue Partners and donor organizations. In the latter context, the AEGC has benefited significantly from external assistance for its work. InWent (Capacity Building International, Germany) has been a key partner of ASEAN since mid-2008. InWent and GTZ (German Technical Cooperation), which merged together as GIZ (German International Cooperation) from 2010, have developed and are undertaking collaboratively with the AEGC several multi-year projects on competition policy.

Other important sources of technical and financial support to ASEAN include the Asian Development Bank Institute, ASEAN-Australia Development Cooperation Program-Regional Economic Policy Support Facility (AADCP-REPSF Phases I and II), ASEAN-Australia and New Zealand Free Trade Area—Economic Cooperation Work Program, the Directorate General—Competition (DG-Comp) of the European Commission, the Organization for Economic Cooperation and Development (OECD), the Fair Trade Commission of Japan, the Korea Fair Trade Commission, and the United States Department of Justice and Federal Trade Commission.

To lay the foundation and to gain a broad-based and comparative perspective for its work, the AEGC commissioned a comprehensive study on “Best Practices in the Introduction and Implementation of Competition Policy and Law in East Asia Summit Countries” (then comprising ASEAN plus Australia, China, India, Japan, New Zealand and Republic of Korea). Supported by AADCP-REPSF, this study was completed in June 2008. The 19-page executive summary of this piece of work is available at www.asean.org/aadcp/repfs/docs/07-008-ExecutiveSummary.pdf.

On the basis of this comprehensive study, among others, the focal areas for regional and international cooperation in during 2008-2010 were advocacy, outreach, and capacity and competencies building. In July 2008, the AEGC established three working groups with responsibilities for developing the *ASEAN Regional Guidelines on Competition Policy (Guidelines)*; the *Handbook on Competition Policy and Law in ASEAN for Business (Handbook)*; and the initiatives, programs and activities for capacity and competencies building. Indeed, the acute shortage of resources and expertise for the introduction and implementation of competition policy means that human and institutional development will be a regular feature in regional and international cooperation in the foreseeable future.

2.2 The Guidelines and the Handbook

Both documents were to be completed by the end of 2010, as per the commitments made by AMSs in the AEC Blueprint. With donor support, from InWent in particular, a series of six regional workshops were convened for the preparations and fine-tuning of the *Guidelines* and the *Handbook*. These two

documents, published on schedule, were launched by the ASEAN Economic Ministers in Da Nang, Viet Nam, on 24 August 2010.

The *Guidelines* embody a pioneering and customs-made effort by the AEGC to provide a detailed, non-binding guide for reference by AMSs in the framing, introduction, improvement and implementation of competition policy, including the organization and management of their own competition regulatory bodies. This policy document was prepared on the basis of regional experiences and international best approaches and practices. In the process, it took fully into account the specific legal and economic contexts and circumstances of AMSs, such as the varying stages of development of competition policy within the region.

The *Guidelines* span the whole spectrum of competition policy with illustrations and explanations on its objectives and scope, guiding principles and benefits, and enforcement framework. This includes, notably, discussions and examples on a range of approaches and practices to promote compliance and mobilize support, and on the rules and regulations for the prevention of anti-competitive business conduct. The *Guidelines* also cover matters relating to the roles and the structure of competition regulatory bodies, to technical assistance, to capacity and competencies building, and to international cooperation.

There has been, meanwhile, a great need for systematic and comprehensive information on competition policy in ASEAN for the local, regional and transnational business firms with an investment project or a commercial presence in one or more regional economies. The *Handbook* represents, therefore, another pioneering and customs-made effort by the AEGC to disseminate the basics of competition policy so as to ensure a better understanding of competition rules and practices as currently applicable in all ten AMSs. It was authoritatively documented and conveniently presented in a non-technical, user-friendly way so as to be easily understandable to the non-experts and non-specialists.

The country chapters in the *Handbook* provide an overview of the national framework on competition policy in AMSs. They contain illustrations and explanations on the principles, the scope and the key areas in enforcement (including the related legal provisions, processes and procedures), and the enforcement mechanisms and their tools in individual AMSs. There are also concrete examples in competition law enforcement so as to highlight the application of competition policy in practice. References and contact points in AMSs are also given in the *Handbook* so as to facilitate follow-up efforts by the readers who may wish to seek and obtain further information.

As such, the *Handbook* and, for that matter, the *Guidelines* have an important advocacy and outreach dimension – particularly in fostering the development of a competition culture in the business community as well as the introduction and enforcement of competition policy in individual AMSs and regionally. In these connections, three socialization workshops were held on the *Guidelines* in Brunei Darussalam, Cambodia and Philippines during October-November 2010. In the same period, six business forums on the *Handbook* were also convened in Indonesia, Malaysia, Philippines, Singapore, Thailand and Viet Nam.

Some 80-100 participants were at each of these nine events. They came mainly from the public and business sectors (including civil society organizations), the media, the academia, and the legal and other professions. To ensure wider outreach, the *Guidelines* and *Handbook* have been uploaded on-line respectively at www.asean.org/publications/ASEANRegionalGuidelinesonCompetitionPolicy.pdf and www.asean.org/publications/HandbookonCompetition.exe. In addition, hard and soft copies of both documents have also been widely distributed inside and outside ASEAN.

2.3 *Capacity and competencies building*

Cooperative initiatives, programs and activities in the above area have been mainly operationalized by means of training workshops, with eminent regional and international professionals and practitioners serving as resources persons. In addition, there were two high-level policy dialogues, and a study visit to competition regulatory bodies in Europe (France, Germany and the United Kingdom). The visit was also instrumental in building up contacts and linkages which have subsequently proved very helpful in the implementation of training workshops and policy dialogues in ASEAN, currently and in the future

Between mid-2008 and end-2010, some 600 ASEAN professionals participated in 17 capacity building activities, with 14 being training workshops. These aimed to broaden and deepen participants' understanding of the approaches, methodologies and techniques (including international best practices and lessons learnt) as well as the associated challenges to be addressed and managed by competition policy and its regulatory bodies. The main target groups were high-level managers and senior technical staff of competition regulatory bodies and other competition-related sectoral agencies and authorities in AMSs, plus ASEC staff members.

Notably, the number of ASEAN professionals taking part in these training activities was quite sizable, relative to the pool of human resources available in the region. Their suggestions and other feedback, which were obtained on-site at the end of every training workshop, have proved very helpful for the identification of future needs and emphases in follow-up capacity and competencies building. Moreover, participants' suggestions and feedback as regards the design of programs and presentations from resources persons, and the associated distribution of training materials, have served to minimize capacity and/or information overloads as well as to ensure better and more effective absorption and dissemination.

Some focal areas in training activities were region-specific. They related to (a) the impact of competition policy on economic development generally and with special reference to ASEAN; (b) major aspects of competition policy in the context of AEC formation; (c) key elements in the regional guidelines on competition policy in ASEAN; (d) the needs for regional cooperation in competition-related enforcement, including information exchange in ASEAN; and (d) the interface among competition, industrial, and consumer protection policies and the related options in policy coordination to maximize policy synergies and minimize tensions, generally and in AMSs' context.

Other focal areas in training activities were more policy- or institution-specific. These included (a) the design and framing of appropriate competition rules and regulations in general, and in the context of small developing economies; (b) the costs and benefits of competition policy and competition regulatory bodies; (c) the setting up and reform of competition regulatory bodies; (d) investigation and enforcement (including leniency, sanctions and private action options); (e) analysis and investigation of anti-competitive business conduct (including case studies on monopolies, cartels and dominance, and on horizontal agreements such as price fixing, bid rigging, market division and customer allocation); and (f) the strategic use of outreach and advocacy to promote compliance and mobilize support from various groups of stakeholders.

In addition to the 14 training workshops, two policy dialogues were held with high-level representatives from competition regulatory bodies from the European Union, and a study visit by high-level ASEAN representatives was made to these bodies in France, Germany and the United Kingdom. The dialogues and the visit aimed to facilitate the development of region-to-region linkages and the exchange of policy experiences and insights. These related to best and replicable practices in the design and application of competition policy and law, and in the establishment and operation competition regulatory bodies, those for small and developing economies especially.

Indeed, several institutional issues, implications and options associated with competition regulatory bodies received considerable emphasis in the policy dialogues and study visit. They covered (a) the functional or sectoral approaches feasible for adoption toward case work by regulatory bodies, and the systems and arrangements of check and balance to be in place; (b) the independent vs. autonomous status of such bodies which were recently established or yet to be formed; and (c) the recruitment, incubation and retention of skilled and experienced staff, and the needs for on-going enlargement of the internal skills base in these bodies.

3. The Medium-term agenda in cooperation

In moving forward, the AEGC is examining ways and means to lend support in a holistic manner to AEC formation in 2015. Despite the recent achievements, clusters of skills and experiences remain to be incubated, widened and deepened virtually across the spectrum of policy and institutional development and management as well as virtually across ASEAN. Moreover, the required core competencies currently in existence will have to be adapted and new core competencies gained in response to the upward trends in economic liberalization and policy deregulation, and knowledge generation and technological progress in a multi-polar global economy. Thus, the agenda for attention and action in capacity and competencies building will continue to be extensive in ASEAN in the years ahead.

Meanwhile, there are plans to revise and update the *Handbook* to incorporate recent changes and developments in ASEAN as well as in international best approaches and practices relating to competition policy. In addition, the translation and publication of the *Guidelines* and *Handbook* into other languages of several regional economies is currently under consideration. This is to better meet the demand for information from local industry clubs, consumer associations, suppliers of business development services, and last but not least, small and medium-sized enterprises intending to expand their business regionally or to enter into the regional and global supply chains to take full advantage of the forthcoming establishment of the AEC.

Moreover, the AEGC established in 2011 two additional working groups with one being responsible for the development of a manual, and the related action plans, on regional core competencies in competition policy, including those pertaining to the specialist judiciary system. As currently planned, the manual aims to set the basic standards of competencies required in the three focal areas: institutional building, enforcement and advocacy. The action plans would recommend practical approaches and steps to develop those core competencies, including the relevant training curricula.¹⁰

The other additional working group is responsible for the development of a strategy and the related tools for regional advocacy of competition policy. Its work would be in synergy with that of the core competencies working group, one of whose focus areas is on advocacy, as well as with the capacity building working group. The related activities as currently planned include the development of tools for customized advocacy strategies, compiling case studies on advocacy, conducting advocacy campaigns, and developing and maintaining an interactive AEGC Platform (Website).

Equally notable is the AEGC decision to convene a series of ASEAN Competition Conferences whose main objective is to foster the wider and deeper acceptance of competition policy in ASEAN. The

¹⁰ Provisionally, work on the focal area of institutional building may involve the core competencies required in the drafting and reviewing draft laws and regulations; in the development of objectives-based structures, leadership and managerial skills in human resources functions, etc. Work on enforcement may examine and recommend the core competencies required in investigation, case analysis, and adjudication, etc., while work on advocacy may relate to the core competencies for public outreach and the promotion of basic understanding and awareness on the benefits of competition policy and law and the related multi-media communications techniques.

first Conference was hosted by the Commission for the Supervision of Business Competition of Indonesia and supported by several international donors. It was held in Bali, Indonesia, during 15-16 November 2011 to ensure a higher profile. This period coincided with the ASEAN Summit and other important Summit-related meetings, such as the ASEAN Business and Investment Summit, taking place in Bali at the same time.

The Bali Conference's theme was "Fostering the Promotion of Competition Policy for Regional Development". It examined (a) the benefits of competition policy and law to consumers, economic growth and development; (b) competition policy in support of small and medium-sized enterprises and employment creation; (c) AMSs' experiences with competition policy; and (d) the role of competition policy and law in promoting the AEC and international competitiveness. Some 200 regional and international participants were present at this Conference, many of whom are high-level executives from a wide spectrum of public- and private-sector entities and stakeholder groups. Conference speakers and resource persons were eminent professionals and practitioners from within and outside ASEAN.

4. Conclusion

A solid foundation has been built and a good momentum, achieved by the AEGC since regional and international cooperation in the development of competition policy in ASEAN was initiated in 2008. The process has been greatly facilitated by the persistent hard work and good will of AMSs as well as by the sustained support, both technical and financial, from a large number of ASEAN's Dialogue Partners and donor organizations.

The significant diversity in development conditions and circumstances within the region, among other reasons, has led to ASEAN's own approach toward cooperative confidence building and the formation of collaborative linkages within and outside the region. Advocacy, outreach, and capacity and competencies building were the focal areas in regional and international cooperation in during 2008-2010. Among other outputs, the *Guidelines* and the *Handbook*, completed on schedule, have been extensively socialized across the region and disseminated within and outside ASEAN. Meanwhile, the number of ASEAN professionals participating in activities for capacity and competencies building (some 600 persons) was quite sizable, relative to the human resources pool available in the region.

The extensive agenda in regional and international cooperation in competition policy remains equally challenging, and equally exciting, in ASEAN over the medium term ahead. The AEGC will focus on identifying the range of basic competencies required in such functional areas as institutional building, enforcement and advocacy. Action plans would then be prepared and implemented to help develop those core competencies, including through the needed training activities. In these connections, the AEGC and ASEAN Secretariat stand ready to collaborate with all stakeholders and organizations in designing, and in sourcing from the global and regional reservoir of specialist expertise to support and implement demand-driven initiatives, programs and activities in competition policy in ASEAN in the years ahead.

BIAC

1. Introduction

BIAC appreciates the opportunity to make this written contribution to the debate on improving international co-operation in cartel investigations and looks forward to participating in the discussions at the OECD Global Forum on Competition.

2. Background

BIAC fully supports vigorous and effective enforcement to eradicate hard core cartels. Indeed, because businesses are often the direct customers, they are damaged as much as consumers and the economy as a whole by hard core cartel behaviour. Where a hard core cartel is international in scope, effective enforcement can be enhanced by co-operation between investigating authorities. BIAC's contributions are made in an attempt to assist in furthering such enforcement, recognising, of course, the need for appropriate protection of the rights of defence and of the confidential information of any person - business or individual - accused of such serious infringements.

The OECD Recommendation of the Council concerning Effective Action Against Hard Core Cartels of 1998 ("the 1998 Recommendation") defines a hard core cartel as an anticompetitive agreement or arrangement by competitors to fix prices, make rigged bids, establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce. Excluded from the definition are agreements or arrangements authorised under or excluded from the coverage of the national law or which are related to the lawful realisation of cost-reducing or output-enhancing efficiencies¹. BIAC considers that to the extent conduct falls clearly into the hardcore category, this comprehensive definition remains valid to identify these serious violations. We would underline the need to maintain a clear distinction between such behaviour and the broader range of activities which may be subject to competition laws but which should not be confused with or equated to hard core cartel behaviour. As more and more countries adopt competition laws and authorities seek to apply those laws to an ever broader range of perceived problematic behaviour, the term "cartel" is sometimes used overly-broadly. The need for a clear, consistent approach to identifying hard core cartel behaviour appropriately remains of crucial importance. Efforts at convergence in developing a consistent definition of hard-core cartel activity, both in concept and in enforcement efforts, are among the most important forms of co-operation in which authorities can engage.

The implementation of the 1998 Recommendation has been the subject of OECD Reports, most recently in 2005², which BIAC has noted with interest. BIAC also participated in the discussions leading to the OECD's Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations 2005 ("the 2005 OECD Best Practices") and to their recognition of the need for and formulation of the safeguards to protect commercially sensitive and other confidential

¹ Para A. 2.a).

² OECD Reports. Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation 2005.

information.³ Formal “mutual legal assistance” and similar international co-operation agreements can provide transparency and add confidence that cooperative efforts between enforcement authorities are to be conducted for defined purposes, according to an established set of protocols and respecting such safeguards.⁴

Recent developments in the technological and business background underline the continuing need for and importance of safeguards to protect commercially sensitive and other confidential information. There is no basis for eroding them. For example, among such recent developments we would note the increased technological sophistication of investigation techniques under which some enforcement authorities may now in certain circumstances duplicate the entire contents of the memory of computers or servers. This means that ever greater quantities of confidential information, of varying relevance or no relevance at all to the investigation but including the most recent and sensitive legitimate commercial materials may be held by enforcement authorities. The maintenance of the highest levels of protection and safeguards for such information is crucial. This is especially true as cartel enforcement proliferates in jurisdictions where there is no clear line of demarcation between – and at times a unity of – governmental and commercial interest.⁵ Developments in business economics and the speed of technical change mean that information represents an increasingly vital and valuable portion of the assets of businesses in many sectors, again underlining the need for high levels of protection and safeguards for confidential business information. At the same time data systems are increasingly vulnerable to hacking, espionage and other illegal practices to extract data and so companies are increasingly dependent on adequate safeguards to protect confidential information.

3. Business’ contribution to international co-operation

Over and above responding to investigations, a key aspect of business' contribution to, and co-operation with, cartel enforcement takes place within the context of leniency programmes. This section of BIAC’s submission will focus on ways in which leniency programmes could be better aligned and coordinated so as to provide an optimum level of incentive for businesses to report illegal cartels, maximising the investigation and prosecution efforts which follow.

As more authorities around the world recognise the value of leniency regimes and adopt their own programmes, there is currently some concern that divergences, and even outright contradictions, between these programmes create problems which make it more difficult to rely on leniency programmes effectively in some international cases and even more difficult to agree waivers for the exchange of leniency information. Whilst business welcomes the spread of leniency programmes, it would be unfortunate if problems in the way the various programmes function together were to lead to reduced use of them in international cases.

Areas in which inconsistencies between leniency programmes may currently cause difficulties include:

- How the potential applicant should establish the facts. Contradictory requirements to interview employees to provide the most complete admission in some jurisdictions, but to refrain from interviewing key witnesses in others, may reduce the chance of applying successfully in both

³ BIAC also proposed additional safeguards at that time with respect to confidentiality, but understands that the consideration of such additional safeguards are beyond the scope of the present forum.

⁴ The 2005 OECD Report notes that the number of international co-operation agreements continues to grow significantly – p. 37. The United States alone has entered into bilateral cooperation agreements with 11 separate jurisdictions. See, <http://www.justice.gov/atr/public/international/int-arrangements.html>.

⁵ See also comments by BIAC in relation to the work on SOEs and the need for a level playing field in competition law.

jurisdictions, so reducing the incentive to apply in either jurisdiction and ultimately reducing the likelihood of the cartel being discovered and prosecuted at all.

- Inconsistent approaches to marker policies. Confessions would be encouraged if marker policies were aligned, including as to availability, information requirements, timing and the scope of markers granted. The process to perfect markers on a timely basis in multiple jurisdictions can also be complex and a flexible approach, recognizing the time and resources needed⁶ would encourage use of leniency policies.

BIAC would respectfully suggest that the OECD consider embarking upon an initiative to develop a recommendation regarding the availability and implementation of marker policies, with a common set of principles and practices. Such a recommendation could most usefully include the availability of an option for a company applying for a marker in one OECD jurisdiction to opt for that application to qualify in other OECD jurisdictions concerned. A “one-stop shop” for the application for necessary markers would represent a most important step forward in encouraging business co-operation with international hard core cartel enforcement through recourse to leniency programmes.

- The extent of the jurisdictional nexus required to trigger an investigation and hence the lack of clarity as to which jurisdictions an applicant needs to address without either "missing" jurisdictions where a less worthy applicant may then secure priority or wasting resources - its own and those of the authorities concerned - by making unnecessary applications.
- Appropriate safeguards in all jurisdictions concerned regarding limited use and disclosure of leniency information (including a clear commitment to oppose its disclosure for use in private litigation).⁷
- Tensions between obligations by some jurisdictions (notably the EU) that the amnesty applicant immediately discontinue communications with other cartelists, while other authorities (notably the US) simultaneously may require the applicant to engage in “consensual monitoring” by remaining in contact with those same cartelists.
- The prohibition by some jurisdictions (notably the EU) against the amnesty applicant disclosing the fact of its amnesty position during the investigation while other jurisdictions (notably the US) require the amnesty applicant to reveal themselves and cooperate with civil plaintiffs in order to reduce their liability exposure.
- Timing and scope of requests for applicants to provide information exchange waivers. Waivers to permit disclosure of confidential information should never be mandatory but improved consistency would promote willingness by leniency applicants to grant waivers permitting disclosure of information to other authorities under appropriate safeguards. In this respect, business is aware of the OECD’s 2011 Guidelines to Multinational Enterprises which provide that such enterprises should “co-operate with investigating competition authorities by, among other things and subject to applicable law and appropriate safeguards.....considering the use of available instruments, such as waivers of confidentiality where appropriate, to promote effective

⁶ For example to deal with issues of differential exposure of individuals, the volume of records to be reviewed and the need for translations.

⁷ At present many authorities are playing an active role to assist in protection of leniency documents from disclosure in private disputes but the courts, while frequently helpful, have not invariably granted maximum protection to them. BIAC would encourage the promotion of legislative solutions where necessary to protect leniency documents and hence leniency programmes.

and efficient co-operation among investigating authorities⁸. To enhance such co-operation it is vital, as to timing, that waivers should not be requested until the availability and scope of leniency has been established in all of the jurisdictions concerned (which may mean waiting to make waiver requests or providing earlier leniency rulings). As to scope, waiver requests should be limited to the scope common to the leniency rulings concerned and should not include legally privileged information.

- Recognition of legally privileged materials. BIAC has consistently emphasized the need for greater international convergence in establishing a clear international standard for the comprehensive protection of legal advice. It will remain impossible to achieve the highest possible level of co-operation in respect of international leniency cases, or indeed international cartel cases more generally, without recognition by all authorities concerned that businesses need to be able to seek advice in confidence from lawyers around the world to examine their conduct in the light of all applicable competition laws and to prepare an appropriate strategy for resolving any problems which may have arisen⁹. National laws which limit legal privilege to locally qualified attorneys or which exclude in-house counsel from its protection continue to undermine the scope of voluntary co-operation which may reasonably be offered in many international cases¹⁰.
- Predictability as to the recognition of the contribution of second and subsequent applicants. In international cases there may often be circumstances where even a business which is most anxious to co-operate and resolve a competition problem finds that it cannot be first to apply for leniency in every jurisdiction involved. Greater predictability as to the position of subsequent applicants would enhance the likelihood of voluntary co-operation from such potential applicants.
- Predictability as to the calculation and level of sanctions from which leniency reductions will be made. A more consistent international approach could avoid unnecessarily duplicative penalties¹¹

As the 2005 Report¹² recognises international cooperation in discovering, investigating, and prosecuting international cartels has reached unprecedented levels and confidentiality waivers in cases of simultaneous leniency applications have created more opportunities for multi-jurisdictional co-operation¹³. Removing the inconsistencies between leniency programmes which impede their smooth interaction in international cases, including those identified above, would help to ensure that the opportunities in the future are maximized to encourage businesses to rely on those programmes and provide the information waivers which facilitate agency co-operation.

⁸ OECD (2011) OECD Guidelines for Multinational Enterprises, Part 1, Recommendations, Section X para 3 p 57.

⁹ Greater and more uniform recognition of the value of compliance efforts would also increase the incentive for companies to implement state of the art international compliance programmes.

¹⁰ While the discussion of legal privilege goes beyond the scope of the present Global Forum and so is not further discussed in this submission, BIAC would once again underline the importance of legal privilege and of protection of it as a topic for international convergence efforts.

¹¹ Currently duplication can arise from overly-broad definitions of affected sales or commerce, whether geographically overlapping or by including sales of finished products incorporating the products affected by the cartel.

¹² See footnote 2 above.

¹³ Report p30.

4. Scope for increased international co-operation: Conclusions

Beyond the scope of agreed waivers, particularly in leniency cases as discussed in this submission, BIAC supports international co-operation agreements including appropriate safeguards¹⁴ for confidential information and would, in conclusion, underline how crucial such safeguards are, not least in light of the technological and business developments and the opportunity for enhanced voluntary co-operation under leniency programmes. BIAC would be pleased to discuss further and to contribute to an initiative to develop an OECD recommendation regarding the availability on a “one-stop shop” basis and implementation of marker policies under such leniency programmes.

¹⁴ Which meet or exceed the 2005 OECD Best Practices standards.

CHALLENGES TO INTERNATIONAL CARTEL ENFORCEMENT AND MULTI-JURISDICTIONAL LENIENCY APPLICATIONS – DISCLOSURE OF LENIENCY APPLICANT STATEMENTS AND MATERIALS¹

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Introduction

Recent rulings by courts in a number of jurisdictions (UK, Australia, United States, and the European Union) are resulting in increased disclosure of oral statements and interview materials produced by leniency applicants.³ Increased disclosure of leniency material may affect the willingness of immunity applicants to report cartel conduct in certain jurisdictions, create disincentives for comprehensive internal investigations, and cause immunity and leniency applicants to circumscribe the statements of collusive conduct they provide to enforcement authorities.

These developments – when combined with an increasing number of jurisdictions with immunity and amnesty policies – may lead amnesty applicants away from parallel applications in multiple jurisdictions, and towards focusing on those countries where there is the greatest net benefit in applying. This may in turn lead enforcement efforts to once again become focused on the major enforcement jurisdictions, and may marginalize “newer” cartel enforcement jurisdictions. In the medium term, applicants will be faced with a more complex analysis of immunity and leniency incentives, with substantial differences between jurisdictions.

1. Immunity incentives and protecting statements of leniency applicants against disclosure

Since the introduction of amnesty and immunity programs in the US in 1993 and the EU in 1996, it is a generally accepted tenet of cartel enforcement that leniency applicants will only come forward if they can be certain that their position, having revealed the cartel conduct, is at least no worse than the expected outcome in the absence of the leniency or immunity application. This is said to require that the leniency program provide for certainty, predictability, and critically, protection of the leniency applicant against disclosure of admissions that it would not have made but for the leniency application.

¹ This paper is an updated version of a discussion paper presented at the recent ABA International Cartel Workshop – Vancouver – February 1-3, 2012.

² Marc Hansen is a partner, Luca Crocco and Susan Kennedy are associates, in the Brussels and London offices of Latham & Watkins. The authors wish to thank Craig Arnott, Wentworth Chambers, Sydney, Michael O’Kane, Peters & Peters, Omar Shah, Latham & Watkins, London, and their colleagues in several of the US offices of Latham & Watkins who have commented and provided input to this paper.

³ Except where stated otherwise, this paper uses the term “leniency applicants” to denote amnesty applicants in US terminology and immunity and leniency applicants in most other jurisdictions (whether first applicants for immunity, or subsequent applicants for reduction of penalties). The paper also uses the term “disclosure” as a common term for US-style discovery, court ordered disclosure in systems inspired by English law, or indeed voluntary disclosure by enforcement authorities where it is understood that the prosecution on the basis of leniency applicant evidence would not be able to go forward without disclosure of such evidence to parties outside the enforcement agency. The paper also refers to the “UK jurisdiction”, but focuses on English law and does not address any issues specific to Scottish law.

The protection of the confidentiality of leniency applicant statements against disclosure in Court is commonly seen as a cornerstone of leniency regimes. As an example, the most recent official statement by the Commission in this regard is in the Observations submitted to the UK High Court pursuant to Article 15(3) of Regulation 1/2003 in the *National Grid* litigation:

*“The Commission’s policy [is] that undertakings which voluntarily cooperate with DG Competition in revealing cartels should not be put in a significantly worse position in respect of civil claims than other cartel members that refuse any cooperation. In practical terms, this means the Commission’s long established practice is that the corporate statements specifically prepared for submission under the leniency programme are given protection against disclosure both during and after its investigation”.*⁴

Similarly in the US, Scott Hammond, director of Criminal Enforcement at the Department of Justice, described in the following terms the long-standing policy of the department in the field:

*“The Antitrust Division’s policy is to treat as confidential the identity of leniency applicants as well as any information they provide. Thus, the Antitrust Division will not disclose a leniency applicant’s identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. [...] [T]he confidentiality policy is a necessary inducement to encourage leniency applications. If jurisdictions shared information obtained from an amnesty applicant with other competition and prosecuting authorities without the applicant’s permission, then it would create a significant disincentive to entering the leniency program that would lead to fewer leniency applications. Such a result would not be in anyone’s interest. First, lost applications would mean that no one would have the information and the conduct would go unpunished. Second, it is important not to lose sight of the fact that amnesty applications lead to cases against other cartel members that result in public filings detailing aspects of the cartel conduct that can assist other competition authorities as well as victims to develop their own cases, even if they do not have direct access to the leniency applicant’s information.”*⁵

Over the years, enforcement authorities have gone to great lengths to protect, from disclosure to third parties, the various forms of statements or materials that are prepared by leniency applicants, whether in the form of lawyer proffers in the US, Australia, UK, and Canada, or statements of corporate leniency applicants in EU and civil UK proceedings⁶, or legally privileged records of internal investigations.⁷

⁴ The Observations of the Commission in the *National Grid* case are available at: http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf. The same concern can be found in recital 8 of the Commission Leniency Notice: *“In addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.”*

⁵ Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice *“Dispelling the myths surrounding information sharing”* speech presented before the ICN Cartels Workshop Sydney, Australia November 20-21, 2004, available at: <http://www.justice.gov/atr/public/speeches/206610.htm>

⁶ A number of jurisdictions which rely on corporate statements in leniency – including the EU and Japan – moved from written to oral corporate statements after 2002 following attempts by civil plaintiffs in US

Even if the protection of such materials has not been perfect,⁸ the general consensus in the private bar has been that the occasional failures to protect leniency applicant statements have not undermined incentives for corporate entities to seek immunity or leniency. Recent developments in some jurisdictions may, however, change this analysis and are therefore the focus of this paper.

2. Recent international developments in disclosure practices

The remainder of the paper examines four recent judgments and enforcement authority positions in the United Kingdom, Australia, the United States, and the European Union, and seeks to identify possible consequences of these recent developments. The four situations raise different issues for immunity and leniency applicants, each of which may affect the incentive to apply for immunity, in one or more jurisdictions.

1. The UK Office of Fair Trading (“OFT”), in October 2011, published its proposed new leniency guidance setting out the circumstances where it will require a leniency applicant to waive legal privilege⁹ over legal advisors’ interview notes from an internal investigation.
2. In August 2011, the Australian Federal Court ruled that the Australian Consumer and Competition Commission (the “ACCC”) could not in the specific circumstances of a case rely on public interest immunity or similar principles to avoid disclosing to defendants the notes of the ACCC taken during proffer meetings with corporate immunity applicants. On 3 February 2012, the Australian Federal Court dismissed a claim of legal privilege advanced by the ACCC in the same dispute.
3. In response to recent high profile criminal trials where the government allegedly failed to disclose certain exculpatory material, in 2010 the United States Department of Justice (“DOJ”) issued new criminal discovery guidance to ensure that all federal prosecutors meet their discovery obligations to criminal defendants, including those accused of cartel conduct.¹⁰ As more cartel cases go to trial in the U.S., this new discovery policy has the potential, and as recently as August 2011, actually led to the disclosure of virtually all of the attorney proffers provided to the government by cooperating companies and individuals in a major cartel investigation.¹¹

litigation to gain access to copies of written corporate statements in the hands of the leniency applicant. See, e.g., footnote 8 below.

⁷ The DOJ Antitrust Division has for years taken the view that they will not require, as a condition for cooperation under the DOJ Amnesty Program, waiver of privilege of interview records prepared by legal counsel to an amnesty applicant. This is in contrast with the view of the DOJ in other areas of enforcement where an amnesty program is not in place (e.g., for FCPA violations).

⁸ See United States District Court for the District of Columbia, in *Re Vitamins Antitrust Litigation*—Misc. No. 99–19 in May 2002.

⁹ This paper uses the term “legal privilege” to denote the various forms of that privilege in different legal systems, whether referred to as legal professional privilege, legal privilege or other attorney-client confidentiality.

¹⁰ “Department of Justice Guidance for Prosecutors Regarding Criminal Discovery” David W. Ogden, Deputy Attorney General (2010) available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm

¹¹ *United States v. AU Optronics Corp., et al.*, 3:09-CR-0110-SI (N.D. Cal.) Doc. No. 502 at p. 2, filed Dec. 7, 2011.

4. In June 2011, the European Court of Justice ruled in *Pfleiderer*¹² that European Union competition law rules do not prevent a person adversely affected by a cartel infringement, who is seeking to obtain damages, from being granted access to leniency documents submitted by the perpetrator of that infringement and that it was a matter for national courts to perform the balancing exercise required. The uncertainties created by the *Pfleiderer* case were compounded by an even more recent judgment by the General Court in the case *CDC v Commission*,¹³ which arguably dismisses the expansive theory of confidentiality of investigation materials put forward by the Commission in several cases.

Individually and collectively, these four recent developments may lead to a shift in how leniency applicants will approach immunity and leniency applications.

2.1 *United Kingdom – Requirement placed on immunity applicant to waive legal privilege in respect of applicant’s internal investigation*

Since the collapse in May 2010 of the prosecution brought by the OFT against four British Airways (“BA”) executives, the OFT’s policy with regard to disclosure requirements placed on leniency applicants has been the subject of considerable public discussion and legal commentary.¹⁴

The BA case was the first contested prosecution of a cartel offence in the UK, and was the result of information provided by Virgin Atlantic Airways (“Virgin”) under the leniency policy of the OFT. The Virgin information alleged participation by certain BA and Virgin employees in anti-competitive discussions to fix passenger fuel surcharges. On the basis of the information provided, Virgin obtained full (civil and criminal) immunity under the OFT’s leniency program. Following an investigation, the OFT brought criminal charges against four BA executives, alleging an offence under Section 188 of the Enterprise Act 2002 (the criminal cartel offence in UK law).

During trial, a substantial volume of electronic communications (which had been in Virgin’s possession, but had not been provided to the OFT) came to light shortly before a key witness from Virgin was called. The judge, Owen J, was already cognitive of disclosure difficulties in the case and refused an OFT application for an adjournment. As a result, the OFT was forced to offer no evidence against all defendants in the case and the prosecution came to an end.

The collapse of the prosecution, and the events leading up to it and in particular a ruling by the judge in the case on disclosure by the OFT to defendants of “unused material” that may be exculpatory, have called into question the OFT’s approach to the interaction between legal privilege, disclosure and leniency.

Prior to the BA case, the leniency guidelines¹⁵ had been silent on the issue of waiver of privilege. Following the experience during the *BA / Virgin* investigation and the circumstances leading to its collapse,

¹² Judgment of the Court of 14 June 2011 in *Pfleiderer AG v. Bundeskartellamt*, C-360/09.

¹³ Judgment of the General Court of 15 December 2011 in case T-437/08, *CDC v European Commission*.

¹⁴ See e.g., “*Criminal cartel prosecution and civil leniency: international perspectives on irreconcilable differences?*”; *British Institute of International and Comparative Law, London, September 2011*. Nicholas Purnell QC, Sir Christopher Bellamy QC, Nicole Kar, Daniel Piccinin and Priya Sahathevan “*Criminal cartel enforcement – more turbulence ahead? The implications of the BA/Virgin case*” *Competition Law Journal*.

¹⁵ Draft final guidance note on the handling of leniency applications (OFT, November 2006); Guidance on the appropriate amount of a penalty (OFT 423, as revised in December 2004); and Guidance on the issue of no-action letters for individuals (OFT 513, March 2003).

in December 2008, the OFT issued substantially revised guidance setting out, *inter alia*, the OFT's position on disclosure obligations of leniency applicants, and in particular whether a leniency applicant may assert legal privilege ("the 2008 Guidance").¹⁶ The 2008 Guidance, was heavily influenced by the difficulties the OFT faced in obtaining material leading up to the trial of the four BA executives, and provided that in certain circumstances the OFT might require a leniency applicant to waive legal privilege over lawyer's notes taken during internal investigations. According to paragraph 8.29:

"It is accepted that the undertaking may contend that legal professional privilege will attach to notes [of internal investigations and witness interviews]. However, there may be circumstances where the OFT is advised by counsel that disclosure to the OFT and to others is necessary to enable a case to proceed and in those circumstances the OFT will expect an undertaking or individual to waive any applicable privilege to the extent that the OFT is advised that it is necessary. The OFT will not require the disclosure to it of such notes as a matter of course – it simply asks that notes are taken by the undertaking or its advisers and duly preserved pending any possible issues which might subsequently arise."

This conditioning – in certain circumstances – of immunity on waiver of legal privilege was motivated by the OFT's desire to ensure that it would have access to the requisite exculpatory material in sufficient time to enable it to comply with its disclosure obligations as a prosecutor.¹⁷

The OFT's treatment of legal privilege and disclosure in the 2008 Guidance was explored in detail in a judgment given by Owen J in the BA case (on 7 December 2009 (unreported)). Relying on UK case law and the Attorney General's Guidelines on Disclosure,¹⁸ Owen J held that:

*"where there are reasonable grounds to suspect that a third party has material or information that might be disclosable if in the possession of the OFT, the OFT is under a duty to take reasonable steps to obtain it."*¹⁹

In applying this principle to the BA case, Owen J further stated:

"furthermore the argument that the OFT would not have succeeded in obtaining the relevant material, had the airlines sought to protect the privilege that they claimed by the application to the court, appears to me to miss the point. The question is whether, as the case has evolved, it would be reasonable for the OFT now to press for disclosure of the material, notwithstanding the claim to LPP, on the basis that both airlines and the VAA witnesses are under the duty to give continuous and complete cooperation as a condition of leniency/immunity, and failing a satisfactory response, to have invoked its power to revoke the leniency agreements and no-action letters. In my judgment the OFT ought reasonably to take such steps ... for a number of reasons ... the overriding obligation of the OFT as the prosecuting authority to deal fairly with the defence ... the duty on the airlines and VAA witnesses to give continuous and complete cooperation ... the nature of the material sought and ... the fact that it may shed light upon an

¹⁶ Leniency and no-action guidance (OFT 803, December 2008).

¹⁷ See for a detailed discussion of UK prosecutorial disclosure obligations: "*Criminal cartel enforcement – more turbulence ahead? The implications of the BA/Virgin case*"; see footnote 14 above.

¹⁸ "[W]here the investigator...believes that a third party...has material...which...might reasonably be capable of undermining the prosecution case or of assisting the case for the accused, the prosecutor should take what steps they regard as appropriate...to obtain the material." Attorney General's Guidelines on Disclosure, Attorney General (2005), para. 51.

¹⁹ *R v George, Crawley and Others* (unreported) 7 December 2009, para. 11.

*issue likely to be of considerable importance at trial, namely whether the VAA witnesses were subject to pressure or inducement with regard to the changes in their account...*²⁰

The competition bar in the UK was quick to point to the potentially far-reaching implications of this ruling, not only for the conduct of internal investigations and disclosure of investigation results, but in particular with regard to international cartel cases where waiver of legal privilege in one jurisdiction may result in a global waiver and in circumstances not considered by the UK court or enforcement authority.²¹

The disclosure problems in the BA case were also among the central reasons for the OFT appointing a panel of members of the OFT Board (“the Board Review”) to examine the events leading up to and during the trial with a view to making recommendations for the conduct of future criminal cartel cases in the UK.²²

When it delivered its report, some of the key findings and recommendations of the Board Review were on the issue of waiver of legal privilege.²³ The following recommendations were included in the conclusions:

- The 2008 Guidance should be reviewed and consideration should be given to including an explicit notice to leniency applicants that they may expect requests for disclosure of witness account material (including legally privileged material) in any criminal proceedings conducted by the OFT arising out of their proffer.²⁴
- The OFT should in addition consider specifying in the revised guidelines that such disclosure may be required as a condition of leniency/immunity. The Board Review considered that “*any concern about the impact of this approach to disclosure and possible chilling effects on future leniency applicants must be weighed against the huge financial and other advantages to applicants resulting from immunity*”.²⁵
- It should be made clear in the revised leniency guidelines that where material sought by the OFT is withheld on the basis of claims for legal privilege or commercial sensitivity, the OFT may require the applicant to make it available for review by independent counsel (the instructions to whom will be disclosable) or, where appropriate, by an OFT lawyer unconnected with the case.²⁶

²⁰ R v George, Crawley and Others (unreported) 7 December 2009, para. 31 and 32.

²¹ Owen J went a step further than the 2008 Guidance and considered that the courts could order limited disclosure, the result potentially being that such disclosure would not amount to a waiver of legal privilege under EU or US rules. Whether disclosure could be limited in this way remains untested and it is, as some commentators have suggested, somewhat difficult to see how this would operate in practice. See e.g., “*Criminal cartel enforcement – more turbulence ahead? The implications of the BA/Virgin case*”, see note 14 above.

²² Project Condor Board Review, December 2010.

²³ In the BA case, the OFT was in the position of seeking disclosure from a leniency applicant (who was subject to a duty of cooperation) of material, some of which the applicant considered to be protected by legal privilege, which arguably it was not in the applicant’s interests to disclose.

²⁴ Project Condor Board Review, Appendix Recommendation 2.

²⁵ Project Condor Board Review, Appendix Recommendation 2.

²⁶ Project Condor Board Review, Appendix Recommendation 3.

The OFT, as follow-up to the Board Review, accepted the recommendations and in October 2011, published for consultation a revised version of its guidance on applications for immunity and no action (the “Draft Guidance”).²⁷

The Draft Guidance confirms that the OFT will continue to seek waivers of lawyers’ notes taken during internal investigations (para. 3.18). The language appears, however, to offer some solutions to the types of problems seen in the BA case, while at the same time offering some protection against the consequences in other jurisdictions of requiring the applicant to waive legal privilege for lawyers’ notes taken during internal investigations.

First, one must welcome the statement in para. 3.17 of the Draft Guidance that the OFT will not seek waivers in civil investigations. However, as it will only become clear after the initial internal investigation whether there is a risk of criminal investigation, the fact that there remains a risk of waiver requests will in many cases have to inform the conduct of investigations and applicants’ decision-making even in cases that eventually only turn out to be civil investigations.

Second, the OFT appears to have acknowledged the validity of concerns relating to the timing of waiver requests. Paras. 3.19 and 3.22 of the Draft Guidance now make it clear that the waiver requests will be made at the earliest when the OFT has “determined that there is otherwise sufficient evidence to charge one or more individuals with the cartel offence” (para. 3.22), or in some cases even later when a case is before the courts (para. 3.19).²⁸ This represents a significant departure from practice in early cases and limits disclosure to cases where charges are about to be brought, or the court proceedings have already commenced.

The suggestion in para. 3.19 that, at least in some cases, the waiver would only be considered when the case is before the courts (“having sought the guidance of the court where necessary”) may be intended to deal with cases with an international component. In such cases, there is a significant risk of even limited waivers in a UK proceeding being found to result in complete subject-matter waiver in other jurisdictions, and perhaps even under English law.²⁹ By involving the court in the decision to seek disclosure of privileged materials, the OFT may be seeking ways to avoid collateral (international) effects of the waiver policy. This should be lauded, and while a UK court may not be willing³⁰ to issue an order that the privileged materials be disclosed under protective order (thereby avoiding need for a waiver of privilege), there may be court-enforced procedural devices by which the waiver is limited and protective orders are imposed which would convince a judge, e.g., in the United States or Australia, that waiver had not been entirely voluntary and that the disclosure was under circumstances similar to procedures that might have been employed in those jurisdictions to order limited disclosure of privileged communications.

Even with these proposed improvements over the 2008 Guidance, it is regrettable however that the OFT has not focused on whether intrusive waiver requirements are indeed the best way to address the issues that come up in cases such as the BA case, which as many commentators have noted, involved a

²⁷ Applications for leniency and no-action in cartel cases (OFT 803con).

²⁸ A court would not be expected to give guidance on the need to seek disclosure of materials before charges had been brought and the court had been seized of the case.

²⁹ In this regard, the language in para. 3.21 of the Draft Guidance suggesting that waivers should not imply that the materials will be disclosed to third parties, may be of limited comfort to parties in international cases. A third country court may well find that a limited waiver to a UK enforcement authority results in full waiver. The same is likely to apply where the OFT requests that the privileged materials be reviewed by a lawyer “unconnected with the case” in para. 3.16.

³⁰ See footnote 21 above for commentators’ doubts in this regard.

perhaps unique set of facts in which a criminal prosecution was pursued in a bilateral cartel case where a jury would ultimately have been asked to consider whether a self-admitted cartelist was, despite this, a witness of truth.

In this regard, one may question whether there are not more proportionate responses to late disclosure of contradictory or exculpatory statements, such as possibly requesting the leniency applicant to certify at certain times during a proceeding (under risk of loss of leniency) that there are no material contradictory or exculpatory materials.³¹ In any event, with increasingly interlinked international investigations, it is not clear that it will serve the enforcement interests of the United Kingdom to seek waivers except in very specific and narrow circumstances.

2.2 *Australia – Disclosure of proffer notes of the enforcement agency*

The ACCC has since August 2005 had an immunity policy in place for cartel enforcement. The most recent version of that policy was issued in 2009.

The various iterations of the ACCC immunity policy, and the ACCC practice under that policy, have provided that immunity applicants may provide certain information to the ACCC – e.g., in the context of proffers by applicants which are subject to cooperation obligations – subject to an understanding that elements of such statements or proffers will be held in confidence by the ACCC, or at least that the ACCC will use its “best endeavours” to protect such confidentiality.³² This is particularly relevant in cases where a witness cooperating in Australia may be the subject of prosecution in another country, but the ACCC is seeking information from that witness which would only serve as background and may not necessarily be needed for an Australian prosecution but could be harmful to the witness if disclosed to the third country authorities. It is also very relevant for leniency applicants assessing whether admissions to the ACCC will be disclosed to civil plaintiffs.

Two recent judgments of the Australian Federal Court sheds new light on the degree to which the ACCC can protect information provided in confidence by an immunity applicant.

The case concerns allegations of cartel conduct in contravention of section 45 of the (then) Trade Practices Act 1974 against, inter alia, Prysmian Cavi E Systemi Energia SRL (“Prysmian”) and Nexans SA

³¹ The draft revised leniency guidance seeks to rectify this uncertainty by specifying that information that will have a bearing on the OFT investigation includes ‘*information that supports a finding of cartel activity, information which suggests and absence of cartel activity (generally, or on the part of specific undertakings or individuals) – “exculpatory” material – and information on possible leads or sources of information that the OFT may wish to pursue*’ (para 5.14). However it could be much more specific and require the applicant to set out in detail where key individuals provide any exculpatory comment or information and this obligation could be continuous throughout the investigation.

³² See para. 45 of the Interpretation Guidelines issued with the 2005 Immunity Policy of the ACCC. See also para 64 of the current Interpretation Guidelines issued with the 2009 Immunity Policy. This provision of the Interpretation Guidelines must be seen in the context of the Australian enforcement system, where the ACCC does not have decision-making authority, but must prove its case in court and the judges will likely require considerable disclosure. As a result of the enforcement framework, it is obvious for any immunity applicant that witness statements given to, and documents provided to the ACCC are provided with a view to their disclosure in court, and the only likely protection against disclosure of such materials to third parties is the “implied undertaking” that defendants are subject to and which restrict the defendant from using the materials for purposes other than their defence. Even this implied undertaking has limitations as a third party (e.g., a civil plaintiff) may and often will apply to the court to obtain documents, and will often be granted such leave.

(“Nexans”) (*ACCC v. Prysmian & Ors*, SAD 145/2009).³³ The action, commenced in September 2009, was brought against the French and Italian parent companies of Nexans and Prysmian as those companies were established outside Australia and had no local presence against which the action could be brought.

Prysmian and Nexans contested the ACCC’s ability to serve process outside of Australia in a preliminary action. In order to serve process outside the jurisdiction, the ACCC had the onus to establish a *prima facie* case against Prysmian and Nexans. In this connection, they sought to have disclosed to them, *inter alia*, evidence supporting the ACCC’s affidavits in support of the action and documents relating to the immunity application.

The ACCC had taken evidence prior to the commencement of proceedings having “assured” a witness for the leniency applicant that it “*would not waive legal professional privilege or public interest immunity privilege*”.³⁴ An attorney for the witness noted that “*prior to the interview the ACCC had stated ‘public interest immunity would appear likely to be available should a third party seek to access any records of the interview, in addition to the separate legal professional privilege residing in the notes’*”.³⁵

The ACCC objected to the Nexans and Prysmian disclosure requests and argued that “public interest immunity” applied, at least at an early stage of the proceeding, to information provided by immunity applicants who cooperate with the ACCC, and also requested that a “confidentiality order” should be made under the Federal Court of Australia Act 1976 (“FCA”).

The judge, Lander J, hearing the applications of Nexans and Prysmian ruled in the first judgment of August 2011 that the ACCC was not entitled to withhold the evidence from Nexans and Prysmian on grounds of “public interest immunity”, and ordered the disclosure of a significant amount of documents. Judging by the disclosure requests formulated by the defence, the documents disclosed would appear to have included the ACCC officials’ notes of proffer meetings with the immunity applicants counsel.

The Court held that the ACCC had a “heavy burden” to establish that real detriment to the public interest would result from the disclosure.³⁶ In this case the Court held that Prysmian and Nexans were entitled to the documents in order to prepare for their challenge to the jurisdiction of the Australian courts. In its findings, the Court recognized that the result may undermine the ACCC’s immunity policy and the willingness of individuals and companies to assist the ACCC in its cartel investigation, but indicated that these considerations were outweighed by the public interest of a “fair trial” in favour of disclosure, and specifically found that the risk of prosecution of witnesses provided by the immunity applicant in other jurisdictions as a result of the disclosure is not a matter to which the Court should have regard when determining where the public interest lies. The Court also refused to grant a “confidentiality order”, restricting disclosure of the information. The judgment found that such an order “*was in no way necessary...to prevent prejudice to the administration of justice*” where the public interest favors disclosure.³⁷

The first judgment of the Federal Court in *Prysmian* again raises the question of the degree to which the ACCC can always give immunity applicants meaningful assurances with respect to disclosure of

³³ The case has been described by a number of Australian practitioners and law firms, including Blake Dawson, which has provided the following insightful summary of the case: http://www.blakedawson.com/Templates/Publications/x_publication_content_page.aspx?id=63787

³⁴ *ACCC v. Prysmian & Ors*, [2011] FCA 938 (“*Prysmian Judgment*”) at [52].

³⁵ *Prysmian Judgment* at [52].

³⁶ *Prysmian Judgment* at [180].

³⁷ *Prysmian Judgment* at [240].

proffers and other preliminary information. It has been well-understood by the cartel bar that given the procedural framework within which the ACCC operates, witness statements and other evidence collected by the ACCC will eventually be disclosed when an enforcement action is brought in court, and that disclosure in court of such information is the norm given the absence of plea bargaining procedures that operate to reduce disclosure of immunity applicant materials in other jurisdictions (such as in particular the US).

The ACCC recognized this issue already some years ago and amendments to the relevant legislation now provide additional protection for information provided by immunity applicants by the introduction of a provision on "protected cartel information" in section 157B of the TPA. This "protected cartel Information" provision was held not to apply to the conduct considered by the Court in the *Prysmian* case.³⁸

This new provision of Australian law provides that the ACCC may withhold from disclosure "protected cartel information", except when ordered by a court. When deciding such a matter, the Court must have regard only to those matters set out in section 157B, including, relevantly, the fact that the protected cartel information was given to the ACCC in confidence; the need to avoid disruption to national and international efforts relating to law enforcement; and the fact that the production of a document/disclosure of protected cartel information may discourage informants from giving protected cartel information in the future.

To date, the Courts have not had an opportunity to consider the application of this provision. However, the language of the new section 157B does not give all practitioners comfort when considered in light of the reasoning in the recent *Prysmian* Judgment. In its commentary on the judgment, Blake Dawson states: "*While, this statutory formula appears to shift the balancing exercise to be undertaken when determining whether information is to be disclosed in the ACCC's / an immunity applicant's favour, the precise ramifications of section 157B in light of judicial decisions like Prysmian remain uncertain.*"

Following the first ruling of the Federal Court, the ACCC resisted to the Court order to produce the documents by filing a claim for legal professional privilege. Nexans opposed the claim, calling for another examination of the matter by the Federal Court.

By a ruling of 3 February 2012, the Court rejected the ACCC's claim for legal professional privilege on certain documents (including communications between an immunity applicant and the ACCC) created before proceedings were opened or anticipated.³⁹

Australian law accords legal professional privilege to documents created "*in anticipation of legal proceedings*," i.e., when litigation was reasonably anticipated or contemplated. According to the Court, the ACCC did not show that it reasonably anticipated or contemplated the opening of an investigation when the immunity applicant submitted to the ACCC the disputed documents. This notwithstanding the self-incriminating nature of the documents and proffers by the applicant, and a context where other enforcement authorities already had initiated investigations on substantially the same set of facts.

It was only some months later -- after interviewing obtaining further evidence from an employee of the immunity applicant -- that the Court's considered that the ACCC could show that it reasonably contemplated litigation. Any document created prior to that date therefore was found not to be protected by legal professional privilege.

³⁸ *Prysmian Judgment* at [271].

³⁹ Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L. (No 2)[2012] FCA 44.

As regards the documents created after the interview of the immunity applicant's employee, the Court upheld the ACCC's privilege claim. However, the Court also held that the ACCC had waived legal professional privilege in respect of a draft oral statement, by making extensive reference to such statement in an affidavit filed by one of its official with the Court. Note that the draft oral statement itself had not been filed with the Court.

This second ruling of the Federal Court adds further concern as regards the degree of protection afforded by Australian law to leniency applicants and their statements.

First, the interpretation given here to the long-standing principle of "reasonable contemplation of litigation" is perplexing. Although it might seem obvious to an immunity applicant who gives a self-incriminatory statement to a prosecutor that such statement is for the purpose of prosecuting other parties to the cartel, this is not the view of the Australian Federal Court. This can discourage leniency applications, and it would certainly seem to warrant seeking early guarantees from the ACCC as to the nature and status of their investigations, in particular before giving very precise details of a matter.

A second concern arises in relation to the "waiver" of legal professional privilege. According to the Federal Court, the ACCC waived the legal professional privilege on the draft oral statement by acting inconsistently with the maintenance of the confidentiality of the document. The ACCC argued that "*it does not necessarily follow that a reference to the contents of documents in an affidavit leads to a waiver of privilege over those documents. Determining whether a party has waived privilege in a document is always a question of fact and degree to be assessed in the particular circumstances of the case. Considerations of fairness are relevant [...]*".⁴⁰ The Federal Court in *Prysmian* did not accept this argument.

The full impact of these recent rulings on the attractiveness of the ACCC leniency program cannot be assessed at present, but one must assume that prospective leniency applicants will consider the impact of the rulings carefully when considering whether to include Australia in a multi-jurisdictional immunity or leniency strategy. In this connection it will be clear that absent immunity applications in Australia, the ACCC will not have access to information obtained by other authorities through bilateral waivers and will need to conduct the investigation using traditional information discovery means. Where a company does not have a substantial presence in Australia, this may complicate the investigation significantly.

2.3 *United States– Disclosure of proffer notes at trial*

Since 1993, with the adoption of the DOJ Antitrust Division's Corporate Leniency Policy, a bedrock principle of the leniency program in the United States has been the ironclad assurance of confidentiality for all leniency applicants. In 2008, the DOJ reiterated this principle and stated that: "*[t]he Division holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the Division does not publicly disclose the identity of a leniency applicant or information provided by the applicant, absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order in connection with litigation.*"⁴¹ The Division also adopted a "*policy of not disclosing to foreign antitrust agencies information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure.*"⁴²

⁴⁰ Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L. (No 2), at [94].

⁴¹ "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008)" by Scott D. Hammond and Belinda A. Barnett, Question No. 32 available at: <http://www.justice.gov/atr/public/criminal/239583.htm>

⁴² Id. at Question No. 33.

The Division has been able to dutifully abide by these confidentiality guarantees in most cases and most, if not all, of the information supplied by a leniency applicant has been kept confidential and out of the public domain. This success is the result of cartel cases being resolved primarily through plea agreements with limited information disclosed to pleading defendants or in open court.

However, with an increase in cartel cases going to trial, more information from the leniency applicant must be disclosed to the defendant and ultimately disclosed in open court. In the last few years almost every major cartel case has resulted in some indictments and the subsequent disclosure to the defendants of the identity of the leniency applicant and information provided to the government by the leniency applicant, including witness statements.⁴³ While the DOJ regularly seeks protective orders in criminal antitrust cases, to ensure that the criminal discovery is not publicly disclosed, and is used solely for the defense of the case, there is a large amount of information relating to the leniency applicant that is inevitably disclosed in open court during the course of a criminal trial. Moreover, recent guidance from the DOJ relating to pretrial discovery obligations increases the chance of even greater disclosure of leniency material.

In 2010, in response to recent high profile criminal trials where the government allegedly failed to disclose certain exculpatory material (including the prosecution of former United States Senator Ted Stevens), the DOJ issued new criminal discovery guidance to ensure that all federal prosecutors meet their discovery obligations to criminal defendants, including those accused of cartel conduct.⁴⁴ One particular area of the guidance which is relevant to cartel cases is the requirement that DOJ prosecutors review and produce “[p]rior inconsistent statements (possibly including inconsistent attorney proffers, see *United States v. Triumph Capital Group*, 544 F.3d 149 (2nd Cir. 2008)).” (Emphasis added)

The possibility that attorney proffers from cooperating parties, including leniency applicants, may be disclosed, may come as a surprise to cartel defense lawyers. Antitrust enforcement agencies have gone to great lengths to allow for leniency applicants, and other cooperating parties, to provide cooperation through oral attorney proffers as a basis to obtain leniency or gain cooperation credit. These “paperless” presentations were specifically crafted to prevent their disclosure to private plaintiffs in civil damage claims. These efforts may be in vain if these same statements will be disclosed to defendants in criminal cases and possibly disclosed in open court. Moreover, it is not uncommon for a witness’ initial statements to company counsel to be incomplete, especially if the lawyer does not have the benefit of documents to refresh the witness’ recollection. If these early witness statements are disclosed to government, they may later need to be disclosed to the defendant as prior inconsistent statements when compared to later statements by the witness with the benefit of full preparation and review of all relevant documents.

In the United States, the government has a duty to disclose all material evidence favorable to a criminal defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This disclosure requirement also applies to material that can be used to impeach prosecution witnesses. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). “A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused.” *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). Evidence is material if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 870.

Courts have recently extended the government’s disclosure obligations under *Brady* to include attorney proffer notes that are inconsistent with subsequent statements by the prosecution witnesses. *See*

⁴³ E.g., DRAM, Marine Hose, Air Cargo, and LCD cases.

⁴⁴ “Department of Justice Guidance for Prosecutors Regarding Criminal Discovery” David W. Ogden, Deputy Attorney General (2010) available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm

United States v. Triumph Capital Group, Inc. 544 F.3d 149, 162-165 (2nd Cir. 2008). (The government's failure to produce attorney proffer notes that were inconsistent with that witness' later statements resulted in the reversal of the defendant's conviction on certain charges). Thus, in the context of a cartel case, if an attorney provides a proffer indicating that a particular witness was not at a meeting with a competitor or did not reach an agreement on pricing, those proffer notes may need to be handed over to the defendant by the government if the witness later provides materially different testimony.

Moreover, based on the recent practice of the DOJ, counsel should assume that all attorney proffer notes, whether inconsistent or not, will be produced to defendants indicted for cartel conduct. The disclosure of attorney proffer notes recently arose in the highly publicized case of *United States v. AU Optronics, et al.*, Case No. 3:09CR-0110-SI (N.D. Cal.). As part of pretrial discovery in that case the government produced "200 boxes of hard-copy documents, approximately 2300 GBs of electronically stored documents, all FBI 302s from the investigation, 132 extensive summaries of witness interviews, and transcripts of all grand jury testimony."⁴⁵ In addition "the government, erring on the side of disclosure" produced "over 500 typewritten pages containing information proffered by counsel for cooperating individuals and corporations at various stages during the investigation."⁴⁶ Given the large volume of attorney proffer notes it appears as if the government simply produced a copy of every single attorney proffer in its possession.

As more cartel cases go to trial in the U.S., the DOJ's new discovery policy has the potential to lead to the disclosure of leniency applicant witness statements and attorney proffers in all cases that go to trial. Fortunately, although the government is obligated to produce leniency material including attorney proffers in all criminal cases, the government recognizes its bedrock obligation to protect the confidentiality of the leniency applicant's identity and information provided by the leniency applicant. Therefore, the DOJ's Antitrust Division routinely seeks pre-trial protective orders in all criminal cases to preclude the public disclosure of leniency materials, except for the purpose of defendants defending themselves at trial. Such a protective order was entered in the *United States v. AU Optronics, et al* case.⁴⁷ Nevertheless, despite the government's efforts to protect the identity of the leniency applicant and its cooperation material, given the public policy favoring public and open trials in the United States, there is still a large amount of material that is disclosed to the public during criminal trials. Although necessary for the fair trial of a criminal defendant, these disclosures do create meaningful disincentives to companies in deciding whether to report cartel conduct to the enforcement agencies.

2.4 European Union – *Pfleiderer*⁴⁸ and access to leniency statements

The *Pfleiderer* case originated with a cartel decision of the German Bundeskartellamt of 2008 imposing fines on three manufacturers of specialty paper.

Pfleiderer – a customer of the companies involved in the cartel – sought from the Bundeskartellamt full access to the investigation file, to prepare a follow-on damages action. The Bundeskartellamt only granted access to a non-confidential version of the decision and to a list of the evidence seized during the inspections. *Pfleiderer* insisted on having access to the entire file, including the leniency applications and the evidence seized, and brought an action to this effect before the local court in Bonn, Germany. The court ordered the Bundeskartellamt to grant access to the file, but stayed the enforcement of the decision,

⁴⁵ *United States v. AU Optronics Corp., et al*, 3:09-CR-0110-SI (N.D. Cal.) Doc. No. 502 at p. 2, Filed Dec. 07, 2011.

⁴⁶ *Id.* at p. 3.

⁴⁷ *United States v. AU Optronics, et al.* 3:09-CR-0110-SI (N.D. Cal.) Doc. No. 120, Filed on Aug. 19, 2010.

⁴⁸ Judgment of the Court of 14 June 2011, *Pfleiderer AG v. Bundeskartellamt*, C-360/09.

seeking a preliminary ruling from the European Court of Justice (“ECJ”). The local court asked the ECJ whether European Union law prevents parties adversely affected by a cartel, and seeking damages, from being granted access to leniency applications, documents and information voluntarily submitted by a leniency applicant to a national competition authority under a national leniency regime, in the framework of an Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) investigation.

The case has attracted considerable interest among EU practitioners and enforcement authorities. The European Commission, the European Free Trade Association (“EFTA”), and several EU Member States intervened in the ECJ proceedings, supporting the view that access to leniency documents should be denied to preserve the effectiveness of leniency programs.⁴⁹

In its judgment delivered on 14 June 2011, the ECJ applied the fundamental EU law principle of national procedural autonomy, and in doing so, opted for a decentralized approach where the decision on access to leniency statements in a proceeding involving the application of EU competition rules is ultimately made by the national courts of each EU Member State.

The reasoning of the Court is that absent any binding EU regulation, it is for the Member States to establish and apply national rules on the right of access to leniency materials, even where the substantive violation is under EU law (i.e., a violation of Article 101 TFEU). As regards the concrete exercise of this competence, the Court held that national courts must carry out a balancing act between two conflicting interests:

- On the one hand, they must protect the effectiveness of leniency programs, which are “*useful tools*” serving the objective of effective application of EU competition rules. The Court recognized that the effectiveness of leniency programs could be compromised if leniency documents were disclosed to claimants in private actions.
- At the same time, the Court held, EU law affords to any individual the right to claim damages for loss caused by a breach of competition rules, and this right also serves the effective application of EU competition rules, by discouraging companies from entering into illegal agreements. Thus, the rules governing the right to claim damages cannot operate in such a way to make recovery of the loss “*practically impossible or excessively difficult*”.

Unfortunately, the Court gave little guidance on the criteria that must govern this balancing act, stating only that the assessment must be “*on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case*”.

This sentence is potentially a cause of concern for leniency applicants. The need for a case-by-case assessment makes it difficult to predict how a national court will treat requests for access. The solution suggested by Advocate General Mazak – to adopt different rules for different categories of documents (leniency statements vs. preexisting evidence; see footnote 49 above) – would have offered more security.

⁴⁹

Advocate General Mazak delivered an opinion in the case advising that access to leniency statements should be prevented, as “*it could substantially reduce the attractiveness and thus the effectiveness of a national competition authority’s leniency programme. This in turn could undermine the effective enforcement by the national competition authority of Article 101 TFEU and ultimately private litigants’ possibility of obtaining an effective remedy*”; on the other hand, he advised that access to pre-existing evidence should be granted as these documents are not “*a product of the leniency procedure as they, unlike the self-incriminating corporate statements referred to above, exist independently of that procedure and could, at least in theory, be discovered elsewhere. [...] It would run counter to the fundamental right to an effective remedy if access to such documents could be denied by a national competition authority in circumstances such as those in the main proceedings.*”

Moreover, rather than being constrained by common principles (which the Court did not identify), each assessment will be influenced by the specific features of the national law applied in the case. The reference to “*all the relevant factors*” equally offers little security to leniency applicants.

This uncertainty is particularly troubling in cases where (as is often the case in the EU) parallel leniency applications have been filed in different Member States. In such cases, plaintiffs could take advantage of the decentralized and case-by-case solution adopted in *Pfleiderer* by obtaining leniency documents in plaintiff-friendly jurisdictions, subsequently using them in other jurisdictions (including outside the EU).⁵⁰ This risk could have a chilling effect on companies contemplating an application for leniency in multiple jurisdictions. It could also dissuade companies from granting waivers authorizing enforcement authorities to share information as a leniency applicant might be reluctant to grant a waiver to share documents with an authority of a jurisdiction where there is a serious risk of disclosure to private claimants.

Another important feature of *Pfleiderer* is that its reasoning seems to be applicable not only to proceedings before national competition authorities, but also, to a more limited extent, to Commission enforcement procedures. Although the preliminary reference of the German court explicitly referred to documents submitted in an investigation by a national competition authority, pursuant to a national leniency program, the broad language in the first sentence of paragraph 32 of the ECJ judgment states that EU competition rules do not prevent access to leniency materials, without mentioning the national or EU nature of the proceedings where the document were submitted. The Commission itself has recognized in the Observations submitted to the UK High Court in the *National Grid* litigation that the reasoning in *Pfleiderer* is also applicable by analogy to EU investigations.

The implication for the Commission is that when requested to provide leniency documents by a private party under the EU Transparency Regulation, it will – in the present state of EU law – have to carry out a balancing exercise weighing the interests of a civil litigant in disclosure against preserving the incentives of a leniency applicant in blowing the whistle on cartel conduct similar to that which the ECJ imposed on national courts.

This will be no easy task. The Commission decisions on requests for public access to documents submitted in competition cases are already subject to a pervasive judicial review by the EU Courts. So far, the Commission has refused to grant public access to leniency documents under the EU Transparency Regulation relying on Article 4(2) of the Regulation, which provides that: “*The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] — the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.*” However, the recent judgment by the General Court of the European Union in *CDC*⁵¹ shows that this exception must be interpreted strictly, and its conditions must be proven to the required legal standard. Specifically, the Court rejected the Commission’s argument that the concept of the “purpose of the investigation” includes all of the Commission’s policy in regard to the punishment and prevention of cartels and that the exception may be relied in a general way to refuse disclosure of any leniency document likely to undermine the Commission’s cartel policy. It can be expected that future *Pfleiderer*-type balancing of interests by the Commission will be subject to a similar rigorous analysis by the Court.

The German court that had referred the dispute to the ECJ for the *Pfleiderer* preliminary ruling, issued on 30 January 2012 its judgment on the case.⁵² Following the application of the balancing test set out by

⁵⁰ In practice, this could well lead to a preliminary reference to the ECJ in the first case and a stay of other cases pending resolution of the first case, but the uncertainty remains.

⁵¹ Judgment of 15 December 2011 in Case 437/08.

⁵² Amtsgericht Bonn, Decision of 18 January 2012, 51 Gs 53/09.

the ECJ, the Bonn Amtsgericht refused to allow Pfeiderer to access the leniency statements in the Bundeskartellamt's file.

The Amtsgericht recognized that leniency applications are essential for the discovery of secret cartel arrangements. Disclosure in court of the leniency documents could deter future applicants from cooperating with the enforcement authorities thereby adversely affecting the efficacy of antitrust investigations. Ultimately, the disclosure of leniency applications would also hinder private enforcement of competition law, as many infringements would never be discovered and come to the attention of the victims.

According to the Amtsgericht, the victim's right to a redress must be balanced with the interest to an effective enforcement of competition law, as well as with the German legal notion of "informational self-determination" (a personal right to control which information is available about oneself, and under what conditions). Finally, the Amtsgericht noted that denying disclosure of the documents would not be inconsistent with EU law, which equally sees in the detection and punishment of competition law infringement an interest worth of legal protection.

Interestingly, the Amtsgericht stated that preserving confidentiality of the leniency submissions would not necessarily result in a denial of justice for the victim of a competition law infringement. Such party still has access to the decision of the National Competition Authority, the index of the documents seized as well as the procedural file and the documents seized during the inspections (the so-called "preexisting documents"), for which a non-confidential version had to be made available.

There is little doubt that the ECJ preliminary ruling and the Amtsgericht judgment will not be the last words on all these issues. At least one other case is currently pending before the ECJ⁵³ and similar cases are likely to reach national courts.

In the months since the *Pfeiderer* judgment of the ECJ, the Commission has continued defending against disclosure requests and stressing the importance of confidentiality for leniency programs. It did so in official statements⁵⁴ and in *amicus curiae* submissions, such as the Observations in the *National Grid* litigation described above and in a letter sent by the Director General of DG Competition Alexander Italianer to Magistrate Judge Pohorelsky of the Eastern District of New York in the context of the Air Cargo litigation.⁵⁵

Following the EU cartel decision in the Air Cargo case, plaintiffs in an action for damages before the New York court sought disclosure of the confidential version of the Commission decision from the defendants. In its letter, the Commission opposed the request for disclosure noting that "*the success of this [leniency] program, which is the most effective tool at the Commission's disposal for the detection of cartels, crucially depends on the willingness of the companies to provide comprehensive and candid*

⁵³ Case C-536/11, Reference for a preliminary ruling from the Oberlandesgericht Wien (Austria) lodged on 20 October 2011 -*Bundeswettbewerbsbehörde v Donau Chemie AG and Others*.

⁵⁴ The EC Commissioner for Competition Joaquín Almunia stated in a recent speech that: "*Damages actions can start before or after a competition authority has issued a decision. In either case, we need to regulate access to the evidence held by competition authorities. This is absolutely necessary if we want to preserve our leniency programmes, which are crucial for the effectiveness of our fight against cartels*" (Speech /11/598, *Public Enforcement and Private Damages Actions in Antitrust*, delivered in Brussels on 22 September 2011 at the European Parliament).

⁵⁵ In *Re: Air Cargo Shipping Services Antitrust Litigation*, M.D.L. No. 1775 (Eastern District Court of New York).

information. This willingness could be jeopardized if potential leniency applicants knew that their corporate statements could become discoverable in civil litigation”.⁵⁶ On 22 December 2011, Judge Pohorelsky rejected on grounds of international comity the plaintiffs’ request to compel production of the EU decision.

The Commission has also specifically acknowledged the threat to its cartel enforcement program resulting from the *Pfleiderer* judgment and tried to provide some guidance to national courts on how to approach this issue.⁵⁷ In the recent submission to the UK High Court in the *National Grid* litigation, it attempted to provide two criteria for the balancing act:

- The first criterion being “*whether, in the circumstances of the case, the disclosure of the leniency documents, or documents including material derived from leniency documents, would expose the leniency applicants to greater liability than those parties that did not cooperate with the Commission [...]*”.
- The second criterion was stated as follows: “whether disclosure is proportionate in the light of its possible interference with leniency programmes”; The Court should consider whether the leniency document is “at all relevant for the purpose of the claim, and whether there are other available sources of evidence that are equally effective for that purpose” which are less likely to adversely affect the functioning of the leniency program.⁵⁸

The Commission’s suggestions must be welcomed as an attempt to set some boundaries to the *Pfleiderer* analysis. The Commission’s view is, however, not binding in any way on national courts and has not been so far been validated by the ECJ.

Despite these recent efforts to defend the confidentiality of leniency documents post-*Pfleiderer*, the trend seems to be toward an even greater tension between leniency regimes and private antitrust enforcement, as damage actions spread across the continent. The Commission is aware of this, and has indicated in recent statements that it is seriously considering proposing legislation to impose harmonized rules on access to evidence in private antitrust actions.⁵⁹

⁵⁶ It appears that the Commission sent a similar letter to a Court in Vancouver, Canada, to oppose the disclosure in a private litigation of materials related to the EU settlement in the DRAM cartel investigations. See the report of 6 February 2012 by Lewis Croft on Mlex.com: “*EC seeks protection for DRAM cartel documents in Canadian Court*”.

⁵⁷ See the remarks by Eddy de Smijter, Deputy Head of Unit, Private Enforcement, DG Competition, reported by Lewis Croft, “*EC mulls legislative option for solving leniency, damage disclosure dilemma*” of 16 September 2011, available on Mlex.com: “*The most worrying element of the Pfleiderer case is this ‘case-by-case analysis’ [...] ‘That is exactly leading to the uncertainty that is so hard to live with if you want to protect leniency programmes’*”.

⁵⁸ In the *National Grid* case, the defendants had already consented to disclosure of preexisting documents, so the Commission did not need to take a position on those materials, but it referred to witness statements as a possible alternative source of evidence preferable to leniency statements.

⁵⁹ See the remarks by Eddy de Smijter of DG Competition reported in Lewis Croft, “*EC mulls legislative option for solving leniency, damage disclosure dilemma*”, cit. in footnote 31 above: “*It seems that the only real cutting alternative is to have hard law. We all have an interest in the Commission coming up with some ‘ex ante’ way as soon as possible*”.

3. Implications for cartel enforcement and leniency programs

The developments described above may well, in the view of the authors, have an impact on the decision-making of putative immunity and leniency applicants. Applicants may see these developments as signaling a greater risk of disclosure of materials, which previously – rightly or wrongly – were perceived as unlikely to be disclosed. This applies in particular to oral attorney proffers and oral corporate statements given to authorities, as well as to notes of internal investigations and attorney witness interviews that are needed in order to determine whether to apply for immunity or leniency.⁶⁰

Such a shift in perception will affect decision-making in particular in two situations.

First, cases where a company (or its employees) have immunity in one jurisdiction, but may be at risk of prosecution in another jurisdiction. Second, cases where the applicant considers that it would be in a position to withhold from civil plaintiffs certain materials or oral statements provided to enforcement authorities.

While counsel to an immunity or leniency applicant will have to consider the implications in light of the specific facts of each case, one may already identify the following possible effects of expansive disclosure rulings:

- Increased disclosure risks may affect the willingness of immunity applicants to come forward in certain “marginal” jurisdictions where the downsides of additional disclosure are seen to outweigh the upsides of an immunity or leniency application;
- Increased risk of disclosure of proffers (by way of disclosure of notes of authorities taken during proffer meetings) could lead applicants to more narrowly circumscribe proffer statements to ensure that these do not reveal more than what will eventually come out in witness testimony;
- Narrower proffer statements in certain jurisdictions could well have the effect of causing applicants to circumscribe more narrowly oral corporate statements in jurisdictions such as the EU, thereby increasing pressure on the EU to move to more requesting witness testimony in order to get the same level of information as other jurisdictions;
- Increased disclosure of leniency applicant materials in certain jurisdictions could lead applicants to seek to limit information exchange waivers given to enforcement authorities so as to avoid information flowing to the disclosing jurisdiction, and from there to plaintiffs or other (non-immunity) enforcement jurisdictions; and
- A requirement that applicants waive legal privilege over notes of internal investigations and witness interviews by counsel to the corporate immunity applicant could cause companies to limit internal investigations (and therefore less unlawful conduct might be found and reported), or perhaps to segregate investigations conducted for jurisdictions that require disclosure from investigations conducted for other jurisdictions.

⁶⁰ We assume for this purpose that applicants already take it as a given that any “pre-existing” (contemporaneous) documents relating to the alleged infringements of law, and witness statements will be disclosable in many jurisdictions, either by way of court ordered disclosure/discovery, or access to file in ways that do not protect against use of the materials by other jurisdictions or by civil plaintiffs. The issue for these documents is therefore often more a question of when rather than whether they are disclosed.

These possible reactions to the new disclosure requirements – when combined with an ever-increasing number of jurisdictions with immunity and amnesty policies – may also lead immunity and leniency applicants away from the recent trend of many parallel applications, and towards a focus on those countries where there is the greatest net benefit in applying (“must have” jurisdictions).

This could, on its own, lead to other jurisdictions competing to attract leniency (in particular immunity) applicants. Such a development could lead to a difference in approach between jurisdictions on the issue of the level of immunity incentives that are “sufficient” to bring out applications, which in turn could slow down or reverse the recent trend towards harmonization of approaches to leniency. Over time, this could create new challenges for inter-agency cooperation (e.g., affect the use of information obtained by asymmetric waivers).

There are several steps that enforcement agencies can take to mitigate the negative impact of disclosure of leniency materials and statements.

First, the agencies should clearly state at the beginning of an investigation the nature and scope of its disclosure policy. It is important for counsel to know what will, and will not, be disclosed before any disclosures by leniency applicants are made to enforcement agencies. In this regard, it will be important that authorities carefully consider their ability to enforce policy positions when dealing with the courts, and if necessary seek appropriate changes in legislation.

Second, the enforcement agencies should seek protective orders or similar measures in all cases where disclosures are necessary to ensure that leniency material is not publicly disclosed and is only used by the accused in the defense of its case. It may be appropriate to adopt practices similar to those of the US DOJ, Antitrust Division, which obtains protective orders in almost all criminal cartel cases before discovery is provided to the defendant.

Third, enforcement agencies should make every effort in private damage claims to prevent the disclosure of leniency material to private civil plaintiffs. Many enforcement authorities, including those of the US, the EU, and Japan, have regularly intervened in private civil damage litigation to ensure that leniency material or other confidential information connected with their investigations is not disclosed in civil discovery. These steps will go some way in limiting the damage resulting from increased disclosures of leniency material in cartel cases.

SUMMARY OF DISCUSSION

By the Secretariat

Mr. Frederic Jenny opened the roundtable on improving international co-operation in cartel investigations and welcomed all the participants. He passed the floor to the Chair of the roundtable, Mr. Vinicius Marques de Carvalho, Secretary of the Brazilian Secretariat of Economic Law (SDE).

The Chair began by introducing the topic of the roundtable, which sparked significant interest as evidenced by the high number of country submissions. The increasing number of cartels with global reach means that international co-operation in these investigations is of paramount importance to enforcers around the world. Although international co-operation in cartel cases has reached unprecedented levels in recent years, a number of obstacles to effective co-operation remain. These include the inability to share confidential information, the difficulties of gathering evidence located outside of the jurisdiction concerned and the undertaking of joint investigations. Developing economies also appear to be less engaged in this process than their more developed counterparts.

The purpose of the roundtable was twofold. First to discuss approaches and mechanisms that have proved successful in the past. Second to take stock of the practices employed in other areas of law, such as anti-corruption and tax, where international co-operation plays a prominent role. The Chair introduced the expert panellists contributing to the discussion which included: Mr. Toshiyuki Nambu, Deputy Secretary General for International Affairs of the Japanese Fair Trade Commission, Mr. Malick Diallo, Secretary General and Commissioner of the Senegal National Competition Commission, both representing the side of cartel enforcers, Mr. Marc Hansen, partner at Latham and Watkins, providing his view as a representative of companies involved in international cartel investigations, and Mr. Jean-Bernard Schmid, state prosecutor in Switzerland and Mr. Stefano Gesuelli, Head of the Taxation, International Co-operation Office in the Italian Guardia di Finanza, sharing their experience with international co-operation in the fields of anti-corruption and tax.

The Chair invited Ms. Hilary Jennings, Head of Outreach, to introduce the topic and present the background paper for the roundtable.

Ms. Jennings summarised the developments in international co-operation. These began to intensify with the publication of the OECD's 1995 Recommendation on co-operation in competition matters¹. The developments include both formal agreements and informal co-operation on various levels and experience sharing within the International Competition Network (ICN), as well as challenges to international co-operation. These developments were well documented in OECD's Third Cartel Report² on the implementation of the 1998 OECD Hard Core Cartel Recommendation.³

Further progress has been made since 2005, in particular with respect to informal co-operation on the basis of confidentiality and co-operation waivers from the parties being investigated. However, significant,

¹ OECD (1995).

² OECD (2005).

³ Council Recommendation Concerning Effective Action against Hard Core Cartels ([C\(98\)35/FINAL](#)).

systemic obstacles to effective co-operation remain. These often stem from differences between administrative and criminal enforcement systems as well as from lack of trust or inexperience. Moreover, newer enforcement agencies are generally less involved in the enforcement process, which is a particularly pertinent issue for discussion given the audience of the roundtable.

Various discussions at the OECD and within the ICN have clearly illustrated both the great strides that have been made towards more effective co-operation and the barriers to further progress that persist. Given the slow progress in overcoming these barriers and the fact that no comprehensive solution has thus far emerged, Ms. Jennings raised the question whether enforcement agencies should consider more revolutionary approaches. For inspiration they could look to international co-operation in other areas of law enforcement, and consider approaches under multilateral frameworks, which have functioning information sharing systems and in some cases could designate a lead agency to investigate a given case. She closed by noting that this roundtable would be particularly well suited for such discussion due to the diverse composition of its participants.

The Chair thanked Ms. Jennings for her presentation and invited Mr. Nambu to comment on the Japanese experience with international co-operation.

In his presentation, Mr. Nambu covered the reasons for international co-operation in cartel investigations and the issues surrounding formal co-operation mechanisms, the Japanese experience of co-operation with other agencies, and the possibilities for further co-operation in the future.

First, Mr. Nambu emphasised that the globalisation of business and the rise in international trade, with the resulting geographic effects on cartel activity, are the main reasons for needing international co-operation in cartel investigations. Globalisation delivers considerable economic benefits. However, many of these benefits are not realised if cartel activity hampers cross-border trade. Globalisation demands both vigorous anti-cartel enforcement by jurisdictions around the world and effective co-operation among regulatory bodies in order to optimally address the effects of cross-border cartels. Authorities may co-operate even without a formal agreement or framework. However, Mr. Nambu stressed that in his view formal co-operation agreements, establishing firm lines of communication and promoting further co-operation, are preferable. The Japanese Fair Trade Commission (JFTC) is involved in several types of formal co-operation frameworks, each of which provide different options for co-operation. The JFTC hopes that its involvement in these mechanisms will foster greater co-operation through, for example, notification procedures and information sharing arrangements.

Mr. Nambu noted that although formal co-operation agreements may be viewed by some agencies as involving a substantial and unilateral burden, their usefulness far outweighs the obligations they impose. In the experience of the JFTC, formal agreements provide an effective mechanism for building permanent lines of communication. Mr. Nambu further stressed the importance of the obligation to notify the other contracting party of anti-competitive conduct affecting its territory, (so called ‘negative’ or ‘traditional’ comity) which is normally contained in formal co-operation agreements. It is only following notification that other forms of co-operation, such as co-ordination and information sharing can take place.

Despite a number of formal co-operation agreements, the majority of international co-operation takes place following confidentiality and co-operation waivers granted by leniency applicants. While effective, this type of co-operation depends on whether leniency applicants grant the necessary waivers to the authorities involved. The challenge is that most formal co-operation agreements do not cover the current co-operation methods in investigations launched by leniency applications.

Mr. Nambu noted the three major cartel investigations where the JFTC co-operated with other jurisdictions around the world, including Vinyl Chloride Resin Modifiers, Marine Hoses and Cathode Ray Tubes. While in Vinyl Chloride Resin Modifiers co-operation involved successful information and evidence sharing, in Marine Hoses, co-operation was limited to the co-ordination of dawn raids because of

confidentiality constraints. This made subsequent evidence sharing impossible. In that case, the JFTC was able to collect evidence from the foreign cartel participants only pursuant to co-operation with their Japanese counsel.

Mr. Nambu discussed several issues, which in his view should be taken into account in any attempts for further improvements in international co-operation. In cartel investigations, which are started on the basis of leniency applications, international co-operation is possible only with the consent of the applicant(s) and only between agencies to which the applicant(s) have approached. In this context, Mr. Nambu urged competition agencies in different jurisdictions to require applicants to identify other jurisdictions where they have applied for leniency and request waivers. This would allow for co-ordination as well as information sharing. A balance should of course be carried out against the obligations of confidentiality and discretion, which are necessary for the optimal functioning of leniency programmes.

Another area where existing co-operation could be improved relates to evidence gathering. Mr. Nambu emphasised the importance of dawn raid co-ordination in order to minimise the scope for cartellists to destroy or conceal evidence. Simultaneous inspections in all the affected jurisdictions are of paramount importance to ensure that evidence is available to all the enforcers involved. In Mr. Nambu's view, this should even extend to jurisdictions to which the leniency applicant has not granted a waiver.

In many international cartel cases, evidence cannot be gathered through dawn raids as the company under investigation does not have a physical presence (i.e. a registered office) in that particular jurisdiction. In such cases, information sharing among authorities is of crucial importance to conducting a successful investigation. However, it is often complicated by confidentiality rules that prevent authorities from sharing information and evidence with each other. A possible way to overcome these limitations would be for one of the investigating authorities to convince the parties being investigated to co-operate with the other authorities involved and provide them with the relevant documents.

The Chair thanked Mr. Nambu and invited Mr. Gesuelli to share his experience with international co-operation in cross-border tax investigations.

Mr. Gesuelli stressed the developments that have made international co-operation in tax collection and investigations an absolute necessity. Globalisation, asset liquidity, cross-border migration and other factors have all contributed to the significant challenge of identifying and investigating tax fraud. To overcome these challenges, tax authorities are relying on co-decision making among agencies in different policy areas, consistency in approaches to different issues, (achieved through multilateral discussions in fora similar to this roundtable) and co-operation in individual cases.

International co-operation in the area of taxation can take many different forms. These include civil or administrative co-operation in assessing tax arrears or auditing a taxpayer, judicial or criminal co-operation in investigating tax fraud which relies on codified legal instruments, and intelligence sharing, which is an informal but important form of co-operation that relies heavily on trust between the counterparts. Co-operation can be based on either bilateral or multilateral agreements, which formalise the possible modes of co-operation that can be employed. This includes information and evidence sharing or the ability to carry out simultaneous audits.

Bilateral agreements play an important role in establishing co-operation regimes between different jurisdictions and the OECD Model Tax Convention on Income and Capital has played an important harmonising role in this respect. On a multilateral level, the Multilateral Convention on Mutual Assistance in Tax Matters, jointly developed by the Council of Europe and the OECD, is a powerful tool in fostering and simplifying international co-operation. The convention provides a single legal basis for co-operation and a joint body overseeing its application and features, which has ensured trust of the system among its contracting parties. Further means of co-operation are provided for under EU law. Mr. Gesuelli highlighted common electronic forms for the purpose of sharing information, which have greatly simplified

information sharing across jurisdictions with different official languages. The importance of the early warning system, Eurofisc, was also stressed, as well as networking events, which facilitate co-operation through personal knowledge of counterparts in other jurisdictions.

Mr. Gesuelli illustrated the importance of international co-operation and effective interagency co-operation within a single jurisdiction with an example of a VAT fraud in the area of emission allowances. The ability to detect and properly investigate a multijurisdictional tax fraud such as this requires deep and effective co-operation with various authorities both nationally and internationally.

In conclusion, Mr. Gesuelli outlined future prospects of international co-operation in the tax area. These are heavily focused on multidisciplinary approaches and co-operation. Discussions in this respect take place within the so called Oslo dialogue, which is co-organised by the OECD. Finally, Mr. Gesuelli emphasised the importance of proactive participation by all authorities in co-operation mechanisms, which can bring benefits to all involved. Existing tools and practices in the tax area offer adequate solutions. The key is in their proper and diligent use rather than in establishing new frameworks altogether.

The Chair thanked Mr. Gesuelli and turned to Mr. Jean-Bernard Schmid, to discuss his experience with international co-operation in bribery cases.

Mr. Schmid recounted the significant strides that have been taken in the area of international co-operation in corruption cases in the past decade and a half. Two major drivers have greatly enhanced the effectiveness of international co-operation and legal assistance in criminal matters.

First, Switzerland's membership in the Schengen Area has allowed for direct co-operation between the investigative authorities instead of having to rely on diplomatic channels and co-operation through central offices. This has vastly simplified and sped up international co-operation in relation to corruption cases between Schengen countries.

Second, the OECD Anti-Bribery Convention of 1997 marked a milestone with respect to co-operation on corruption matters by establishing a level playing field in signatory countries' approach to corruption. By mandating criminal sanctions for corruption, it facilitated criminal co-operation, which is predicated on dual criminality. It provided common definitions for basic legal concepts, such as corruption and sanctions, and established minimum standards for limitation periods, thus facilitating co-operation among countries with different legal systems. By laying down common jurisdictional rules, the convention allows for clear determination of which jurisdiction is competent to investigate. It also provides transparent and straightforward rules for resolving jurisdictional conflicts. Mr. Schmid highlighted the importance of the concept of predicate offence, whereby a country in which the proceeds of corruption are located has jurisdiction both over the money laundering crime and the corruption crime, even if the latter took place outside its territory. This is an important element, which goes a long way in ensuring that corruption with international aspects is properly investigated and punished.

Mr. Schmid further highlighted several general issues relevant for international co-operation. He stressed the implications of fundamental rights and due process, which affect, for example, the use of evidence collected by another jurisdiction or double jeopardy considerations. The issue of double jeopardy is so far not regulated on an international level and is left to bilateral arrangements in individual cases. Another important issue is the multijurisdictional aspect of evidence location whereby relevant data is stored electronically on servers around the world or in a cloud, which makes locating the data nearly impossible. In this respect, Mr. Schmid argued for the accessibility of data located abroad as long as it can be accessed from the investigating jurisdiction.

In conclusion, Mr. Schmid discussed the different aspects of the two types of international co-operation, criminal and civil. While criminal co-operation is generally slower than civil or administrative co-operation, it is often more effective. The harmonisation of sanctions is very important in this respect, in

particular as regards co-operation in criminal matters. Mr. Schmid closed his presentation by stressing the importance of well negotiated and implemented multilateral and bilateral agreements.

The Chair thanked Mr. Schmid and invited the European Commission delegation to discuss the factors that impact its decision whether or not to co-operate with other jurisdictions.

The European Commission (EC) delegation explained that in deciding whether or not to co-operate in situations not covered by any formal agreements, two factors play a prominent role. First is the perceived usefulness of that co-operation for both agencies. Second is the relationship between the agencies and the knowledge of each other's procedures. Co-operation often entails the sharing of sensitive non-public information, for example, about upcoming inspections. Knowing how this information will be treated by the other agency is of utmost importance. In this respect, the EC delegation highlighted the usefulness of personal knowledge between the counterparts involved, which can foster the trust necessary for effective co-operation.

Co-operation affects all issues spanning the lifetime of a case, from inspection planning to theory of harm and fining policy discussions. The degree of co-operation with respect to each of these elements is dependent on the nature of the relationship between the agencies involved. The EC delegation closed by emphasising its willingness to co-operate with any agency subject to the limitations mentioned.

The Chair turned to the Russian delegation and invited it to comment on co-operation between countries of the Commonwealth of Independent States (CIS) discussed in its submission.

The Russian delegation explained that competition agencies of the CIS countries interact in the framework of the Interstate Council on Antimonopoly Practices (ICAP), established by an intergovernmental agreement in 1993 and composed of the heads of the individual competition agencies. Its purpose is to co-ordinate actions relating to competition within the CIS market according to rules regulating both co-operation in specific cases and preventative measures.

To foster closer co-operation between CIS countries, the ICAP set up a permanent headquarters on joint investigations in 2006 to analyze markets with CIS-wide relevance. These included aviation, pharmaceuticals, telecoms and agriculture. This work served both as a basis for political action by the governments involved and for the purposes of co-operation in individual cases. One of the main priorities of the joint headquarters is the improvement of cartel investigations and co-operation between agencies. A special task force set up for this purpose issued a report highlighting the obstacles to effective co-operation in cartel cases within CIS, one of which is the difficulties in exchanging confidential information.

The Chair turned the discussion to the European Competition Network (ECN), which many contributions lauded for its success in facilitating regional co-operation. He noted, however, that some proposals for improvement were put forth and asked the French delegation to discuss those suggestions set out in its submission.

The French delegation stressed the undeniable success of the ECN due, in particular, to four elements: the institutional framework of the EU Member States, the economic union, the single market and a single set of rules enforced by the common judicial framework. Two important successes of the ECN are the sharing of information and the co-ordination of leniency programmes. The obligatory sharing of information between the EC and its 27 Member States often allows for the prosecution of cartel cases that would lack sufficient evidence in any individual jurisdiction. The ECN has also had remarkable success in the harmonisation of leniency programmes and convergence in the treatment of leniency applications.

However, three areas could be advanced even further. First, with respect to the ECN's capacity to detect anti-competitive practices, the delegation proposed the co-operation of sectoral investigations. This could increase efficiency by providing valuable evidence across cases. He also pointed to the Nordic Cartel

Network, mentioned in the joint written Nordic contribution,⁴ as a potential model for early detection. There, in sectors identified as priorities, agencies share information even before an investigation is started.

Second, the delegation explained that while within the ECN there is progress toward substantive convergence in leniency programmes, convergence in procedure (notably the application of markers and formulas) is equally necessary to be able to effectively implement the substantive law. The ECN should also consider whether there could be further standardisation in the calculation of fines to ensure the dual function of deterring potential cartellists and proportionately punishing wrongdoers.

Finally, while it is important to maintain the independence of the enforcers and judges who adopt and review decisions, the ECN should consider a mechanism that would allow for mutual recognition of evidence in order to streamline decisions regarding admissibility. This should also extend to an international network, including non-EU countries, which would be more efficient than bilateral agreements.

The Chair turned to the topic of bilateral agreements and invited the delegation of Singapore to discuss its experience in this respect.

The delegation from Singapore explained that under its Competition Act, the Competition Commission of Singapore (CCS) may enter into information exchange agreements with foreign authorities for the purpose of carrying out its functions. The CCS may limit the use of any information exchanged by demanding a written undertaking from the other agency. This helps resolve some of the problematic issues in information sharing, such as the differences in privilege against self-discrimination and sanctions.

The delegation noted that the CCS, as a relatively new agency, has yet to enter into a formal agreement with another agency. However, it has been successful in informal co-ordination with several agencies, including co-ordination on a dawn raid with a developed agency.

The Chair invited BIAC to discuss the issue of confidentiality waivers by leniency applicants and the practical steps that competition agencies may take to encourage companies to grant them.

BIAC proceeded to discuss four issues, focussed on how competition authorities could foster co-operation in cases involving leniency by incentivising leniency applicants to grant confidentiality waivers allowing authorities to co-operate.

First, agencies might wish to consider enhancing the consistency of their marker policies insofar as timing, procedure, scope and the conditions for a marker are concerned. Leniency applicants will not grant waivers of confidentiality of their submissions if doing so might lead to increased liability in other jurisdictions. Therefore, the alignment of marker policies or even the establishment of a one-stop marker system, as suggested by New Zealand and France in their written contributions, would represent a significant step forward.

Second, concerning the scope of the waiver, BIAC urged competition authorities to request information sharing waivers only once all relevant information has been identified. Doing so would allay companies' concerns over the increasing practice of competition authorities to collect vast amounts of electronic data, some of which is highly commercially sensitive and of little relevance to the investigation. Companies need to be assured that authorities share only relevant information and in a manner where its confidentiality is guaranteed by the receiving authorities.

Third, BIAC noted the importance of the protection of leniency information from disclosure under either freedom of information type rules or in damage litigation. It commended the efforts expended by

⁴ From Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden.

several jurisdictions in this respect and urged authorities to take all necessary steps, including legislative, to protect leniency information from disclosure. This will ensure the effectiveness of their leniency programmes, which are founded to a large extent on the confidentiality of submissions.

Fourth, BIAC emphasised the need to eliminate or minimise any conflicting requirements imposed on leniency applicants in different jurisdictions. A certain level of divergence is unavoidable. However, given the number of jurisdictions with leniency policies, it is essential that leniency applicants do not face obvious conflicts as regards their obligations in either jurisdiction.

The BIAC delegation closed by emphasising the importance of jurisdictions co-ordinating their approaches to legal privilege. This may also contribute to companies' willingness to grant confidentiality waivers.

The Chair turned to the South African delegation to discuss how a young agency might develop the relationship of trust with more established agencies.

The South African delegation explained that trust building between agencies is a gradual and difficult process. Direct contact and extensive discussions are required before a level of trust is reached where co-ordination on highly sensitive issues, such as dawn raids, can take place. Involvement in the community of enforcers, such as regular meetings with one's counterparts within the ICN or at the OECD, plays an important role in this respect.

It is also crucial to demonstrate enforcement credibility, to reassure the co-operating authority that the information shared will actually be of use. Developing a solid track record, even with simpler cases, is essential for newer agencies in order to gain the trust of more developed agencies.

In closing, the South African delegation stressed the mutual benefits of co-operation and reminded newer agencies to consider, in any co-operation arrangement, the assistance they can offer to their more developed counterparts.

The Chair then asked Mr. Malick Diallo to discuss the challenges to international co-operation faced by developing countries.

Mr. Diallo explained that while many of the challenges faced by developing countries were similar to those previously discussed, they also face unique barriers to co-operation. He spoke in particular about the members of the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (known as UEMOA from its French name, Union Economique et Monétaire Ouest-Africaine). Some co-operation between these members has emerged because of their similar market structures. In general, most sectors of the economy are extremely concentrated with the bulk of competitors, predominantly small and medium enterprises, struggling to compete effectively against large dominant firms. Moreover, many of these large firms are present across all countries in the region.

Successful regional co-operation is both a prerequisite and a complement to international co-operation. ECOWAS also negotiates economic partnerships with the EU and African, Caribbean and Pacific (ACP) countries. Some mechanisms already exist to facilitate co-operation between ECOWAS and UEMOA, each of which has its own law regulating competition in its respective member states.

Co-operation is however lacking between the competition authorities in the member states of UEMOA, notably in the enforcement of cartels. There has not yet been a cartel decision at UEMOA level and only one case has been brought in Senegal since the enactment of its competition law in 2003. That case, dealing with the exclusion of competitors in the insurance industry, also demonstrated that the judicial system needs training in competition law. In its decision, the administrative judge went beyond the competition authority's own competence, which is limited to the enforcement of price fixing cartels.

Other notable obstacles to co-operation are the legal restrictions to the sharing of information with other competition authorities and the lack of trust between agencies, also highlighted by the French delegation. Such trust would go a long way toward facilitating the sharing of essential confidential information. Co-operation in this area is essential as international cartels are increasingly present in developing countries.

The Chair invited Mr. Marc Hansen to provide his perspective on international co-operation in the context of leniency policies.

Mr. Hansen began his presentation by emphasising the importance of well functioning leniency policies to successful cartel enforcement. Leniency applicants have become major sources of cartel investigations in jurisdictions with optimally functioning programmes. However, the increasing complexity of international cartel enforcement combined with the high number of active jurisdictions operating under diverse legal systems, creates uncertainty and lack of predictability in the process.

The uncertainty stemming from the interactions of enforcers in different jurisdictions, together with the possibility of damage actions in the United States and elsewhere in the world, form a large part of the cost benefit analysis performed by companies when considering whether or not to apply for leniency. The greater the uncertainty, the less likely companies are to apply. When assessing the level of predictability of a given system, potential applicants do not only look at the law in a particular jurisdiction but also at its application and the practices of the enforcement agencies. Perception and trust are therefore of paramount importance.

As to the specific sources of uncertainty and the factors affecting the incentives of companies to co-operate, several issues were highlighted. First, greater convergence of marker policies would facilitate certainty and predictability in the process. Second, agencies should be sensitive to applicants' concerns over confidentiality waivers in situations where there are different scopes of immunity coverage in different jurisdictions.

The importance of ensuring confidentiality of leniency applications was emphasised, both with respect to other jurisdictions and to third parties. Disclosure of leniency information to plaintiffs in damage actions and to other parties was described by Mr. Hansen as one of the greatest current disincentives for companies to co-operate.

Another important issue concerned the consequences of individual witnesses' co-operation in one jurisdiction on their position in other jurisdictions. Agencies should be cognisant of the possible negative impact their actions (such as publishing the identities of relevant witnesses) may have on the legal status of these individuals in other countries and therefore their initial willingness to co-operate.

Lastly, the benefit of internal investigations was highlighted, in particular for uncovering cartel behaviour and collecting the necessary evidence for completing a leniency application. Competition agencies were urged not to hamper the internal investigation process by insisting on the disclosure of privileged information or limiting the agencies a company may contact with the information found.

Mr. Hansen closed his presentation by highlighting the importance of communication and contacts between enforcers in fora such as the OECD or the ICN, in which they may discuss and resolve potential conflicts.

The Chair thanked Mr. Hansen for his contribution and opened the general discussion by inviting delegations to comment on any of the issues raised so far.

The Korean delegation noted the achievements in international co-operation in cartel enforcement following instruments such as the 1998 OECD Hard-Core Cartel Recommendation and within the ICN.

Much progress has been made towards procedural convergence, which remains a central focus, as evidenced by the roundtable's discussion of confidentiality waivers, markers and information sharing. The delegation, however, urged, that more emphasis should be given in the future to substantive issues relating to the extraterritorial aspect of cartel enforcement. Double jeopardy and agreement on what constitutes a single economic entity or relevant sales, are equally important and arise more and more frequently.

The delegation from the Philippines commented on the issue of jurisdiction, and proposed methods that would allow for efficient use of the resources of different authorities when dealing with international cartels. The delegation suggested adopting a formal mechanism under which newer agencies participate in cartel investigations being carried out by more advanced agencies, and which implicate both territories. This would avoid duplication of effort and ensure that sanctions imposed by the investigating jurisdictions also cover the cartels' effects in the less developed jurisdictions.

The Brazilian delegation discussed the problems its authorities face concerning the service of process abroad and the consequent delays to their investigations. National laws often require service of process or notification of documents through diplomatic channels or through public notice, as is the case in Brazil. This can significantly complicate investigations involving companies located abroad. The Brazilian delegation therefore highlighted the recent efforts to reform the system to allow for direct co-operation between agencies and the establishment of broader commitments through co-operation agreements.

The Chair invited the Canadian delegation to discuss the project on the sharing of intelligence described in its written contribution.

The Canadian delegation explained that the Canadian Competition Bureau recently explored with other agencies around the globe the possibility of creating an informal information sharing network. Existing forms of co-operation, such as bilateral agreements and meetings in multilateral fora such as the OCED or ICN, are geared more towards relationship building and process harmonisation than towards information sharing.

Efficient information sharing could improve the awareness of anticompetitive conduct that may affect a given agency's territory and facilitate ex officio investigations. Such a framework would usefully complement immunity and leniency policies as a means of cartel detection, leading to increased deterrence.

While there are many legislative limitations on the sharing of non-public information, even the sharing of public information or locally known intelligence could have great benefits. Therefore, as a first step, agencies participating in such a network could agree to share public information. They would only subsequently move to deeper information sharing, provided that sufficient restrictions were in place to satisfy concerns over confidentiality and the use of the information exchanged.

The delegation noted that in order to be successful, the project would have to involve a number of agencies willing to voluntarily commit for a certain amount of time to reciprocally share information with each other. The process would then yield benefits outweighing the resources required to participate in it.

The Chair thanked the Canadian delegation and gave the floor to Mr Hansen to comment.

Mr. Hansen noted that in his view the growing number of parallel investigations by different authorities and the complexity this creates are among the greatest challenges for the effectiveness of cartel enforcement. Focusing on the need to achieve deterrence rather than punishment, agencies should, in his opinion, begin considering the introduction of mechanisms for determining the enforcement priority. This would mean the best placed jurisdiction would investigate instead of all affected jurisdictions acting in parallel.

The Chair asked the Indonesian delegation to comment on the statutory limitations to co-operation within ASEAN and its proposals for improvements in this regard.

The Indonesian delegation explained that in handling foreign and cross-border cartel cases, the KPPU (the Indonesian competition agency) has witnessed the importance of international co-operation, in particular within the region. While Indonesia and Japan have an effective partnership agreement, which among other things calls for the exchange of information, developing regional co-operation is more problematic.

First, only six of the ASEAN member states have a competition law in place. Those that do are of varying levels of competence, which poses challenges to effective investigation and data collection.

Another challenge is that cartels receive different legal treatment in the different ASEAN countries. This is both in terms of the legal standard applied (i.e., per se violation or rule of reason) and the sanctions imposed. To combat these challenges, the ASEAN Experts Group on Competition (AEGC), comprised of the member states' competition authorities, has issued regional guidelines on laws and policies and a competition handbook for businesses. It is now in the process of developing regional core competency manuals geared toward strengthening the capacity of the competition authorities. These efforts toward standardisation should improve regional co-operation and thus effective enforcement against cartels.

The Chilean delegation raised a point in response to Mr. Hansen regarding the complexity of cartel enforcement. After the Chilean competition authority received enhanced investigatory powers in 2009, it was confronted with a corresponding increase in the complexity of litigating against cartels. The burden of proof is higher and the discovery procedures more challenging. However, these procedural changes are important, particularly in cases dealing with consumer products where public awareness is high.

The delegation from ECOWAS then added to the points raised by Mr. Diallo that, in addition to co-operation within ECOWAS, co-operation between the region and the rest of the world is equally necessary. Since many of the companies now carrying out business in West Africa are European or American, it is important that ECOWAS can also take into account competition developments in those regions. For example, once a company has applied for leniency in the EU, it is difficult for ECOWAS not to recognise that and to continue prosecuting. Most often, an exemption is granted on that basis. It would therefore be helpful at that point for consultations to take place between ECOWAS and the EU. This will be increasingly useful as it tends to be the same firms that operate on a global scale.

Instead, ECOWAS has adopted decisions, for example in the area of maritime transport and telecommunications, that have already been adjudicated elsewhere. These cases emphasise the need to develop mechanisms to facilitate international co-operation to the same extent as that achieved under intra-regional co-operation.

The Chair asked the Colombian delegation to expand on its contribution, which discusses the process of knowledge sharing between more and less-experienced competition authorities.

The Colombian delegation explained that Colombia has initiated a new international co-operation agenda under which it has strived to improve its investigative techniques through learning from other competition authorities. Colombia is also involved in several international programmes designed to build and improve the capacity of less developed competition agencies, particularly within Latin America. This co-operation is facilitated by specific clauses in the free trade agreements (FTA) currently being signed. One example is the FTA between the US and Colombia, which specifically provides for the improvement of competition law enforcement through co-operation and assistance.

The Chair asked Mr. Jean-Bernard Schmid whether, in his opinion, international co-operation would be improved if cartels were universally defined as a crime.

Mr. Schmid explained that sharing information in support of criminal prosecution requires a much higher level of co-operation since that information must be concrete enough to serve as evidence in court. Moreover, guaranteeing confidentiality is difficult given that civil parties often have access to the files and the press have access to the proceedings. Therefore, information sharing on this level must be mutually agreed upon.

Whether cartels should be universally criminalised to improve competition is a more complicated issue. As cartels are costly to society, they should be repressed. However, international co-operation in cartel enforcement triggers two main problems. First, competition enforcers cannot ensure the confidentiality of information shared. Second, without any supranational or multilateral competition authority, companies could be prosecuted over and over across multiple jurisdictions. Moreover, agencies and judges, who must maintain their independence, often reach different decisions on the same case. Therefore, it is unlikely that successful harmonisation of criminal prosecutions can be achieved unless and until countries surrender sovereignty to an international court.

Mr. Gesuelli explained that one of the ways that tax authorities have achieved such a high level of international co-operation is to emphasise the quality of the information exchanged rather than its sheer quantity. It also requires commitment from the authorities and trust between them. Commitment is important as each request for information takes resources from the responding authority. Thus, there must be a universal commitment to a system of international co-operation that will promote fair competition across jurisdictions. Trust between authorities would help to improve enforcement by allowing them to work together, not only to co-ordinate information, but also to identify the jurisdictions where the strongest case can be made.

Mr. Nambu emphasised the points made by Mr. Gesuelli by reiterating that under the current globalised economy, most cartels are cross-border with the same firms acting in several jurisdictions. In order to avoid destruction of evidence, competition authorities should consider conducting dawn raids simultaneously even with limited information. For this to work, mutual trust and good working relationships are essential, and regional and bilateral agreements to this effect are fundamentally important.

Mr. Diallo added that an electronic platform on the ICN website for the sharing of information could be very helpful. Once an investigation has been started in one jurisdiction, the platform could provide some non-confidential information and indicate whether it has international elements so that other authorities may know to act.

Senegal and Gambia are already beginning to co-operate and share information. The two competition authorities are trying to formalise the framework for such co-operation through a memorandum of understanding. In the future, this dynamic will hopefully be expanded to the entire ECOWAS region, allowing for stronger and more effective enforcement against cartels and other anticompetitive practices.

Mr. Hansen emphasised the importance and success of leniency programmes in the international enforcement of cartels. He stressed that trust was equally important not only among competition authorities but also on the part of leniency applicants. Most cartels are cross-border and, in the case of consumer products, sometimes global. In those cases, agencies must decide between themselves which are best positioned to pursue enforcement. If every country attempted to bring cases, the leniency system would not be as effective, or would collapse completely, resulting in less deterrence.

Mr. Schmid emphasised that most international bribery cases end in plea bargains given the quantity and complexity of information and the desire to keep that information confidential. Although it is not traditional, particularly in civil law systems, such plea bargains are the most effective way to tackle large global cases, including cartel cases.

The Chair thanked the panellists and participants for their contributions and turned to Mr. Frederic Jenny to conclude the discussion with some final comments.

Mr. Frederic Jenny highlighted six themes that arose from the roundtable discussion. First, he emphasised that the goal is not to increase co-operation as an end in itself but to make enforcement more efficient and thus reduce anticompetitive practices. Co-operation is necessary because transactions and markets are globalised, while jurisdictions remain fragmented. If a single multilateral law governed competition, such co-operation would be to a large extent unnecessary.

Second, while some successes in co-operation were discussed, they were not universal. For example, the barriers to co-operation within ECOWAS was highlighted, despite its members being neighbouring countries, in addition to the desire for greater co-operation between this regional body and the EU. However, this is difficult given the varied levels of development and barriers to the trust required for effective co-operation, mentioned by numerous contributors.

Third, the interests of the business community were emphasised, in particular how concerns over the exchange of information will alter a firm's incentive to apply for leniency. If firms know that information they provide will be shared with other agencies, and they run the risk of investigations in multiple jurisdictions, they will be less likely to apply for leniency anywhere. This would significantly weaken the strongest tool that enforcers have against cartels. However, the extent of this effect, if at all, must be shown with empirical evidence over time.

Fourth, for further thought and discussion, are the remaining obstacles to co-operation. Mr. Jenny cited the point raised by Mr. Gesuelli about the resources required to respond to information requests from another jurisdiction. The costs and benefits for each instance of co-operation are not evenly distributed, and the Committee should continue to consider this complex issue in the future.

The fifth item for future inquiry was where improvements in co-operation can be made. Some suggestions were at the level of case instruction or during the investigations.

Finally, as an alternative to co-operation in cartel investigations, the possibility of consolidated multilateral enforcement was raised. As sometimes seen in the ECN or the Nordic countries, one authority could be designated to handle each investigation or the authorities could work together to reach a common decision. The outcomes of such investigations would be granted global mutual recognition.

The discussion raised a number of new interesting questions for future analysis and debate, many of which would be considered in more detail as part of the Committee's long term strategic theme on international co-operation.

COMPTE RENDU DE LA DISCUSSION

Par le Secrétariat

M. Frederic Jenny a ouvert la table ronde sur renforcement de la coopération internationale dans les affaires d'ententes et a souhaité la bienvenue à tous les participants. Il a donné la parole au Président de la table ronde, M. Vinicius Marques de Carvalho, Chef du Secrétariat d'Etat brésilien en charge du droit économique (SDE).

Le Président a tout d'abord présenté le thème de la table ronde, qui a suscité un intérêt considérable, comme en témoigne le grand nombre de contributions soumises par les pays. La multiplication des ententes de dimension internationale confère à la coopération internationale dans les enquêtes sur ces pratiques une importance majeure pour les organismes chargés de l'application de la loi dans le monde entier. S'il est vrai que la coopération internationale dans les enquêtes sur les ententes a atteint des niveaux sans précédent ces dernières années, il subsiste un certain nombre d'obstacles qui entravent son efficacité, notamment l'impossibilité d'échanger des renseignements confidentiels et la difficulté de rassembler des éléments situés à l'étranger et de mener des enquêtes conjointes. Les économies en développement semblent aussi participer moins à ce processus que les pays plus développés.

L'objet de la table ronde était double : premièrement, examiner les approches et les mécanismes qui ont fait leurs preuves dans la passé et, deuxièmement, inventorier les pratiques en vigueur dans d'autres domaines du droit, tels que la lutte anticorruption et la fiscalité, où la coopération internationale joue un rôle de premier plan. Le Président a présenté les membres du groupe d'experts contribuant aux débats : M. Toshiyuki Nambu, Secrétaire général adjoint aux affaires internationales de la Commission japonaise de la concurrence, M. Malick Diallo, Secrétaire général et Commissaire de la Commission nationale de la concurrence du Sénégal, représentant tous deux les autorités de la concurrence, M. Mark Hansen, partenaire chez Latham and Watkins, donnant son avis en tant que représentant d'entreprises participant à des enquêtes sur des ententes internationales, et M. Jean-Bernard Schmid, procureur d'État en Suisse et M. Stefano Gesuelli, Responsable de la fiscalité, Office de coopération internationale à la Guardia di Finanza italienne, faisant part de leur expérience en matière de coopération internationale dans le domaines de la lutte contre la corruption et de la fiscalité.

Le Président a invité Mme Hilary Jennings, Chef de l'Unité « Outreach », à présenter le sujet et la note d'information concernant la table ronde.

Mme Jennings a résumé les activités de coopération internationale. Ces dernières se sont intensifiées avec la publication de la Recommandation de 1995 de l'OCDE sur la coopération en matière de concurrence¹. Mme Jennings a parlé notamment des accords formels et de la coopération informelle à divers niveaux et d'un échange d'expériences au sein du Réseau international de la concurrence (RIC), ainsi que des problèmes auxquels se heurte la coopération internationale. Ces activités ont été décrites dans

¹ OECD (1995).

le troisième Rapport de l'OCDE sur les ententes², portant sur la mise en œuvre de la Recommandation de 1998 de l'OCDE sur les ententes injustifiables.³

Le progrès a continué depuis 2005, en particulier du point de vue de la coopération informelle sur la base de renoncements au droit à la confidentialité de la part des parties soumises à enquête. Il subsiste toutefois d'importants obstacles systémiques à une coopération efficace. Ces obstacles résultent de différences entre les systèmes administratifs et pénaux d'application de la loi et du manque de confiance ou d'expérience. De plus, les organismes plus récents chargés de l'application de la loi participent généralement moins au processus – une question particulièrement intéressante à examiner compte tenu des personnes prenant part à la table ronde.

Divers débats menés à l'OCDE et au sein du RIC ont clairement illustré à la fois les grands pas qui ont été faits en direction d'une coopération plus efficace et les obstacles qui continuent d'entraver la cette progression. Compte tenu de la lenteur du progrès réalisé et du fait qu'aucune solution globale n'a été trouvée jusqu'à présent, Mme Jennings a posé la question de savoir si les organismes chargés de l'application de la loi devraient envisager des approches plus révolutionnaires. Pour ce faire, ils pourraient s'inspirer de la coopération internationale dans d'autres domaines de l'application du droit, et réfléchir à des approches applicables à l'intérieur de cadres multilatéraux, qui offrent des systèmes performants d'échange d'informations et, dans certains cas, peuvent désigner un chef de file pour enquêter sur une affaire donnée. Mme Jennings a terminé en faisant observer que cette table ronde serait particulièrement adaptée pour ces discussions en raison de la diversité de ses participants.

Le Président a remercié Mme Jennings pour son exposé et invité M. Nambu à présenter l'expérience japonaise en matière de coopération internationale.

Dans son exposé, M. Nambu a évoqué les raisons de la coopération internationale dans les enquêtes sur les ententes et les problèmes auxquels se heurtent les mécanismes de coopération formels, l'expérience japonais en matière de coopération avec d'autres organismes, et les possibilités de développer davantage la coopération dans l'avenir.

En premier lieu, M. Nambu a souligné que la mondialisation de l'activité économique et l'intensification des échanges internationaux, avec les conséquences géographiques qui en résultent pour les ententes, sont les principales raisons pour lesquelles une coopération internationale est nécessaire dans les enquêtes sur ces pratiques. La mondialisation procure des avantages économiques considérables mais certains de ces avantages ne se concrétisent pas si des ententes entravent le commerce international. La mondialisation exige à la fois une application rigoureuse de la loi dans le monde entier et une coopération efficace entre les organismes de réglementation afin de contrer au mieux les effets des ententes internationales. Les autorités peuvent coopérer même en l'absence d'accord ou de cadre formel. Cependant, selon M. Nambu, des accords de coopération formels, établissant des voies de communication fermes et favorisant une coopération plus poussée, sont préférables. La Commission japonaise de la concurrence (JFTC) participe à plusieurs types de cadres formels, offrant chacun différentes possibilités de coopération. La JFTC espère que sa participation à ces mécanismes favorisera une plus grande coopération, par le biais, par exemple, de procédures de notification et de systèmes d'échanges de renseignements.

M. Nambu a fait observer que, même si les accords de coopération formels peuvent être considérés par certains organismes comme impliquant une charge considérable et unilatérale, leur utilité compense

² OCDE (2005).

³ Recommandation du Conseil concernant une action efficace contre les ententes injustifiables ([C\(98\)35/FINAL](#)).

largement les obligations qu'ils imposent. D'après ce que la JFTC a pu constater, les accords formels offrent un mécanisme efficace pour établir une communication permanente. M. Nambu a par ailleurs souligné l'importance de l'obligation de notifier à l'autre partie contractante les conduites anticoncurrentielles qui touchent son territoire (courtoisie « passive » ou « traditionnelle »), que prévoient normalement les accords de coopération formels. Ce n'est qu'après notification que d'autres formes de coopération, telles que la coordination et l'échange de renseignements, peuvent avoir lieu.

En dépit de l'existence d'un certain nombre d'accords de coopération formels, la majeure partie de la coopération internationale intervient à la suite d'exemptions de confidentialité et de coopération accordées par les demandeurs de clémence. Bien qu'efficace, ce type de coopération dépend de la décision des demandeurs de clémence d'accorder ou non les exemptions nécessaires aux autorités qui enquêtent. La difficulté tient au fait que la plupart des accords de coopération formels ne couvrent pas les méthodes actuelles de coopération dans les enquêtes lancées par des demandes de mesures de clémence.

M. Nambu a noté les trois grandes enquêtes portant sur des ententes dans lesquelles la JFTC a coopéré avec d'autres pays : Vinyl Chloride Resin Modifiers, Marine Hoses et Cathode Ray Tubes. Alors que dans l'affaire Vinyl Chloride Resin Modifiers, la coopération s'est faite sur la base d'un échange fructueux de renseignements et de données, dans le cas de Marine Hoses, elle s'est limitée à la coordination des perquisitions en raison de contraintes de confidentialité. Cela a rendu impossible l'échange ultérieur de preuves. Dans cette affaire, la JFTC a réussi à recueillir des éléments de preuve auprès des participants étrangers à l'entente seulement, en vertu de la coopération avec le conseil japonais.

M. Nambu a évoqué plusieurs problèmes qui, selon lui, devraient être pris en compte dans toute tentative d'amélioration de la coopération internationale. Dans les enquêtes sur les ententes qui sont lancées par suite de demandes de clémence, la coopération internationale n'est possible qu'avec le consentement du (des) demandeur(s) et seulement entre les organismes auxquels le(s) demandeur(s) s'est (se sont) adressé(s). Dans ce contexte, M. Nambu a demandé instamment aux organismes en charge de la concurrence dans les différents pays d'obliger les demandeurs à indiquer les autres pays où ils ont sollicité des mesures de clémence et demandé des exemptions. Cela permettrait la coordination et l'échange d'informations. Il faudrait, bien entendu, mettre cela en balance avec les obligations de confidentialité et de discrétion, qui sont nécessaires au fonctionnement optimal des programmes de clémence.

Un autre domaine dans lequel la coopération existante pourrait être améliorée a trait au recueil d'éléments de preuve. M. Nambu a souligné l'importance de la coordination des perquisitions afin de réduire au minimum la possibilité pour les participants aux ententes de détruire ou de dissimuler des preuves. Des inspections simultanées dans tous les pays concernés sont d'une importance primordiale pour que les éléments de preuve puissent être disponibles à toutes les autorités qui interviennent dans les enquêtes. De l'avis de M. Nambu, cela devrait même s'étendre aux pays dans lesquels le demandeur de clémence n'a pas accordé d'exemption.

Dans bien des affaires d'ententes internationales, il n'est pas possible de recueillir des preuves en procédant à des perquisitions du fait que l'entreprise qui fait l'objet de l'enquête n'a pas de présence physique (c'est-à-dire de siège statutaire) dans ce pays particulier. Dans ces cas-là, l'échange de renseignements entre autorités revêt une importance décisive pour la réussite de l'enquête. Toutefois, cela est souvent compliqué par les règles de confidentialité qui empêchent les autorités d'échanger des informations et des preuves entre elles. Une possibilité, pour surmonter ces limites, serait que l'une des autorités participant à l'enquête convainque les parties soumises à enquête de coopérer avec les autres autorités et de leur fournir les documents requis.

Le Président a remercié M. Nambu et invité M. Gesuelli à faire part de son expérience en matière de coopération internationale dans des enquêtes fiscales internationales.

M. Gesuelli a souligné les évolutions qui ont fait de la coopération internationale dans le recouvrement des impôts et dans les enquêtes fiscales une nécessité absolue. La mondialisation, la liquidité des actifs, les migrations internationales et d'autres facteurs ont tous contribué à rendre très difficiles l'identification de la fraude fiscale et les enquêtes sur cette pratique. Afin de surmonter ces difficultés, les autorités fiscales s'appuient sur la prise de décision conjointe entre organismes compétents dans différents domaines, la cohérence dans la façon d'aborder les différents problèmes (grâce à des discussions multilatérales dans le cadre de forums analogues à cette table ronde) et la coopération dans les différentes affaires.

La coopération internationale en matière de fiscalité peut revêtir de multiples formes, telles que la coopération civile ou administrative pour l'évaluation des arriérés d'impôt ou le contrôle fiscal d'un contribuable, la coopération judiciaire ou pénale dans les enquêtes pour fraude fiscale, à l'aide d'instruments juridiques codifiés, et l'échange de renseignements, qui est une forme de coopération informelle mais importante reposant largement sur la confiance entre homologues. La coopération peut être fondée sur des accords bilatéraux ou multilatéraux, qui officialisent les modes de coopération possibles, à savoir l'échange d'informations ou d'éléments de preuve ou la possibilité de procéder à des contrôles fiscaux simultanés.

Les accords bilatéraux jouent un rôle important dans l'établissement de régimes de coopération entre les pays, et le Modèle de convention fiscale de l'OCDE concernant le revenu et la fortune a contribué grandement à l'harmonisation à cet égard. Au plan multilatéral, la Convention multilatérale d'assistance mutuelle en matière fiscale, établie conjointement par le Conseil de l'Europe et l'OCDE, est un puissant instrument pour encourager et simplifier la coopération internationale. La Convention offre une base juridique unique pour la coopération et un organe conjoint de surveillance de son application, ce qui assure la confiance des parties contractantes dans le système. Des moyens supplémentaires de coopération sont offerts dans le cadre de la législation de l'UE. M. Gesuelli a évoqué les moyens électroniques d'échange d'informations, qui ont grandement simplifié l'échange de données entre pays dont les langues officielles sont différentes. L'importance du système d'alerte précoce, Eurofisc, a été aussi soulignée, de même que les rencontres organisées, qui facilitent la coopération par le biais de la connaissance personnelle des homologues dans autres pays.

M. Gesuelli a illustré l'importance de la coopération internationale et d'une coopération efficace entre organismes d'un même pays à l'aide d'un exemple de fraude à la TVA dans le domaine des droits d'émission. Pour pouvoir détecter une fraude fiscale pluri-juridictionnelle de ce type et enquêter convenablement à ce sujet, il faut une coopération profonde et efficace avec diverses autorités, aux plans tant national qu'international.

En conclusion, M. Gesuelli a exposé dans leurs grandes lignes les perspectives de la coopération internationale dans le domaine fiscal, qui sont nettement axées sur les approches et la coopération pluridisciplinaires. Les discussions à cet égard se déroulent dans le cadre du « dialogue d'Oslo » organisé conjointement avec l'OCDE. Enfin, M. Gesuelli a souligné l'importance d'une participation volontariste de toutes les autorités aux mécanismes de coopération, qui est dans l'intérêt de toutes les parties. Les outils et pratiques existants dans le domaine fiscal offrent des solutions adéquates. Leur efficacité réside dans leur utilisation judicieuse et régulière plutôt que dans la mise en place de nouveaux cadres.

Le Président a remercié M. Gesuelli et a demandé à M. Jean-Bernard Schmid d'exposer son expérience en matière de coopération internationale dans des affaires de corruption.

M. Schmid a retracé le progrès considérable réalisé ces quinze dernières années en matière de coopération internationale dans des affaires de corruption. Deux principaux facteurs ont grandement amélioré l'efficacité de la coopération internationale et de l'assistance juridique en matière pénale.

Premièrement, l'adhésion de la Suisse à l'espace Schengen a permis une coopération directe entre les autorités chargées d'enquête au lieu d'avoir à passer par les voies diplomatiques et par les services centraux. Cela a grandement simplifié et accéléré la coopération internationale dans les affaires de corruption entre pays de l'espace Schengen.

Deuxièmement, la Convention anticorruption de 1997 de l'OCDE a marqué un tournant décisif pour la coopération en matière d'enquêtes sur des affaires de corruption en uniformisant la stratégie des pays signataires à l'égard de la corruption. En rendant obligatoires des sanctions pénales pour corruption, cette convention a facilité la coopération en matière pénale, fondée sur la réciprocité d'incrimination. Elle a établi des définitions communes pour les concepts juridiques de base, tels que la corruption et les sanctions, ainsi que des normes minimum concernant la prescription, facilitant ainsi la coopération entre pays dotés de systèmes juridiques différentes. En fixant des règles de compétence communes, la convention permet de déterminer clairement le pays compétent pour enquêter. Elle offre aussi des règles claires et transparentes pour la résolution des conflits de compétence. M. Schmid a souligné l'importance du concept d'infraction sous-jacente, selon lequel un pays dans lequel le produit de la corruption se situe a compétence pour enquêter à la fois sur le crime de blanchiment d'argent et sur le crime de corruption, même si ce dernier a été perpétré hors de son territoire. C'est là un élément important, qui est fort utile pour permettre d'enquêter sur les affaires de corruption à l'échelle internationale et de sanctionner ces pratiques.

M. Schmid a par ailleurs évoqué plusieurs questions générales qui ont trait à la coopération internationale. Il a souligné les conséquences des droits fondamentaux et de la procédure régulière, qui touchent, par exemple, l'utilisation d'éléments de preuve recueillis par un autre pays ou les considérations relatives à la double incrimination. La question de la double incrimination ne fait pas, jusqu'à présent, l'objet d'une réglementation internationale et elle relève des arrangements bilatéraux dans les différentes affaires. Une autre question importante est l'aspect pluri-juridictionnel de la localisation des preuves lorsque les données pertinentes sont stockées sous forme électronique sur des serveurs dispersés dans le monde ou dans un nuage, ce qui rend quasiment impossible la localisation des données. A cet égard, M. Schmid a plaidé pour l'accessibilité des données situées à l'étranger dans la mesure où le pays qui procède à l'enquête peut y accéder.

En conclusion, M. Schmid a évoqué les différents aspects des deux types de coopération internationale : la coopération pénale et la coopération civile. Si la coopération pénale est généralement plus lente que la coopération administrative ou civile, elle est souvent plus efficace. L'harmonisation des sanctions est très importante à cet égard, en particulier en matière pénale. M. Schmid a terminé en soulignant l'importance d'avoir des accords bilatéraux et multilatéraux bien négociés et bien mis en œuvre.

Le Président a remercié M. Schmid et invité la délégation de la Commission européenne à exposer les facteurs qui influent sur sa décision de coopérer ou non avec d'autres pays.

La délégation de la Commission européenne (CE) a expliqué que, lorsqu'il s'agit de décider de coopérer ou non dans des situations qui ne relèvent pas d'accords formels, deux facteurs jouent un rôle de premier plan. Le premier est l'utilité perçue de cette coopération pour les deux organismes. Le second est le rapport entre les organismes et la connaissance réciproque de leurs procédures. La coopération implique souvent l'échange d'informations sensibles qui ne sont pas rendues publiques, concernant par exemple les inspections à venir. Il est de la plus haute importance de savoir comment ces informations seront traitées par l'autre organisme. A cet égard, la délégation de la CE a souligné l'utilité de la connaissance personnelle entre homologues intervenant dans les enquêtes, qui peut aider à établir la confiance nécessaire pour une coopération efficace.

La coopération concerne toutes les questions qui interviennent tout au long d'une affaire, de la planification de l'inspection à la théorie des effets nuisibles et à la politique en matière d'amendes. Le degré de coopération à chaque étape dépend de la nature de la relation entre les organismes participant à l'enquête. La délégation de la CE a terminé en soulignant sa disposition à coopérer avec tout organisme dans les limites indiquées.

Le Président s'est adressé à la délégation russe et l'a invitée à parler de la coopération entre pays de la Communauté des Etats indépendants (CEI) dont il est question dans le document qu'elle a soumis.

La délégation russe a expliqué que les autorités de la concurrence des pays de la CEI interagissent dans le cadre du Conseil inter-Etats sur les pratiques antimonopoles, établi par un accord intergouvernemental en 1993 et composé des responsables des différents organismes chargés de la concurrence. Il coordonne les actions en matière de concurrence au sein du marché de la CEI, conformément aux règles régissant la coopération dans des affaires spécifiques et les mesures préventives.

Afin d'encourager une coopération plus étroite entre les pays de la CEI, le Conseil inter-Etats sur les pratiques antimonopoles a mis en place en 2006 un siège permanent pour les enquêtes conjointes, chargé d'analyser les marchés intéressant l'ensemble de la CEI : aviation, produits pharmaceutiques, télécommunications et agriculture. Ces travaux ont servi de base à la fois pour l'action politique des gouvernements concernés et pour les besoins de la coopération dans les différentes affaires. Une des principales priorités du siège conjoint est l'amélioration des enquêtes sur les ententes et de la coopération entre les organismes en charge de la concurrence. Un groupe spécial créé à cet effet a publié un rapport faisant ressortir les obstacles à une coopération efficace dans les affaires d'ententes au sein de la CEI, notamment les difficultés rencontrées en matière d'échange de renseignements confidentiels.

Le Président a ensuite parlé du Réseau européen de la concurrence (REC), dont de nombreuses contributions ont vanté l'efficacité pour faciliter la coopération régionale. Il a fait observer, toutefois, que certaines améliorations avaient été proposées et il a demandé à la délégation française d'examiner les propositions formulées dans le document qu'elle avait soumis.

La délégation française a souligné l'efficacité indéniable du REC, due, en particulier, à quatre éléments : le cadre institutionnel des Etats membres de l'UE, l'union économique, le marché unique et un ensemble unique de règles appliquées par la cadre judiciaire commun. Le REC est particulièrement efficace en matière d'échange d'informations et en matière de coordination des programmes de clémence. L'échange obligatoire d'informations entre la CE et ses 27 Etats membres permet souvent d'engager des poursuites dans des affaires d'ententes pour lesquelles il n'y aurait pas suffisamment de preuves dans un pays considéré isolément. Le REC a aussi réussi remarquablement à harmoniser les programmes de clémence et le traitement des demandes de clémence.

Il serait cependant possible de progresser encore dans trois domaines. Premièrement, en ce qui concerne la capacité du REC de détecter les pratiques anticoncurrentielles, la délégation a proposé une coopération dans les enquêtes sectorielles. Cela pourrait accroître l'efficacité en fournissant de précieux éléments relatifs à plusieurs affaires. Elle a aussi cité le Réseau nordique sur les ententes, mentionné dans la contribution écrite conjointe des pays nordiques,⁴ comme modèle possible pour la détection précoce. Dans cette région, pour les secteurs identifiés comme prioritaires, les organismes échangent des informations avant même que l'enquête ait démarré.

Deuxièmement, la délégation a expliqué que, si le REC s'achemine vers une véritable convergence des programmes de clémence, la convergence des procédures (notamment l'application de marqueurs et de

⁴ Danemark, Iles Féroé, Finlande, Groenland, Islande, Norvège et Suède.

formules) est tout aussi nécessaire pour mettre en œuvre efficacement le droit matériel. Le REC devrait aussi étudier la possibilité de standardiser davantage le calcul des amendes de façon qu'elles servent à la fois à dissuader les participants potentiels à des ententes et à punir de façon proportionnée ceux qui se livrent à ces pratiques.

Enfin, s'il est important de maintenir l'indépendance des responsables de l'application de la loi et des juges qui adoptent et révisent les décisions, le REC devrait envisager de mettre en place un mécanisme permettant la reconnaissance mutuelle des preuves afin de simplifier les décisions concernant l'admissibilité. Cela devrait s'étendre aussi à un réseau international, comprenant des pays non membres de l'UE, qui serait plus efficace que les accords bilatéraux.

Le Président a abordé ensuite la question des accords bilatéraux et invité la délégation de Singapour à exposer de son expérience à cet égard.

La délégation de Singapour a expliqué que, en vertu de la Loi sur la concurrence, la Commission de la concurrence de Singapour (CCS) peut conclure des accords d'échange d'informations avec des autorités étrangères aux fins de l'exercice de ses fonctions. La CCS peut restreindre l'utilisation de toute information échangée en exigeant un engagement écrit de l'autre organisme. Cela aide à résoudre certains des problèmes que pose l'échange de renseignements, comme les différences du point de vue du privilège de ne pas témoigner ni prendre de sanctions contre soi-même.

La délégation a fait observer que la CCS, de création relativement récente, n'a pas encore passé d'accord formel avec un autre organisme. Elle a cependant réussi à assurer une coordination informelle avec plusieurs organismes, notamment avec une autorité chevronnée pour une perquisition.

Le Président a invité le BIAC à s'exprimer sur la question des renoncements au droit à la confidentialité par les demandeurs de clémence et sur les mesures que les organismes en charge de la concurrence peuvent prendre dans la pratique pour encourager les entreprises à accorder ces exemptions.

Le BIAC a abordé quatre questions, portant sur la façon dont les autorités de la concurrence pourraient favoriser la coopération dans des affaires où des mesures de clémence sont demandées en incitant les demandeurs à accorder des exemptions de confidentialité qui permettent aux autorités de coopérer.

Premièrement, les organismes souhaiteraient peut-être renforcer la cohérence de leurs politiques en ce qui concerne le calendrier, la procédure, le champ d'application et les conditions d'utilisation d'un marqueur. Les demandeurs de clémence n'accorderont pas d'exemption de confidentialité des informations qu'ils soumettent si, ce faisant, ils s'exposent à une responsabilité accrue dans d'autres pays. Par conséquent, l'alignement des politiques à l'égard des marqueurs ou même la mise en place d'un système de marqueurs à guichet unique, comme le proposent la Nouvelle-Zélande et la France dans leurs contributions écrites, représenterait un pas important en avant.

Deuxièmement, en ce qui concerne le champ d'application de la renonciation, le BIAC a demandé instamment aux autorités de la concurrence de ne requérir de renonciation à l'échange d'informations qu'une fois que toutes les informations pertinentes ont été identifiées. Cela apaiserait les craintes des entreprises au sujet de la pratique de plus en plus courante qui consiste, pour les autorités de la concurrence, à collecter d'importantes quantités de données électroniques, dont certaines sont très sensibles du point de vue commercial et présentent peu d'intérêt pour l'enquête. Les entreprises ont besoin d'avoir la certitude que les autorités échangent uniquement des informations pertinentes et ce, d'une manière qui garantisse la confidentialité du côté des autorités qui reçoivent ces renseignements.

Troisièmement, le BIAC a souligné l'importance de protéger les informations relatives à la clémence de la divulgation en vertu de règles de type « liberté d'information » ou dans le cadre d'une action en dommages-intérêts. Le BIAC a loué les efforts déployés par plusieurs pays à cet égard et a demandé instamment aux autorités de prendre toutes les mesures nécessaires, notamment législatives, afin de protéger de la divulgation les informations relatives à la clémence. Cela assurera l'efficacité de leurs programmes de clémence, qui sont fondés, dans une grande mesure, sur la confidentialité des renseignements soumis.

Quatrièmement, le BIAC a souligné la nécessité de supprimer ou de réduire au minimum toutes obligations contradictoires imposées aux demandeurs de clémence dans différents pays. Un certain degré de divergence est inévitable. Cependant, compte tenu du nombre de pays dotés de politiques de clémence, il est essentiels que les demandeurs de clémence ne soient pas confrontés à des obligations contradictoires dans leur pays.

Pour conclure, la délégation du BIAC a souligné l'importance pour les différents pays de coordonner leurs approches du privilège légal. Cela peut aussi contribuer à ce que les entreprises soient davantage disposées à accorder des exemptions de confidentialité.

Le Président a ensuite demandé à la délégation de l'Afrique du Sud d'expliquer comment un organisme de création récente peut établir une relation de confiance avec des organismes qui ont davantage d'expérience.

La délégation de l'Afrique du Sud a expliqué que l'établissement de la confiance entre organismes est un processus difficile et progressif. Des contacts directs et de longues discussions sont nécessaires avant que la confiance atteigne un niveau qui permette une coordination sur des questions très sensibles, telles que les perquisitions. La participation aux activités de la communauté des responsables de l'application du droit de la concurrence, comme des réunions régulières avec des homologues au sein du RIC ou à l'OCDE, joue un rôle important à cet égard.

Il est essentiel aussi de prouver la crédibilité de la lutte contre les ententes est de garantir à l'autorité coopérante que les renseignements échangés seront vraiment utiles. Il est indispensable que les organismes de création récente fassent leurs preuves, même dans des affaires plus simples, afin de gagner la confiance de leurs homologues plus expérimentés.

Pour finir, la délégation sud-africaine a souligné les avantages mutuels de la coopération et rappelé aux organismes récents que, dans tout dispositif de coopération, ils peuvent être utiles à leur homologues plus chevronnés.

Le Président a ensuite demandé à M. Malick Diallo de parler des problèmes des pays en développement en matière de coopération internationale.

M. Diallo a expliqué que, s'il est vrai que les pays en développement connaissent des difficultés analogues à celles évoquées précédemment, ils sont confrontés aussi à des obstacles uniques en matière de coopération. Il a parlé, en particulier, des membres de la Communauté économique des Etats de l'Afrique de l'Ouest (CEDEAO) et de l'Union économique et monétaire ouest-africaine (UEMOA). Il existe un certain degré de coopération entre les membres de ces organisations en raison de la similitude de structure de leurs marchés. En général, la plupart des secteurs de l'économie sont extrêmement concentrés, la grande masse des concurrents, principalement de petites et moyennes entreprises, se battant contre les grandes entreprises dominantes. De plus, bon nombre de ces grandes entreprises sont présentes dans tous les pays de la région.

Une coopération régionale efficace est à la fois une condition préalable nécessaire et un complément à la coopération internationale. La CEDEAO négocie aussi des partenariats économiques avec l'UE et avec

des pays du Groupe des Etats d'Afrique, des Caraïbes et du Pacifique (ACP). Il existe déjà certains mécanismes qui facilitent la coopération entre la CEDEAO et l'UEMOA, qui ont chacune leur propre législation régissant la concurrence dans ses Etats membres.

Il n'y a cependant pas de coopération entre les autorités de la concurrence des États membres de l'UEMOA, notamment en matière d'application de la législation contre les ententes. Il n'y a pas encore eu de décision en matière d'ententes au niveau de l'UEMOA et une seule affaire a été soumise au Sénégal depuis la promulgation de sa loi relative à la concurrence en 2003. Cette affaire, qui avait trait à l'exclusion de concurrents dans le secteur des assurances, a aussi montré que le système judiciaire a besoin de formation dans le domaine du droit de la concurrence. Dans sa décision, le juge administratif est allé au-delà de la compétence de l'autorité de la concurrence, qui se limite à faire appliquer la loi par les entreprises participant à des ententes sur les prix.

Parmi les autres obstacles à la coopération, on peut citer les restrictions légales à l'échange d'information avec d'autres autorités de la concurrence et le manque de confiance entre organismes, souligné aussi par la délégation française. Cette confiance contribuerait grandement à faciliter l'échange de renseignements confidentiels indispensables. La coopération dans ce domaine est essentielle du fait que les ententes internationales se multiplient dans les pays en développement.

Le Président a invité M. Mark Hansen a donner son point de vue sur la coopération internationale dans le contexte des politiques de clémence.

M. Hansen a commencé son exposé en soulignant l'importance d'avoir des politiques de clémence qui fonctionnent bien si l'on veut faire appliquer la loi relative aux ententes. Les demandeurs de clémence sont devenus des sources importantes d'enquêtes sur les ententes dans les pays dotés de programmes efficaces. Toutefois, la complexité croissante de l'application de la législation contre les ententes au niveau international, conjuguée au grand nombre de pays ayant des systèmes juridiques différents, crée une incertitude et un manque de prévisibilité du processus.

L'incertitude due aux interactions de responsables de l'application de la loi dans les différents pays, ainsi que la possibilité d'actions en dommages-intérêts aux Etats-Unis et ailleurs dans le monde, pèsent lourd dans l'analyse coût-avantage à laquelle les entreprises procèdent lorsqu'elles réfléchissent à la question de savoir si elles demandent ou non des mesures de clémence. Plus l'incertitude est grande, moins les entreprises sont susceptibles de demander la clémence. Lorsqu'ils évaluent le degré de prévisibilité, les demandeurs potentiels ne s'intéressent pas seulement à la législation dans un pays particulier mais aussi à son application et aux pratiques des organismes chargés de faire respecter la loi. La perception et la confiance revêtent par conséquent une importance primordiale.

Quant aux sources spécifiques d'incertitude et aux facteurs qui influent sur les incitations à coopérer pour les entreprises, plusieurs aspects ont été mis en lumière. Premièrement une plus grande convergence des politiques en matière de marqueurs favoriserait la certitude et la prévisibilité du processus. Deuxièmement, les organismes devraient être sensibles aux préoccupations des demandeurs concernant les exemptions de confidentialité dans les cas où la couverture d'immunité est différente selon les pays.

L'importance d'assurer la confidentialité des demandes de clémence a été soulignée, à la fois pour les autres pays et pour les tierces parties. Pour M. Hansen, la divulgation d'informations relatives à la clémence aux plaignants dans des actions en dommages-intérêts et aux autres parties constitue pour les entreprises la plus grande contre-incitation à coopérer.

Un autre problème important a trait aux conséquences de la coopération des témoins dans un même pays sur leur position dans les autres pays. Les organismes devraient avoir connaissance de l'éventuel

impact négatif que leurs actions (comme la publication de l'identité des témoins) peuvent avoir sur le statut juridique de ces personnes dans les autres pays et, par conséquent, sur leur disposition initiale à coopérer.

Enfin, l'avantage de procéder à des enquêtes internes a été souligné, en particulier pour déceler des comportements d'entente et recueillir les preuves nécessaires pour une demande de clémence. Il a été demandé instamment aux organismes en charge de la concurrence de ne pas entraver le processus d'enquête interne en insistant sur la divulgation d'informations privilégiées ou en limitant le nombre d'organismes qu'une entreprise peut contacter avec les informations obtenues.

M. Hansen a conclu son exposé en faisant ressortir l'importance de la communication et des contacts entre organismes chargés de l'application du droit de la concurrence, dans des centres tels que l'OCDE ou le RIC, où ils peuvent examiner et résoudre des conflits potentiels.

Le Président a remercié M. Hansen pour sa contribution et ouvert le débat général en invitant les délégations à donner leur avis sur les questions soulevées jusque-là.

La délégation coréenne a pris note des progrès accomplis en matière de coopération internationale dans le domaine de l'application de la loi contre les ententes, avec des instruments tels que la Recommandation de 1998 de l'OCDE sur les ententes injustifiables et au sein du RIC. De grands pas ont été faits en direction de la convergence des procédures, qui reste une question centrale, comme en témoignent les travaux de la table ronde sur les renoncements au droit à la confidentialité, les marqueurs et l'échange d'informations. La délégation a toutefois demandé instamment que l'on mette davantage l'accent, dans l'avenir, sur les questions de fond relatives à l'aspect extraterritorial de l'application de la législation contre les ententes. La double incrimination et un accord sur ce qui constitue une entité économique unique ou des ventes pertinentes, sont des questions tout aussi importantes et qui se posent de plus en plus souvent.

La délégation des Philippines a formulé des observations sur la question de la compétence, et proposé des méthodes qui permettraient l'utilisation efficiente des ressources des différentes autorités pour traiter des ententes internationales. La délégation a proposé l'adoption d'un mécanisme formel selon lequel les organismes plus récents participeraient aux enquêtes sur les ententes menées par des organismes plus expérimentés et impliquant les deux territoires. Cela éviterait les doubles emplois et assurerait que les sanctions appliquées par les autorités qui enquêtent couvrent aussi les effets des ententes dans les pays moins développés.

La délégation du Brésil a évoqué les problèmes auxquels les autorités brésiliennes sont confrontées en ce qui concerne la notification à l'étranger et les retards que cela cause dans les enquêtes. Les lois nationales rendent souvent obligatoire la notification de documents par les voies diplomatiques ou par avis au public, comme dans le cas du Brésil. Cela peut compliquer notablement les enquêtes portant sur des entreprises situées à l'étranger. La délégation brésilienne a par conséquent souligné les efforts déployés récemment pour réformer le système afin de permettre une coopération directe entre organismes et l'établissement d'engagements plus larges par le biais d'accords de coopération.

Le Président a invité la délégation canadienne à parler du projet relatif à l'échange de renseignements dont il est question dans sa contribution écrite.

La délégation canadienne a expliqué que le Bureau de la concurrence du Canada a étudié récemment, avec d'autres organismes du monde entier, la possibilité de créer un réseau informel d'échange d'informations. Les formes de coopération existantes, comme les accords bilatéraux et les réunions dans des forums internationaux tels que l'OCDE ou le RIC, visent davantage l'établissement de relations et l'harmonisation des processus que l'échange de renseignements.

Un échange efficace d'informations pourrait sensibiliser davantage aux conduites anticoncurrentielles qui peuvent toucher le territoire d'un organisme donné et faciliter les enquêtes d'office. Ce cadre compléterait utilement les politiques d'immunité et de clémence comme moyen de détecter les ententes, ce qui renforcerait la dissuasion.

En dépit de nombreuses limites législatives à l'échange d'informations non publiques, même l'échange d'informations publiques ou de renseignements connus à l'échelon local pourrait présenter de grands avantages. Dans un premier temps, les organismes participant à ce réseau pourraient par conséquent convenir d'échanger des informations publiques. Ils ne passeraient qu'ultérieurement à un échange d'informations plus poussé, à condition que des restrictions suffisantes soient appliquées de manière à répondre aux préoccupations relatives à la confidentialité et à l'utilisation des informations échangées.

La délégation a fait observer que, pour réussir, le projet devra se faire avec la participation d'un certain nombre d'organismes disposés à s'engager volontairement, pendant un certain temps, à échanger des informations les uns avec les autres. Le processus procurera alors des avantages plus importants que les ressources requises pour y participer.

Après avoir remercié la délégation canadienne, le Président a donné la parole M. Hansen.

M. Hansen a indiqué que, selon lui, le nombre croissant d'enquêtes parallèles menées par différentes autorités et la complexité que cela crée sont parmi les plus gros obstacles à l'efficacité de l'application de la législation contre les ententes. Si l'objectif est la dissuasion plutôt que l'application de sanctions, il faudrait, à son avis, commencer d'envisager la mise en place de mécanismes pour déterminer la priorité de compétence en matière de lutte contre les ententes. Cela signifie que ce serait le pays le mieux placé qui enquêterait au lieu que tous les pays touchés mènent des actions parallèles.

Le Président a demandé à la délégation indonésienne de s'exprimer sur les limites statutaires à la coopération avec l'ASEAN et sur les améliorations qu'elle propose à cet égard. .

La délégation indonésienne a expliqué que, lorsqu'il traite d'affaires d'ententes étrangères et internationales, le KPPU (l'organisme indonésien en charge de la concurrence) se rend compte de l'importance de la coopération internationale, en particulier au sein de la région. Si l'Indonésie et le Japon ont un accord de partenariat efficace, qui prévoit, entre autres choses, l'échange d'informations, il est beaucoup plus difficile de développer la coopération à l'échelle régionale.

En premier lieu, six Etats membres de l'ASEAN seulement ont une législation en matière de concurrence. Ces pays ont des niveaux de compétence divers, ce qui pose des problèmes du point de vue de l'efficacité des enquêtes et de la collecte de données.

Une autre difficulté tient au fait que les ententes sont soumises à un traitement juridique différent dans les divers pays de l'ASEAN, tant du point de vue de la norme juridique appliquée (c'est-à-dire violation *per se* ou règle de raison) que du point de vue des sanctions appliquées. Afin de surmonter ces difficultés, le Groupe d'experts de l'ASEAN sur la concurrence (AEGC), composé des autorités de la concurrence des Etats membres, a publié des directives nationales sur les lois et politiques et un manuel de la concurrence à l'intention des entreprises. Il travaille maintenant à l'établissement de manuels régionaux sur les compétences essentielles visant à renforcer la capacité des autorités de la concurrence. Ces efforts de standardisation devraient améliorer la coopération régionale et donc l'efficacité de la lutte contre les ententes.

La délégation chilienne a soulevé un point en réponse à M. Hansen concernant la complexité de l'application de la législation contre les ententes. Après que l'autorité chilienne de la concurrence a été investie de pouvoirs d'enquête renforcés en 2009, elle a été confrontée à une augmentation correspondante

de la complexité des actions contre les ententes. La charge de la preuve est plus élevée et les procédures de divulgation plus difficiles. Cependant, ces modifications de procédure sont importantes, en particulier dans les affaires concernant les produits de consommation, auxquels le public est très sensibilisé.

La délégation de la CEDEAO a ensuite complété les points soulevés par M. Diallo, à savoir que, outre la coopération avec la CEDEAO, il faut aussi une coopération entre la région et le reste du monde. Bon nombre des entreprises qui opèrent aujourd'hui en Afrique de l'Ouest étant européennes ou américaines, il importe aussi que la CEDEAO puisse aussi tenir compte de l'évolution de la concurrence dans ces régions. Une fois qu'une entreprise a demandé des mesures de clémence dans l'UE, par exemple, il est difficile pour la CEDEAO de ne pas reconnaître cette demande et de poursuivre la procédure. Le plus souvent, une exemption est accordée sur cette base. Il serait donc utile, à ce stade, que des consultations aient lieu entre la CEDEAO et l'UE. Cela sera de plus en plus utile car ce sont généralement les mêmes entreprises qui opèrent à l'échelle mondiale.

Au lieu de cela, la CEDEAO a pris des décisions, dans les domaines du transport maritime et des télécommunications, par exemple, sur lesquelles il a déjà été statué ailleurs. Ces affaires font ressortir la nécessité de mettre en place des mécanismes afin de faciliter la coopération internationale comme cela a été fait pour la coopération intrarégionale.

Le Président a demandé à la délégation colombienne de développer sa contribution, qui traite du processus d'échange de connaissances entre autorités de la concurrence plus et moins chevronnées.

La délégation colombienne a expliqué que son pays a lancé un nouveau programme de coopération internationale dans le cadre duquel il s'efforce d'améliorer ses techniques d'enquête par le biais de l'apprentissage auprès des autres autorités de la concurrence. La Colombie participe aussi à plusieurs programmes internationaux destinés à renforcer et améliorer la capacité des organismes en charge de la concurrence moins expérimentés, en particulier en Amérique latine. Cette coopération est facilitée par des clauses spécifiques dans les accords de libre-échange (ALE) qui sont en cours de signature, notamment dans l'ALE entre les Etats-Unis et la Colombie, qui prévoit expressément l'amélioration de la législation relative à la concurrence grâce à la coopération et à l'assistance mutuelle.

Le Président a demandé à M. Jean-Bernard Schmid si, selon lui, la criminalisation universelle des ententes renforcerait la coopération internationale.

M. Schmid a expliqué que l'échange d'informations à l'appui de poursuites pénales exige un niveau de coopération beaucoup plus élevé car les renseignements doivent être assez concrets pour servir de preuve devant les tribunaux. De plus, il est difficile de garantir la confidentialité du fait que les parties civiles ont souvent accès aux dossiers et que la presse a accès aux résultats des procédures. L'échange d'informations à ce niveau doit être décidé d'un commun accord.

La question de savoir s'il faut criminaliser universellement les ententes est plus compliquée. Les ententes coûtant cher à la société, il convient de les réprimer. Toutefois, la coopération internationale en matière d'application de la loi contre les ententes soulève deux principaux problèmes. Premièrement, les responsables de l'application du droit de la concurrence ne peuvent pas assurer la confidentialité des renseignements échangés. Deuxièmement, en l'absence d'autorité de la concurrence multilatérale ou supranationale, les entreprises pourraient être poursuivies dans de multiples pays. De plus, les organismes en charge de la concurrence et les juges, qui doivent préserver leur indépendance, parviennent souvent à des décisions différentes sur la même affaire. Il est par conséquent improbable que l'on arrive à harmoniser les poursuites pénales tant que les pays ne remettront pas leur souveraineté à un tribunal international.

M. Gesuelli a expliqué que, si les autorités fiscales ont atteint ce niveau élevé de coopération internationale, c'est notamment parce qu'elles ont mis l'accent sur la qualité des informations échangées et non simplement sur leur volume. Cela requiert aussi un engagement de la part des autorités et une certaine confiance entre elles. Il doit donc exister un engagement universel envers un système de coopération internationale qui encouragera une concurrence loyale entre les pays. La confiance entre autorités aiderait à une meilleure application de la loi en leur permettant de travailler ensemble, afin non seulement de coordonner les informations, mais aussi de déterminer les pays où l'enquête sera la plus efficace.

M. Nambu a souligné les points évoqués par M. Gesuelli en répétant que, dans l'économie mondialisée d'aujourd'hui, les plupart des ententes sont de dimension internationale, les mêmes entreprises opérant dans plusieurs pays. Afin d'éviter la destruction de preuves, les autorités de la concurrence devraient envisager de procéder à des perquisitions simultanées, même avec des informations limitées. Pour que cela fonctionne, une confiance mutuelle et de bonnes relations de travail sont indispensables, et des accords bilatéraux et régionaux à cet effet sont d'une importance primordiale.

M. Diallo a ajouté qu'une plateforme électronique d'échange d'informations placée sur le site web du RIC pourrait être fort utile. Une fois qu'une enquête démarre dans un pays, la plateforme pourrait fournir certains renseignements non confidentiels et indiquer s'il existe des éléments internationaux qui aideraient les autres autorités.

Le Sénégal et la Gambie commencent déjà à coopérer et à échanger des informations. Les autorités de la concurrence de ces deux pays tentent de formaliser le cadre de cette coopération dans un mémorandum d'accord. On espère que, dans l'avenir, cette dynamique sera étendue à la région de la CEDEAO tout entière, ce qui permettra une action plus vigoureuse et plus efficace contre les ententes et d'autres pratiques anticoncurrentielles.

M. Hansen a fait ressortir l'importance et l'efficacité des programmes de clémence dans la lutte internationale contre les ententes. Il a souligné que la confiance était tout aussi importante non seulement entre autorités de la concurrence mais aussi du côté des demandeurs de clémence. La plupart des ententes sont de dimension internationale et, dans le cas des produits de consommation, parfois mondiale. Dans ces cas, les organismes en charge de la concurrence doivent décider entre eux celui qui est le mieux placé pour faire appliquer la loi. Si chaque pays tente d'intervenir, le système de clémence ne sera pas aussi efficace, ou s'effondrera complètement, ce qui sera moins dissuasif.

M. Schmid a souligné que la plupart des affaires de corruption à l'échelle internationale se terminent par une négociation pénale en raison de la quantité et de la complexité des informations et du désir de maintenir ces dernières confidentielles. Bien que non traditionnelle, en particulier dans les systèmes de droit civil, ces pratiques de négociation pénale sont le moyen le plus efficace de s'attaquer aux grandes affaires mondiales, notamment en matière d'ententes.

Le Président a remercié les experts et les participants pour leurs contributions et a donné la parole à M. Frederic Jenny pour conclure les débats.

Selon M. Frederic Jenny, les débats ont mis en lumière six points importants. Premièrement, l'objectif n'est pas d'accroître la coopération comme une fin en soi mais de rendre l'application de la loi plus efficace et, partant de réduire les pratiques anticoncurrentielles. La coopération est nécessaire car les transactions et les marchés sont mondialisés, tandis que les compétences des différentes autorités restent fragmentées. Si la concurrence était gouvernée par une législation multilatérale unique, cette coopération serait, dans une grande mesure, inutile.

Deuxièmement, même si des cas ont été évoqués où la coopération a donné de bons résultats, cela n'est pas toujours vrai. On a cité, par exemple, les obstacles à la coopération au sein de la CEDEAO, dont les membres sont pourtant des pays voisins, ainsi que le désir d'instaurer une plus grande coopération entre cet organisme régional et l'UE. Cela est cependant difficile du fait des degrés divers de développement et des obstacles à la confiance requise pour une coopération efficace, mentionnés par de nombreux intervenants.

Troisièmement, il faut prendre en compte les intérêts du monde des affaires, en particulier l'effet des préoccupations relatives à l'échange d'informations sur l'incitation qu'ont les entreprises à demander des mesures de clémence. Si les entreprises savent que les informations qu'elles fournissent seront échangées avec d'autres organismes, et qu'elles risquent de faire l'objet d'enquêtes dans plusieurs pays, elles auront sans doute moins tendance à demander la clémence dans un pays. Cela affaiblirait notablement l'outil le plus puissant dont les autorités disposent pour lutter contre les ententes. Il faudrait cependant examiner l'ampleur de cet effet, si tant est qu'il existe, à l'aide de données d'observations recueillies au fil du temps.

Quatrièmement, une question méritant une réflexion et un examen approfondis est celle des obstacles restants à la coopération. M. Jenny a évoqué le point soulevé par M. Gesuelli au sujet des ressources nécessaires pour répondre à des demandes de renseignements émanant d'un autre pays. Les coûts et avantages pour chaque cas de coopération ne sont pas répartis de façon égale, et le Comité devrait continuer de réfléchir à cette question complexe dans l'avenir.

Le cinquième point auquel il faudra réfléchir dans l'avenir est celui de savoir à quel moment du processus d'enquête il est possible d'améliorer la coopération : au niveau de l'instruction de l'affaire ou au cours de l'enquête.

Enfin, comme solution de rechange à la coopération dans les enquêtes sur les ententes, il serait possible de recourir à une autorité multilatérale pour l'application de la loi. Comme cela se voit parfois au sein du REC et ou dans les pays nordiques, une autorité unique pourrait être désignée pour traiter chaque enquête, ou les autorités pourraient travailler ensemble afin de prendre une décision commune. Les résultats de ces enquêtes bénéficieraient d'une reconnaissance mutuelle à l'échelle mondiale.

Les participants ont soulevé un certain nombre de nouvelles questions intéressantes dont il faudra débattre dans l'avenir et dont bon nombre seront examinées plus en détail dans le cadre du thème stratégique à long terme du Comité sur la coopération internationale.