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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

Cancels & replaces the same document of 20 July 2015

**Global Forum on Competition**

**SERIAL OFFENDERS: A DISCUSSION ON WHY SOME INDUSTRIES SEEM PRONE TO  
ENDEMIC COLLUSION**

-- Session III --

**Call for contributions**

*This document is a call for country contributions for Session III of the Global Forum on Competition to be held on 29-30 October 2015. GFC participants are invited to submit their contributions by 14 September 2015 at the latest.*

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**TO ALL GLOBAL FORUM PARTICIPANTS**

**Re: Serial offenders: a discussion on why some industries seem prone to endemic collusion**

**Global Forum on Competition (30 October 2015)**

Dear GFC Participant,

The OECD Global Forum on Competition will hold a roundtable on “Serial offenders: a discussion on why some industries seem prone to endemic collusion” on Friday, 30 October 2015.

Some industries have been repeatedly investigated and sanctioned for collusion by competition authorities, sometimes involving repeated offences by the same firms. Certain economic sectors seem to be more prone to cartelisation than others and this could reflect characteristics of those sectors. Empirical studies find that many cartels are in industrial intermediate inputs, such as chemicals,<sup>1</sup> as well as in construction services and certain building materials.<sup>2</sup> Research also shows that among the worst serially offending companies are firms with chemical interests.<sup>3</sup> Some of this pattern arises from the same firms engaging in cartel activity repeatedly in different markets and even across countries, but there do seem to be sectors that attract collusion even when the identity of the firms involved differs, across different countries.

Another possibility – in theory at least – is that these are simply the sectors in which it is easiest to *detect* cartels. Perhaps cartels are everywhere and these are just the least successful?<sup>4</sup> Why do cartels in such sectors seem to occur so frequently? Why – despite the access to increasing public evidence on this as well as their own private information – are competition authorities unable to deter repeated violations, by companies and within sectors of which they have reason to be suspicious?

This session will consider the sector-specific characteristics that could explain why some industries are more prone to serial collusion. Economic theory has developed long-established guidelines on the factors that are considered conducive to collusion and these could help explain also repeated cases of collusion. Among other factors, the literature has identified limited innovation (so that the market is rather stable), a common cost structure among competitors, homogeneity of products, symmetric capacities, multi-market interaction as well as structural links between competitors. A high ratio of fixed to marginal costs could also be conducive to collusion, as price wars could result in revenues that do not cover total costs.

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<sup>1</sup> Antonielli and Mariniello (2004) and Combe and Monnier (2012) on a sample of cartels investigated in Europe. Using international cases, Levenstein and Suslow (2011) find a similar list, noting “Forty percent are in chemicals, especially food additives. Another quarter are in a variety of other manufacturing industries, with multiple cartel convictions in steel, carbon and graphite products, plastics, and paper industries.”

<sup>2</sup> Using the database assembled by John Connor (2014 update), but removing global cartels.

<sup>3</sup> Combe and Monnier (2012).

<sup>4</sup> A study on Finnish registered cartels indicates that, among the market allocation cartels in the sample, 77% are found in homogenous goods industries (Hyytinen, Steen and Toivanen, 2013).

Repeated collusion also raises the question of why deterrence and prosecution of cartels does not seem to result in effective deterrence in these sectors. It could simply be that the rewards from collusion are so high, given the sectoral characteristics, that firms are drawn into illegal activity, to make the profit levels their shareholders expect. However, there could also be hysteresis effects: collusion becomes a way of life for the firms involved, so that once cartels do form (perhaps because of sectoral characteristics) they become more likely to form again, even after antitrust action. This could reflect a bad business culture in serially offending firms, or perhaps even learning how to use more sophisticated methods of collusion, as a result of the earlier cartel or even the investigation of that cartel.

Against this backdrop, what should competition authorities do about it? The competition problems arising in some sectors might require a more targeted approach than that commonly used by competition agencies. One relatively easy option is to monitor some sectors or even some companies closely, to enable quicker detection of cartels. However, more targeted action could also extend to guidelines and enforcement practice relating to fines and leniency programmes. Some jurisdictions incorporate recidivism as an aggravating factor in their cartel-fining guidelines, for example. However, leniency programmes generally do not exclude recidivists and this may provide an incentive for violators to engage repeatedly in competition law violations.<sup>5</sup>

International co-operation between competition authorities can also help with the detection and prosecution of such cartels. This will not be a major focus of this session, because the OECD continues to focus on co-operation as a key priority more generally, but could perhaps provide a significant boost to fighting cartels, especially those involving recidivist multinationals.

In this session, in light of the high frequency of cases, we will focus on the following sectors: chemicals; construction services, including public tenders; cement and concrete; and food products.<sup>6</sup> For the purpose of this session, and given the different legal definitions of recidivism across jurisdictions, serial offenders will be companies that have been found to have colluded repeatedly, either in different jurisdictions or in the same jurisdiction, regardless of whether infringements are simultaneous or not.

In particular, we will discuss:

- The extent of repeated collusion in these sectors and any differences between the sectors (for example, whether the players tend to differ in different countries or are mostly the same multinationals).
- The economic characteristics of each of these sectors and whether these characteristics are more likely to lead to repeated collusive practices; and
- Implications for effective detection and sanction mechanisms.

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<sup>5</sup> Experimental evidence indicates that excluding any firms ex ante from possible leniency strengthens cartels, because it weakens or eliminates the fear one firm might feel that its collaborator might apply for leniency first, at least in a two-firm cartel where one is the ringleader (see review by Marvao and Spagnolo, 2014).

<sup>6</sup> Please refer to the statistical classification of economic activities in the European Community (NACE, Rev. 2) for the definition of chemicals (section C, division 20), construction services (section F) and food processing (section C, division 10).

The discussion of this topic will last a full day. The morning will be dedicated to a plenary session on the sectors where frequent collusion is found and any common characteristics they share, and on the extent to which recidivism varies across sectors. The implications for detection, enforcement and priorities for competition authorities will be also discussed. In the afternoon, delegates will discuss in smaller break-out sessions their enforcement experiences. The Secretariat will allocate delegations in the break-out sessions according to the topics discussed in their contribution. The roundtable will terminate with a wrap-up plenary session, in which the outcome of the parallel sessions will be summarised and discussed.

The quality and utility of this roundtable will be greatly strengthened by written contributions. In order to assist you with the preparation of your contribution, we have included a detailed list of the issues in the attachment. This is not an exhaustive list, and participants are encouraged to raise and address other issues in their submissions. Unless explicitly requested not to do so, the Secretariat will reproduce written contributions on the site.

Please advise the Secretariat by 17 August, 2015, if you will be making a written contribution. We would be very grateful if you could send your written contributions to the Secretariat by 14 September 2015. This deadline applies to all GFC participants. It is important to meet the deadline in order to allow the Secretariat to best organise the break-out sessions. Late contributions may not be distributed in advance of the meeting.

All communications regarding documentation for this roundtable should be sent to Ms Susanne Kleve (Email: [susanne.kleve@oecd.org](mailto:susanne.kleve@oecd.org)). All substantive queries relating to this roundtable should be sent to Ms Federica Maiorano (Email: [federica.maiorano@oecd.org](mailto:federica.maiorano@oecd.org)). Please copy Ms Ania Thiemann, Head of Global Relations, Competition Division (Email: [ania.thiemann@oecd.org](mailto:ania.thiemann@oecd.org)) in all correspondence on substantive queries.

## **SUGGESTED QUESTIONS AND POINTS FOR CONSIDERATION**

Countries are invited to answer the questions listed below, bearing in mind that both the issues and the questions are intended to be illustrative rather than exhaustive. You should feel free to discuss other pertinent topics that are not mentioned here. Moreover some of the questions may overlap or may not apply to you; hence we do not expect you to answer all the questions listed below. They are meant as guidance in preparing your contribution. Wherever possible, please demonstrate the points you raise by referring to specific cases and examples from your jurisdiction.

In preparing your contribution, please draw on cases or studies on the following products or industries: construction services, chemicals, cement and concrete, and food sector.

### **1. Sectors prone to repeated collusion**

1. If you have investigated any cartels in the above-mentioned sectors / products, please describe the anti-competitive practice (e.g. market allocation, price-fixing) and the level in the sector at which this practice was observed (e.g. manufacture, wholesale, retail level). What was the outcome of the investigation?
2. Did your investigation in any way take account of investigations of a similar matter in other jurisdictions – whether just for informational purposes or through international cooperation?
3. Have you observed more than one case in the same sector / market over the years?
4. Have you observed more than one case involving the same firms (i.e. serial offenders)? Were these cases in the same product or in a different one?
5. Have you observed if serial offenders adopt the same collusive practices or do they adopt different practices in subsequent cartels?
6. Have you noticed whether repeated collusion in the same sectors or by the same companies has become more or less frequent over time? What are the reasons in your view for any increase or decrease?

### **2. Factors likely to lead to repeated collusion.**

7. Did you start your investigations because of the existence of certain factors or characteristics in a market? What were these factors?
8. In the cases mentioned above, did your decision refer to the economic characteristics of this industry? What were these characteristics?
9. In your view, what are the reasons for repeated collusion in these sectors? Do you think that it is due to specific market characteristics?

### **3. Implications for enforcement**

10. In your cases, have you faced situations in which you considered that fines were not sufficient and additional remedies (e.g. divestiture, information disclosure) would have been more effective? In your jurisdiction, can the competition authority impose these remedies in cartel cases? Do you think there are other enforcement tools that could be used more effectively in these sectors, in addition to cartel law?
11. In your jurisdiction, are serial offenders treated in a stricter way? If yes, do you think that this discourages repeated collusion?

12. Based on your findings on repeated collusion in these sectors, have you drawn any implications for your enforcement planning and priorities? Have you drawn any implications for your leniency programme or your fining guidelines?
13. Do you think that the legal framework in your jurisdiction is suitable to address repeated collusion or are there any changes that could improve it?
14. Is there scope for better international co-operation to combat cartels in these sectors?

### SUGGESTED READING / SELECTED BIBLIOGRAPHY

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