

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Criminalisation of cartels and bid rigging conspiracies: a focus on custodial sentences**

- Background note by the Secretariat -

9 June 2020

This document was prepared by the OECD Secretariat to serve as a background note for Item 1 of 131st meeting of Working Party 3 on Co-operation and Enforcement on 9 June 2020.

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JT03461087

Criminalisation of cartels and bid rigging conspiracies: a focus on custodial sentences

- Background note by the Secretariat -*

Notwithstanding the increased adoption of criminal sanctions, there is no international consensus on criminalisation of cartels, and in particular on custodial sentences against individuals. This paper aims at providing guidance on the benefits and challenges of criminal enforcement, focussing on custodial sentences.

It describes the economic deterrence theory and the retribution theory that have emerged in the criminalisation debate and summarises the main concerns raised in relation to each theory. It offers an overview of criminalisation trends across jurisdictions, and it identifies the key institutional and procedural questions to be carefully assessed when a jurisdiction considers the criminalisation of cartels. It also discusses the benefits and main challenges for international co-operation between jurisdictions that pursue criminal enforcement and those that focus on administrative/civil enforcement, and the effects of criminalisation on leniency programmes.

A case can be made in favour of criminalisation of antitrust enforcement against cartels and bid rigging offences, in particular in favour of custodial sentences against individuals, to complement sanctions against companies. However, not all enforcement regimes are currently built for successful criminalisation. The paper concludes that jurisdictions should gradually build institutions before introducing criminalisation, and that each jurisdiction should determine the right mix of sanctions, depending – among other factors – on social norms, the existing legal framework, resources of competition agencies and the relationship between the competition agency and prosecution authorities. The introduction of criminal enforcement also requires significant advocacy efforts directed at key institutional stakeholders and the general public.

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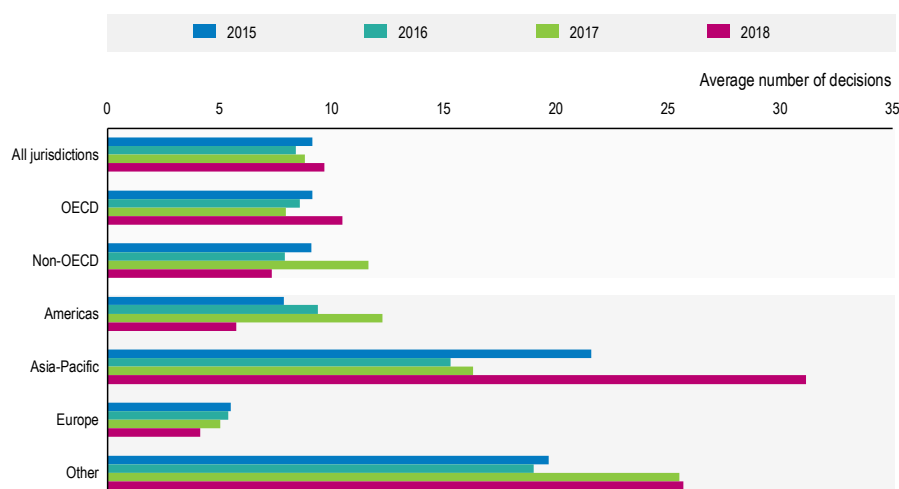
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1. Introduction

1. Hard core cartel prosecution is an enforcement priority for competition agencies across jurisdictions. Consequently, effective enforcement against hard core cartels has been an OECD priority topic throughout the last 25 years.
2. In the last few years, as shown below, the number of detected cartels and enforcement actions has not decreased.¹

Figure 1. Average number of cartel decisions per agency by jurisdiction and by region, 2015-2018

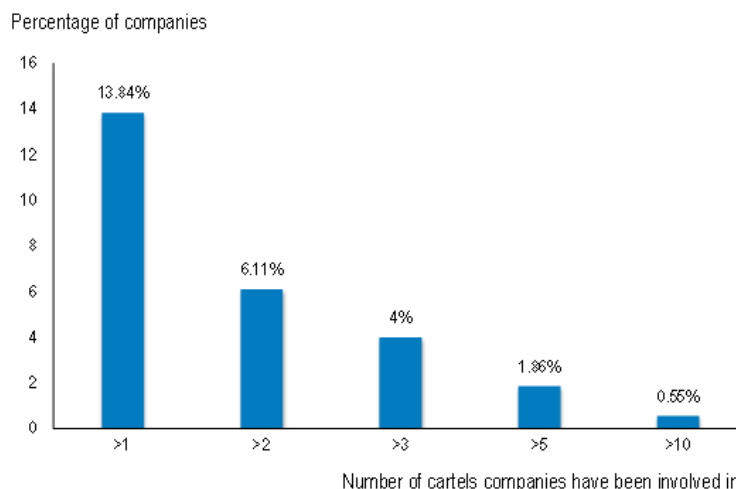


Note: Based on the 49 jurisdictions that provided data for all four years.

Source: OECD (2020), *Competition Trends 2020*, www.oecd.org/competition/oecd-competition-trends.htm.

3. Also, several companies that have been fined for cartel offences in the past continue to engage in similar anti-competitive practices.² Indeed, as reported in the *OECD Competition Trends 2020*, 14% of parent companies in the OECD International Cartels (ICStats) Database³ were directly or indirectly (through subsidiaries) involved in more than one cartel between 1989 and 2018 (OECD, 2020, p. 40_[1]).⁴

Figure 2. Serial collusion, 1989-2018



Source: OECD (2020), *Competition Trends 2020*, www.oecd.org/competition/oecd-competition-trends.htm.

4. This raises the question whether the investigative and enforcement tools currently available to competition agencies are effective and ensure sufficient deterrence. A related question is whether jurisdictions should adopt criminal sanctions, in conjunction with pecuniary fines and other sanctions imposed through civil or administrative proceedings. In fact, it must be preliminarily noted that criminal sanctions, especially criminal sanctions imposed against individuals, are generally seen as complementary (and not a substitute) for pecuniary sanctions imposed against companies (OECD, 2005, p. 26_[2]) (Wils, 2013_[3]).⁵

5. The aim of this background paper is to outline the benefits and challenges of criminal enforcement and custodial sentences, in particular for jurisdictions that have traditionally relied on administrative/civil enforcement. The paper is structured as follows:

- **Section 1** frames the topic, clarifying the focus on hard core cartels, including bid rigging conspiracies, and on custodial sentences against individuals.
- **Section 2** summarises the rationales supporting the imposition of criminal sanctions for antitrust infringements.
- **Section 3** provides an overview of criminalisation of hard core cartels across jurisdictions, focussing on the adoption and the imposition of criminal sanctions (and in particular custodial sentences) against individuals.
- **Section 4** illustrates the main features of antitrust criminal enforcement systems, and the institutional and procedural adjustments required if criminalisation is introduced in administrative and civil enforcement regimes.
- **Section 5** looks at the benefits and challenges for international co-operation resulting from criminalisation trends.
- **Section 6** builds on the analysis and concludes by offering considerations to policy makers and competition agencies on whether and how to pursue criminal enforcement.

1.1. Focus on hard core cartels and bid rigging

6. Criminalisation of antitrust regimes is typically limited to hard core cartels, which are recognised as “*the most egregious violations of competition law*” (OECD, 2019_[4]).⁶ Cartels are considered “*the supreme evil of antitrust*”⁷ because a) they are anti-competitive conduct with no efficiencies or pro-competitive benefits; and b) they are secret practices, with cartelists engaging in “*acts of concealment*” (Werden, 2009, p. 6 and 9_[5]).⁸

7. The gravity of cartel offences is also reflected in their treatment across jurisdictions as *per se* (United States) or by object (European Union (EU)) restrictions, i.e. punishable without the need to prove their anti-competitive effects or their actual implementation. In the United States, where the Sherman Act allows for criminal enforcement to apply to a broad range of anti-competitive practices, the Department of Justice (DoJ) clearly focuses on hard core infringements. Barnett (2006_[6]) notes that this provides “*established, clear, predictable boundaries for businesses*”, while preserving resources by “*reducing the complexity of proof*”, for instance without needing economic testimony to establish the violation.

8. In some jurisdictions (e.g. Austria, Belgium, Colombia, Germany, Hungary, Italy, Poland, and Turkey) the scope of criminalisation is further limited to bid rigging conduct. In some instances (e.g. Italy), bid rigging already qualified as a criminal offence before the adoption of competition laws. In others, the decision to focus on bid rigging is often based on the assumption that cartels that affect public institutions (and public finances) are more

reprehensible than other cartels, and therefore should be subject to (stiffer) criminal sanctions (Shaffer, Nesbitt and Weber Waller, 2015, p. 16^[7]).⁹

9. In practice, a tendency to focus on bid rigging conduct is observed also in the United States, where Assistant Attorney General Delrahim recently noted that more than one third of the DoJ's ongoing investigations related to public procurement or to other practices victimising the government, and in particular the federal government.¹⁰

1.2. Focus on custodial sentences

10. This paper focuses on custodial sentences against individual antitrust offenders because, although imprisonment is not necessary for a sanction to be criminal, it is a sufficient condition (Wils, 2005^[8]), i.e. imprisonment unequivocally qualifies as a criminal sanction across jurisdictions. The paper also looks at the effectiveness of custodial sentences, and how they are imposed in practice.

11. The paper does not focus on:

- **Criminal fines against companies.** Legal entities can be held criminally liable (even beyond antitrust infringements) and fined accordingly in many jurisdictions. However, similar pecuniary remedies for antitrust infringements are imposed through administrative/civil enforcement and tort damages, especially in those jurisdictions (in particular of civil law) that are reluctant to recognise the criminal liability of legal entities.
- **Other sanctions against companies.** Other sanctions against companies such as disqualification from public bids and adverse publicity orders have significant deterrent effect by impacting on companies' financial as well as reputation dimensions. However, these decisions are generally a matter of public procurement law (or criminal law) and they are usually taken by the contracting authority, and not by the competition agency.
- **Pecuniary and other non-custodial sanctions against individuals.** Antitrust offenders may be subject to fines (even of a criminal nature) and other non-custodial sanctions, including disqualification orders against companies' directors (barring individuals from serving as an officer of a public company), loss of business licences, community service, and requirements to publish the violation (OECD, 2003^[9]). However, individual sanctions as such are not a necessary or sufficient condition for criminal enforcement (Wils, 2005^[8]). These sanctions could be enforced by administrative or civil regimes. Moreover, with regard to pecuniary sanctions against individuals, it is argued (see 2.1) that companies can ensure a sufficient degree of compensation to cartel offenders to offset these sanctions and deprive them of effectiveness.¹¹

2. Rationale for criminal sanctions against cartel offences

12. It is well recognised that a rationale is necessary to justify the imposition of criminal sanctions, and in particular incarceration, for antitrust offences (Whelan, 2013^[10]). Two "punishment theories" – not necessarily mutually exclusive (Ducci, 2018^[11]) – have emerged in the criminalisation debate: the economic deterrence theory and the retribution theory.

13. This Section briefly describes how both theories apply to antitrust violations and summarises the main concerns raised in relation to each theory.

2.1. Economic deterrence theory

14. Under deterrence theory,¹² a sanction against criminal conduct can only be justified if it prevents or reduces future crimes. Criminal sanctions against antitrust offences have been traditionally based on an economic deterrence theory. This theory derives from the application of economic analysis to criminal law (Becker, 1968^[12]), and it assumes that companies and individuals are rational and risk-neutral, and that they aim at maximising their own welfare. In this framework of analysis, social welfare is maximised when the marginal benefit of punishment equals the marginal costs of apprehension and conviction. So this theory aims to achieve “optimal” deterrence. Finally, according to the traditional economic deterrence theory, cartels are “morally-neutral criminal offences”, so there is no need to establish immorality.

15. The justification of criminal sanctions against individuals engaging in cartels follows a two-step argument. Firstly, the damage from cartels is not limited to the overcharge, which could be arguably remedied through private enforcement and follow-on damages actions (Wils, 2005, p. 39^[8]),¹³ but it also extends to a deadweight loss/allocative inefficiency, as volumes decrease compared to the situation without a cartel (Whelan, 2017, p. 13^[13]).¹⁴ Secondly, to ensure sufficient deterrence, the size of fines to be imposed on companies would be “too large”. However, there are legal constraints, where laws set a cap to the fines,¹⁵ and practical constraints resulting, for instance, in companies’ inability to pay the fines imposed and, consequently, the risk of eliminating competitors from the market (Werden, 2009, p. 15^[5]). In other words, as noted in the 2003 OECD Roundtable on *Cartel Sanctions against Individuals*, “*there is ample empirical evidence that corporate sanctions in the form of fines are almost never sufficiently high to be an optimal deterrent, and in most cases are substantially below that level*” (OECD, 2003, p. 7^[9]). For instance, Wils (2005, pp. 28-30^[8]) calculated that the minimum level of fines to ensure deterrence in Europe would be in the order of 150% of the annual turnover of the products concerned by the violation. This calculation takes into account a) the overcharge (and the corresponding increase in profits), b) the average duration of cartels, and c) the probability of detection and punishment. The inherent inadequacy of monetary fines supports the case for sanctions against individuals and recognises that the threat of individual sanctions can complement monetary sanctions against companies (OECD, 2005, p. 26^[2]).

16. Moreover, it is noted that not imposing sanctions against individuals, and in particular custodial sentences, results in a “deterrence gap” for two reasons: agent-principal issues and companies’ possibility to indemnify individuals engaging in cartels.¹⁶

- **Agent-principal issues.** It is argued that companies (principals) and their employees (agents) have different incentives and that, therefore, fines against principals may not always deter agents. In particular:
 - Fines imposed on companies do not constitute a direct cost for individuals. Hence, individuals involved in a cartel are able to externalise the cost of sanctions, if these are only imposed on companies.
 - Individuals who engaged in a cartel may no longer be with the company held liable when the cartel is detected and the fine is imposed (and appeals held) (Wils, 2005, p. 32^[8]; Stephan and Nikpay, 2015^[14]).

17. Some of these considerations also emerged in the 2003 OECD Roundtable on *Cartel Sanctions against Individuals*, where it was noted that “*as individuals act as agents on behalf of a corporation, it makes sense to deter those individuals directly by threatening them with sanctions, and to impose such sanctions if they violate the law*” (OECD, 2003, p. 7_[9]). Moreover, individual sanctions can strengthen the incentive of directors and employees to resist corporate pressure to engage in unlawful activity (OECD, 2005, p. 26_[2]).

- **Companies’ possibility to indemnify individuals engaging in cartels.** As rational actors, companies may even be willing to incentivise cartels if the benefits outweigh the potential costs, and to “compensate” its employees engaged in such practices (Ducci, 2018, p. 20_[11]). As a consequence:
 - Even monetary fines against individuals are not “fit for purpose”. Only custodial sentences are “non-indemnifiable sanctions”.
 - The risk of imprisonment is an important element of the individual cost-benefit analysis of potential cartelists as for other white-collar offenders.

18. However, this justification of criminal sanctions, and in particular custodial sentences, against individual cartelists on purely economic deterrence grounds has raised some questions that are summarised below.

2.1.1. “Traditional” economic analysis of criminal law

19. According to Becker’s and Posner’s traditional economic analysis approach, economic deterrence can be achieved by imposing monetary fines on companies only. Individuals should not be subject to custodial sentences for antitrust offences. Alternatively, custodial sentences should be imposed only in cases where individuals are unable to pay the “optimal fine”.¹⁷ Moreover, Becker (1968_[12]) and Landes (1983_[15]) advocate for an “internalisation approach” of optimal fines. In this scheme, offenders internalise all costs and benefits of the violation, leading them to commit “efficient” violations (i.e. those where the cost savings exceed the deadweight loss) and deterring “inefficient” violations.

20. Against this theory, it is argued that hard core price fixing, like many other crimes, should not be analysed within Becker’s framework because central to Becker’s model is the notion that there can be “efficient” offences. However, “*hard core price fixes are intentional conspiracies to steal from consumers, and the negligible probability that the outcome is efficient can safely be ignored*” as the adoption of a *per se* rule shows (OECD, 2003, p. 101_[9]).¹⁸

2.1.2. Is it possible to achieve (optimal) deterrence through criminal sanctions?

21. With regard to an “optimal fine”, Wils (2006_[16]) notes that it “*should exceed the expected gain from the violation multiplied by the inverse of the probability of a fine being effectively imposed*”. As explained above, such fine may be too large in practice to ensure deterrence.

22. As to criminal sanctions against individuals, although there seems to be anecdotal evidence suggesting deterrent effects (including instances of cartels carving out the United States from their operations to avoid the risk of criminal sanctions) (OECD, 2005, p. 26_[2]), there is no systematic empirical evidence (OECD, 2019, p. 63_[17]). Hence, there is no consensus, for instance, on the positive impact on deterrence of having long jail time prescribed in the laws. In this regard, it is argued that the moral stigma and the emotional

trauma associated with imprisonment for white collar offenders is such that short term imprisonment (with reduced social costs)¹⁹ (Whelan, 2017, p. 14_[13]) or even the sole prospect of having a criminal record without jail time (OECD, 2003, p. 9_[9]) may be of sufficient deterrence.

23. Furthermore, as flagged above (and not limited to criminal enforcement), in conjunction with the severity of the sanction, the importance of the perceived likelihood of detection and enforcement should not be underestimated. However, there is little evidence also on the probability of detection of cartels (Werden, 2009_[5]),²⁰ and applying a strict deterrence theory may lead to enormous punishments against individuals in case of low rates of detection. That said, risks of over-deterrence could be somewhat mitigated – as done in many jurisdictions (see 3.1 below) – by limiting the scope of anti-competitive conduct that are deemed to be criminal offences.

24. To conclude, it is worth stressing that the assessment of whether antitrust regimes ensure sufficient deterrence is often conducted in silos, i.e. in relation to one (type of) sanction imposed on (corporate or individual) offenders (Connor, 2016, p. 8_[18]).²¹ A more systematic approach would be more effective in establishing whether the system ensures sufficient deterrence, by looking at the combination of multiple sanctions against antitrust offenders, including, for instance, the threat (and likelihood) of damages actions.²²

2.1.3. Actual costs of criminal enforcement cannot be disregarded

25. An economic deterrence theory requires a careful assessment of the actual costs of criminal enforcement by demonstrating that the marginal benefit of criminal punishment is equal to the marginal costs of imposing such punishment. In other words, when considering criminalisation, it should be ensured that the marginal benefit of introducing sanctions against individuals in the form of less harm from cartel activity exceeds the additional costs that a system of criminal sanctions entails (OECD, 2005, pp. 26-27_[2]). However, it appears extremely difficult to generate empirical data to reach a firm conclusion on this (Whelan, 2017, p. 11_[13]).

26. In any case, it is observed that costs of criminal enforcement may be particularly high, as they include resources required to investigate, prosecute and incarcerate individuals, as well as costs of taking productive individuals out of the economy. Section 4 outlines some of the additional requirements and costs of criminal enforcement as compared to administrative/civil enforcement. Also, it cannot be disregarded that Type I errors in imposing imprisonment (i.e. wrongful convictions) result in high individual and social costs. That said, there are several techniques to keep costs low, including a) imposing short term imprisonments that may be sufficient to achieve deterrence against white-collar criminals; b) focussing on the most harmful cartels; c) employing legal instruments reducing investigation costs such as plea agreements, leniency programmes and bounties; and d) imposing cost orders upon convicted cartelists (e.g. in Ireland²³). However, each of these techniques has its drawbacks. For instance, short sentences may – in the long term – counter the efforts to create a moral norm against cartels (Whelan, 2017, pp. 11-17_[13]).

2.2. Retribution theory

27. The retribution theory does not justify criminal sanctions with the potential deterrent effect on future crimes that the same individuals or others may commit. Criminal punishment is simply justified by the fact that the individual engaged in a prohibited and morally wrong conduct. The retribution theory requires also the punishment to be proportional to the gravity of the offence and to the culpability of the individual (Ducci, 2018_[11]).

28. In essence, cartels are considered to amount to cheating or subverting the competitive process, which is the essence of a market economy system.²⁴ As noted in 1.1, cartels are more harmful than other anti-competitive conduct, and criminal sanctions send a strong message in this respect.

2.2.1. The need to address moral stigma

29. In the criminal world, the issue of moral stigma is typically addressed. This is also relevant when applying a retribution theory to criminal enforcement of antitrust offences. As Harding (2012, p. 141_[19]) notes, “[c]riminalisation ... embodies a significant judgement about particular conduct within a society, and its impact is significant, logically leading to stigma, a change of status for the actor so characterised, and signalling the reaffirmation and protection of core values and interests to others in society”. This is even more relevant for custodial sentences, which usually entail a strong(er) social condemnation.²⁵

30. Nevertheless, even though cartels are often considered to amount to cheating or subverting the competitive process, there is no consensus on what is morally reprehensible. But, as Whelan (2013_[10]) observed, in a criminalisation argument based on a retribution theory it is essential to determine the “moral wrongfulness” of the conduct. A normative approach looks at pre-existing moral norms and considers a conduct “morally wrong” if in violation of such norms.²⁶ Whelan (2013_[10]) attempts to conceptualise cartel activity against the existing moral norms applied to stealing, deception and cheating.²⁷ Aligning cartel offences with one of these moral norms has also implications as to the scope of the criminal offence, with potential implications on deterrence. A summary of his assessment is presented below.

- **Stealing.** To conceptualise cartel activity as stealing, a consumer welfare standard (rather than a total welfare standard) should apply because it preliminarily requires establishing a right of the cartels’ victims to the “overcharge”. Moreover, such conceptualisation may not capture cartels that have not been implemented.
- **Deception.** To conceptualise cartel activity as deception, it requires the cartelist to make false statements regarding the non-existence of the cartel or to fail to disclose the existence of a cartel.²⁸ In both cases, it also requires that the cartel is implemented, i.e. that the cartelised products are offered at a cartelised price. Moreover, deception does not seem to apply to cases in which the cartelist explicitly declares the existence of a cartel.²⁹
- **Cheating.** A conceptualisation as cheating presents some challenges as to identifying the “unfair advantage” that a cartelist wants to obtain. Such advantage (and the link between the illegal conduct and the impact on other players) is much more evident (and direct) in the case of customers of the cartelised product being companies selling goods or providing services on the market. That said, conceptualising the cartel offence as a violation of the moral norms against cheating has the benefit of also covering the mere entering into a cartel agreement.

31. Furthermore, Whelan (2013^[10]) argues that identifying the moral wrongfulness is a challenge relevant also for the economic deterrence theory because – even under a morally-neutral theory – criminal law remains directed to the moral standards of society.

32. Besides the normative framework, there is thin empirical evidence of society’s moral condemnation and of the inherent criminality of cartels. The two surveys presented in the box below attempted to fill these gaps.

Box 1. Empirical studies

University of Melbourne “Cartel Project” in Australia (2009-2011)

In Australia, cartels were criminalised in 2009. The Cartel Project is research carried out between 2009 and 2011 by the University of Melbourne. Researchers conducted a survey divided in two parts. The first part was addressed to a random sample of the Australian population, testing public opinion on the seriousness of cartel conduct and their legal consequences. The second part was addressed to representatives of the business community, testing how the law affected deterrence and compliance.

It is argued that the official justifications (i.e. increased deterrence and inherent criminality) given for cartel criminalisation in Australia were “seriously flawed”. As to deterrence, the Cartel Project showed that knowledge of the law and sanctions, and perception that detection and prosecution are likely, were not sufficiently present in the business community. As to inherent criminality, the Cartel Project showed that the Australian population did not show substantial support for criminalising cartels, and, most importantly, for imposing jail sentences against such offenders.

University of East Anglia Public Survey (2014)

The University of East Anglia’s Centre for Competition Policy led a survey carried out in 2014 in the United Kingdom, Germany, Italy and the United States on the attitudes and perceptions of cartels among the public. These surveys followed up a 2007 study carried out in the United Kingdom.

Its findings suggest that there is empirical backing for the normative justifications for cartel criminalisation, without the need to rely only on deterrence. It showed that the public expects competing businesses to calculate their prices independently of each other and that, therefore, cartels undermine a competitive norm expected of markets. That said, it seems that, even though the public supports the imposition of fines and “naming and shaming” sanctions, this support is weaker for imprisonment. In fact, there is a perception of cartels’ weak wrongfulness compared to other forms of wrongdoing, and this may also reflect the absence of the clear sense of moral stigma that is associated with (more) traditional crimes.

Sources:

<https://law.unimelb.edu.au/centres/cen/research/past-research-projects/cartel>.

(Beaton-Wells and Parker, 2013^[20])

(Stephan, 2017^[21])

33. Finally, applying criminal law in a morally-neutral fashion presents broader risks. Criminal lawyers and practitioners warn against the over-criminalisation of “regulatory offences”, arguing that applying criminal law to what is considered – in certain jurisdictions – a “morally-neutral” conduct may undermine the moral authority of criminal law and delegitimise criminal law enforcement in other fields (Harding, 2012, pp. 143-144^[19]; Ducci, 2018^[11]). The absence of moral considerations may also impact on the willingness of juries and judges to impose punishments that may be considered unfair against cartelists.

3. State of play

34. Notwithstanding the increased adoption of criminal sanctions, there is no international consensus on the criminalisation of cartels, and in particular on custodial sentences against individuals. Furthermore, as Beaton-Wells (2016, p. 4^[22]) notes, there is no uniformity in the way criminal offences have been designed and as to the extent criminal sanctions apply across jurisdictions. This may be due, among other considerations, to the fact that criminal law heavily relies on social norms, which differ between jurisdictions, as well as on the development of a strong “competition culture” within societies.

35. This Section provides an overview of criminalisation trends across jurisdictions as to the scope of criminal sanctions as well as to their enforcement (in particular of custodial sentences) against individuals.

3.1. Adoption and scope of criminal sanctions

36. There is an historic path – although with no systematic pattern – showing an increased adoption of criminal sanctions across jurisdictions.³⁰ Based on the recent OECD *Competition Trends 2020*, looking at the jurisdictions included in the “CompStats database”³¹, “*in almost half of the[se] jurisdictions (26), imposing criminal sanctions on individuals is possible*”, while approximately one-fifth of the jurisdictions (ten) “*can only impose criminal sanctions when the offense concerns bid rigging*” (OECD, 2020, p. 18^[1]).

37. Criminalisation is often limited to hard core cartels or solely to bid rigging. In fact, “rule of reason” cases are generally considered “*unsuitable for criminal prosecution*” (Kovacic, 2016^[23]), as applying criminalisation to such cases would risk lowering the standard for incarceration compared to other criminal statutes/laws (Sokol, 2019, p. 1546^[24]).³²

38. While the US criminal enforcement system remains “*an indispensable point of reference*” for other jurisdictions (Kovacic, 2016^[23]), criminalisation of anti-competitive conduct has historic roots in Europe as well.

39. Jurisdictions that criminalised hard core cartels include, among others, Australia, Brazil, Canada,³³ Chile, Denmark, Estonia, France, Greece, Ireland³⁴, Israel, Japan, Korea, Mexico, New Zealand³⁵, Norway, Oman, the Philippines, Romania, Russian Federation, Slovak Republic, Slovenia, South Africa, the United Kingdom, and the United States³⁶.

Box 2. History of adoption and scope of antitrust criminal offences in the United States and the United Kingdom

The United States

In the United States, cartels historically qualified as misdemeanours under the Sherman Act of 1890, punishable with up to one year of imprisonment. Cartels are also treated as criminal offences under several State laws.

Pursuant to the Antitrust Procedures and Penalties Act, in 1974 criminal violations of the Sherman Act became felonies and could be sanctioned with a maximum of three years of imprisonment. Fine levels were initially set at USD 1 million for corporations and at USD 100 000 for individuals. These statutory fines were increased gradually in 1984 and 1990.

In 2004, the Antitrust Criminal Penalty Enhancement and Reform Act significantly raised the maximum criminal sanctions for Sherman Act violations by increasing the statutory maximum corporate fine to USD 100 million (approximately EUR 93 million), the statutory maximum individual fine to USD 1 million (approximately EUR 930 000), and the maximum jail time to ten years.

The United Kingdom

In the United Kingdom, criminalisation of cartels was introduced under the Enterprise Act 2002. Section 188 of the Enterprise Act 2002 prohibits as a criminal offence an agreement by an individual with one (or more) other person(s) “*to make or implement, or to cause to be made or implemented, arrangements*” relating to at least two undertakings involving price fixing, market sharing, limitation of production or supply, or bid rigging.

Offenders of a criminal cartel may be imprisoned for up to five years and/or receive an unlimited fine (Section 190 of the Enterprise Act 2002). In addition to criminal penalties, criminal cartel offenders may be disqualified from acting as a company director for up to 15 years under Section 9A of the Company Directors Disqualification Act 1986.

Sources:

For a history of US criminal antitrust enforcement, *ex multis*, (Werden, 2009^[5]) (Sokol, 2019^[24]) (Kovacic, 2016^[23]).

(Stephan, 2008^[25])

Hammond, A. and R. Penrose, *The proposed Criminalisation of cartels in the UK. A report prepared for the Office of Fair Trading* (November 2001) [2002] UKCLR 97.

40. In other jurisdictions, the scope of criminalisation is limited to bid rigging. These include, for example, Austria, Belgium, Finland, Germany, Hungary, Italy, Poland, Portugal, and Turkey. In some instances, bid rigging is enshrined in the national criminal laws and pre-dates the adoption of competition laws.

Box 3. Bid rigging as criminal offence in Germany and Italy

Germany

Bid rigging is a criminal offence under Section 298 of the German Criminal Code, stating that “any person that, in connection with an invitation to tender relating to goods or services, makes an offer based on an unlawful agreement whose purpose is to cause the organiser to accept a specific offer incurs a penalty of imprisonment for a term not exceeding five years or a fine”.

Italy

Bid rigging is a criminal offence under Article 353 of the Italian Criminal Code, stating that “any person that, by means of violence or threat, gifts, promises, collusion or other fraudulent means, prevents or disrupts the fair course of a public tender, or prevents bidders from competing in it, incurs a penalty of imprisonment between six months and five years and a fine”.

Anti-competitive conduct may also qualify as “fraud” under Article 640 of the Italian Criminal Code prescribing that “any person who uses deception or fraudulent conduct to induce someone into error to obtain an illegitimate profit, to the detriment of others, incurs a penalty of imprisonment between six months and three years and a fine”.

It was noted (Pedersoli, 2018^[26]) that, following the detection of a cartel, public prosecutors often qualify bid rigging as an offence committed by a criminal association pursuant to Article 416 of the Italian Criminal Code. In such cases, the criminal conduct can also be ascribed to the company involved.

41. Finally, administrative systems are not entirely exempted from the criminalisation debate. In fact, even in administrative systems at EU level and in EU Member States, antitrust fines are deemed of *de facto* criminal nature by the European Court of Human Rights under Article 6(1) of the European Convention on Human Rights (ECHR), which prescribes the right to a fair trial. The “criminal” nature of antitrust fines has raised questions as to whether the current model of enforcement at EU level providing for an administrative body with enforcement and adjudicative functions is adequate to ensure a fair trial.³⁷ A parallel debate took place in Canada – where however cartels and bid rigging are considered criminal offences – with regard to the constitutionality of administrative monetary penalties (Ducci, 2018^[11]).³⁸

3.2. Statutory penalties

42. Statutory criminal penalties against individuals may include both monetary fines and custodial sentences. Jurisdictions with substantial fines and/or jail time prescribed in the laws include, among others, Australia, Brazil, Canada, Greece, Ireland, Israel, Japan, Mexico, South Africa, and the United States.

- In Australia, cartelists may be sanctioned to up to ten years of jail time and/or to a fine of up to 2 000 penalty units (corresponding to AUD 420 000, approximately EUR 237 000).³⁹
- In Brazil, cartelists may be sentenced to jail time between two and five years, which can be longer in case of aggravating circumstances.⁴⁰ Moreover, fines against individuals may be imposed in both criminal and administrative cases.

- In Canada, in 2009 the maximum jail time for cartelists was increased from five to 14 years and the maximum fine was increased from CAD 10 million (approximately EUR 6.6 million) to CAD 25 million (approximately EUR 16.4 million).⁴¹
- In Greece, cartelists may be subject to prison sentences from a minimum of two years up to five years, and fines.⁴²
- In Ireland, individual managers or directors convicted for hard core cartel offences can be subject to a maximum of ten years imprisonment (or up to six months of imprisonment in case of summary prosecution) and fines.⁴³
- In Israel, custodial sentences against cartelists can reach up to three or five years (in case of aggravating circumstances).⁴⁴
- In Japan, in 2009 the maximum term of imprisonment for cartelists was increased from three to five years.⁴⁵
- In Mexico, antitrust criminal offences can be sanctioned with five to ten years imprisonment and with fines.⁴⁶
- In South Africa, cartelists can be sanctioned with imprisonment up to ten years and/or with fines of up to ZAR 500 000 (approximately EUR 25 000).⁴⁷
- In the United States, in 2004 the maximum jail term was increased from three to ten years and the maximum fines from USD 350 000 (approximately EUR 324 000) to USD 1 million (approximately EUR 930 000).⁴⁸

43. As mentioned in 1.2, some jurisdictions (e.g. Australia, Canada, Chile, Lithuania, Mexico, New Zealand, Russian Federation, Sweden, and the United Kingdom) may also prescribe other/ancillary sanctions against individuals such as director disqualifications.⁴⁹ For instance, in the United Kingdom, the Competition and Markets Authority (CMA) has the power to seek Competition Disqualification Orders (CDOs) against company directors for up to 15 years.⁵⁰ Moreover, additional consequences can result from criminal convictions such as in Canada, where it seems that individuals convicted for violations of Sections 45 and 47 of the *Competition Act* must wait for ten years after the sentence has expired before being able to apply for a “record suspension” (i.e. a pardon), affecting their ability to travel to certain countries (Norton Rose Fulbright, 2016, pp. 22-23^[27]). These ancillary sanctions against individuals are not discussed further in the paper.

3.3. Actual enforcement

44. As noted in 3.1, the *OECD Competition Trends 2020* reported that imposing criminal sanctions on individuals is possible in 26 out of the 55 “CompStats jurisdictions” and another ten jurisdictions can impose criminal sanctions (only) for bid rigging infringements. As to actual enforcement, the *OECD Competition Trends 2020* reported that “while imprisonment of individuals participating in a cartel agreement is not yet a widespread practice, the data collected from 55 jurisdictions in CompStats highlighted a growing trend for this type of sanction over the last four years: the number of cartel cases for which a prison sentence was imposed, often together with other sanctions, increased from 7 cases in 2015 to 49 in 2018” (OECD, 2020, pp. 61-62^[1]). Moreover, looking at global enforcement until July 2016, Connor (2016, p. 7^[18]) noted that “more than a thousand cartel managers have been held liable for price fixing ... by 38 jurisdictions worldwide. ... Fines or mandatory restitution

were imposed on 37% of all suspects (and for about half was the sole punishment imposed); about 26% were imprisoned.”

45. In Brazil, criminal prosecution of cartels reached its peak in the last ten years. In 2015, over 300 individuals were facing criminal prosecution for antitrust offences (Calliari, 2015^[28]). In Russia, criminal liability for antitrust offences is effectively enforced: between January and February 2020, Russian courts have handed down three judgments against antitrust infringements, sentencing individuals to multiple years of imprisonment (K&L Gates, 2020^[29]).⁵¹ In the United States, criminal antitrust enforcement remains a strong feature of the overall enforcement system. The DoJ publishes yearly charts on criminal enforcement trends both against companies and individuals. According to these charts, the number of individuals charged in the last two years (2017-2018) dropped from 118 to 55 compared to 2015-2016.⁵² Focussing on jail time, the average prison sentences imposed in the United States amounted to 19 months in the 2010-2018 period, and to 20 months in the 2000-2009 period.

46. That said, it cannot be disregarded that certain jurisdictions with criminal antitrust regimes lack robust criminal enforcement, with imprisonment imposed only in a handful of jurisdictions and in very few cases. For instance:

- In Australia, it took almost eight years from the introduction of criminalisation in 2009 to reach the first criminal conviction (against a company).⁵³
- In Canada, custodial sentences have been imposed in a limited number of cases, with only 11 individuals sentenced for cartel offences between 1998 and 2008, of which only two were sentenced to jail time (Ducci, 2018^[11]), while in most of the cases courts have used probation and non-custodial sentences (e.g. community service).⁵⁴ It must be noted that, in 2012, through amendments to the criminal code, Canada limited the application of conditional sentences (e.g. house arrest) as an alternative to jail time for parties convicted for price fixing, bid rigging or deceptive marketing (OECD, 2019, p. 70^[17]).
- In France, it seems that criminal convictions against individual antitrust offenders mostly resulted in fines or suspended custodial sentences (Viros, 2016, pp. 25-26^[30]).
- In Ireland, the first criminal conviction and the first custodial sentence for price fixing were imposed in 2006.⁵⁵ To date, it seems that criminal convictions have only been secured in four cartel cases against a total of 18 individuals, and that most of these convictions resulted in suspended jail time and fines.⁵⁶
- In the United Kingdom, it seems that jail time has been imposed so far only in two cases and as a result of guilty pleas: the *Marine Hose* case (which remains a unique case because the individual had pleaded guilty in the United States, see Box 10) and the *Galvanised Steel Tanks* case (against one director who pleaded guilty before trial).

47. That said, a word of caution must be given here. Data on actual enforcement appear very difficult to collect, in particular in those jurisdictions with decentralised enforcement.

4. Implications of introducing criminal enforcement

48. If a jurisdiction opts for criminalising cartels, and in particular for introducing sanctions against individuals, there are several institutional and procedural considerations that should be carefully assessed.

49. Moreover, with criminal and administrative/civil enforcement in place in parallel, competition agencies' (as well as other relevant stakeholders') decisions on whether and how to prosecute an antitrust infringement as a criminal offence are based on a number of factors (and often not on strict criteria in the law).⁵⁷ Such decisions have implications as to allocation of resources, in particular when – as often it is the case – criminal prosecutions of individuals are not seen as an alternative to pursuing administrative/civil actions against companies, but rather as a parallel track.

50. This Section illustrates the main features of antitrust criminal enforcement systems and the institutional and procedural adjustments required if criminalisation is introduced in administrative and civil enforcement regimes.

4.1. Defining criminal offences

51. When introducing criminal sanctions, a proper definition of the antitrust offences deemed criminal is essential. Otherwise, criminal sanctions may lead to excessive deterrence and, more importantly, may be unlawful under criminal law principles (OECD, 2003, pp. 22-23^[9]). The proper definition of the criminal offence can indeed affect the effectiveness of a criminal sanctions system.

52. The two main options available are a) to use the definition of cartels in the competition laws; or b) to adopt a separate, and perhaps more narrow definition (see e.g. the United Kingdom). In the 2005 OECD *Report on the implementation of the 1998 Council Recommendation on Hard Core Cartels* it was observed that “Members ... have closely examined this question and concluded that the definition of a criminal cartel offence should be different from the general prohibition of restrictive agreements in the competition act.” This conclusion was motivated by the need to provide legal certainty and to prevent a risk of excessive deterrent effects (OECD, 2005, pp. 28-29^[2]).

4.2. Individuals that can be held liable

53. Another preliminary issue concerns identifying individuals within companies that can be held criminally liable for antitrust offences.

54. To have effective enforcement and to enhance deterrence, as Professor First stated, “one shall understand who participates in cartels” (Norton Rose Fulbright, 2016, pp. 30-31^[27]). In fact, it seems unlikely that cartels are currently organised at institutional level (i.e. as result of established company policies, formally authorised at executive level), at least in Europe and the United States (Stephan and Nikpay, 2015^[14]). Empirical data as to which individuals within a company are antitrust offenders are very thin. In the United States, Professor First looked at the DoJ press releases between March 2014 and March 2016 and found that individuals prosecuted for criminal offences were mostly “high-level corporate actors” (Norton Rose Fulbright, 2016, pp. 30-31^[27]). Although it has been observed that most infringements involve – in different forms – senior management (Wils, 2013^[3]),⁵⁸ further empirical evidence (Stephan and Nikpay, 2015^[14]) based on international cartels prosecuted in either or both of Europe and the United States between 1998 and 2009 suggests that cartels are organised by “small groups of employees” active at various levels of companies, having in common the power to take decisions on – at least some aspects of – price, output or geographic sales. However, this outcome may be the result of practical evidence considerations, making cases against “implementers” of cartels readily prosecutable.

55. Jurisdictions have taken different approaches as to the conditions required for individuals to be held criminally liable for cartels. In the United States, employees, managers, directors and officers of companies can be held individually liable for antitrust violations either a) if directly involved in the infringement;⁵⁹ or b) (independently of and perhaps in addition to exposure for the cartel offence) if they engage in concealing or destroying evidence relevant to the cartel investigation (i.e. “obstruction of justice”). In France, Article L. 420-6 of the Commercial Code prescribes liability to individuals that a) have been personally involved in the anti-competitive conduct (so not to legal representatives); b) who have been active in the infringement with a decisive role; and c) who did so “fraudulently” (Viros, 2016, pp. 24-27^[30]). In South Africa, all directors and individuals with management authority can be prosecuted (Norton Rose Fulbright, 2016, pp. 27-28^[27]; Morphet and Hlatshwayo, 2017^[31]).

4.3. Due process challenges

56. Any enforcement action shall respect due process rights, irrespectively of whether criminal or administrative/civil, or whether it is against companies or individuals. Even in the absence of criminal sanctions against individuals, due process remains a focal point of antitrust proceedings.⁶⁰ That said, it cannot be disregarded that criminal antitrust sanctions trigger additional due process requirements, which may simply result from applying general criminal procedure rules – with stronger safeguards to protect rights of defence and avoid false convictions – to antitrust enforcement. Safeguards already in place for administrative sanctions may not be sufficient, particularly when custodial sentences may be imposed.⁶¹ These additional safeguards increase costs of investigating and prosecuting such cases.

57. A well-recognised implication of criminalisation is the need to separate investigative/prosecutorial functions from adjudicative/decision-making functions, not limiting this separation to appeals of competition agencies’ decisions. So “third parties” are necessarily involved under the general criminal law principle of *nemo iudex in causa sua* (i.e. nobody should be a judge in his own case). While the clear objective of this separation is to protect due process rights, it remains debatable whether the separation of functions increases costs.⁶²

58. Other key criminal principles broadly recognised are the presumption of innocence and the right against self-incrimination.⁶³ These may impact on the competition agencies’ information gathering process and may have spill-over effects on administrative proceedings. For instance, since rights of defence may differ between criminal and administrative proceedings, it may be difficult for competition agencies to initiate a criminal investigation at a later stage, building on an earlier administrative investigation into the same conduct, because the (higher) due process standards for a criminal investigation may not have been sufficiently granted in the (ongoing) administrative proceedings. In addition, an individual could refuse to provide incriminating evidence against a company in the context of an administrative investigation, if concerned that the same evidence may be used against herself in criminal proceedings. This could render oral testimony less effective. Moreover, reinforced rights of defence may result in individuals having (more) timely access to the investigation file. For instance, in Canada individuals charged with criminal offences are entitled to the “fruits of the investigation” in order to make full answer and defence at the time charges are laid. Finally, in some jurisdictions, individuals that can be held criminally liable may have to seek or may be required to seek separate legal representation from their companies due to the

fact that their respective positions may conflict or due to the risk of self-incrimination (Norton Rose Fulbright, 2016, p. 13_[27]).⁶⁴

4.4. Statutes of limitations

59. A statute of limitations restricts the time within which legal proceedings may be brought and it usually applies across crimes. For instance, in the United States, the statute of limitations for most criminal conspiracies, including antitrust conspiracies, is five years⁶⁵ and, in essence, it does not start to run until the purpose of the conspiracy has been achieved or the conspiracy has been abandoned. That said, questions may arise as to what is required for the statute to begin to run and the related burden of proof.⁶⁶

60. The rules on the statute of limitations can affect the interplay between criminal and administrative antitrust proceedings. These rules are particularly relevant when competition agencies refer the case to public prosecutors only once an infringement decision has been adopted. Therefore, safeguards may be necessary to preserve the effectiveness of criminal enforcement, in particular in complex antitrust cases. In France, for instance, investigatory actions in criminal proceedings interrupt the limitation period for the administrative proceedings and vice versa (Viros, 2016, p. 26_[30]), while in Brazil the limitation period is suspended if a leniency agreement (see 4.7.1 below) is executed (OECD, 2018_[32]).⁶⁷

4.5. What is required to prove a criminal offence

4.5.1. The standard of proof

61. In civil or administrative regimes, a “balance of probability test” with strong and convincing evidence (or similar standards) can be deemed sufficient to impose sanctions in antitrust cases. In many jurisdictions, however, criminal law principles may require prosecutors to meet a higher standard (e.g. a “beyond reasonable doubt” standard).

62. Whelan (2014_[33]) argues that in some jurisdictions (especially of civil law tradition), the standard applicable to administrative cases is not defined by law and that – in practice – the standard of proof imposed on competition agencies even in administrative regimes remains high. Moreover, the *per se* / by object prohibition of cartels seems to attenuate the burden on criminal enforcement authorities, at least with regard to the task of proving anti-competitive effects on the market beyond a reasonable doubt (OECD, 2019, p. 15_[17]). It is worth noting that a recent *certiorari* petition asked the US Supreme Court whether the *per se* rule should apply to criminal cases, and in particular if it “violates the constitutional prohibition against instructing juries that certain facts presumptively establish an element of crime”. The US Supreme Court denied the petition in January 2020.⁶⁸

4.5.2. Evidence of the infringement

63. For any cartel agreement, direct evidence has the highest probative value and is often collected through dawn raids and leniency applications (OECD, 2006_[34]). In cases where the proof of collusion is based on indirect evidence (also called “circumstantial evidence”), such as communication or economic evidence, the standard of proof may not be easily met and may increase the costs of prosecuting antitrust offences as criminal cases.

64. In the United States, with the exception of a few early cases under the Sherman Act,⁶⁹ criminal convictions have been largely based on direct evidence (mainly as result of leniency applications), with most convictions closed before trial, through plea agreements

(OECD, 2006, pp. 39-41^[34]) (see 4.7.4 below). In the context of the 2006 OECD Roundtable on *Prosecuting Cartels without Direct Evidence*, the DoJ noted that it usually proceeds with a prosecution only when there is direct evidence of an unlawful agreement and that this is important also to avoid errors such as prosecuting practices which do not constitute a cartel (OECD, 2006, p. 174 and 197^[34]). Similarly in Canada, only in some early cases were criminal convictions (with minimal fines) based solely on circumstantial evidence.⁷⁰ In 1980, the Supreme Court of Canada in *Atlantic Sugar*⁷¹ ruled that a tacit agreement between the defendants with no evidence of communication did not constitute a violation of the applicable criminal law, which led to a subsequent amendment of the Competition Act in 1986 (OECD, 2006, pp. 39-41^[34]).

4.5.3. *Mens rea*

65. Another question that arises in criminal enforcement is whether and how to prove *mens rea* (criminal intent), which increases the burden to prove an antitrust offence.⁷² Indeed, criminal intent is one of the distinguishing characteristics of criminal law and, as Wils (2005^[8]) notes, a guilty state of mind, and not mere negligence, is usually required to commit a criminal offence.

66. It appears that there are some jurisdictions requiring a strict criminality test with proof of fraud or intent to deceive (e.g. France⁷³). Such strict criminality tests may further increase the burden to obtain convictions. Hence, in relation to France, Viros (2016, pp. 24-27^[30]) observed that criminal convictions have been mainly limited to bid rigging combined with other counts.

67. On the other hand, other jurisdictions do not strictly require proof of *mens rea*⁷⁴ (e.g. Denmark, Estonia, Ireland, Slovenia, and the United Kingdom). In the United States, under the Sherman Act, “*the perpetrator’s knowledge of the anticipated consequences* [of cartel activity] *is a sufficient predicate for a finding of criminal intent.*”⁷⁵

68. It is worth mentioning that in the United Kingdom a “dishonesty” requirement – corresponding (at least partially) to a *mens rea* requirement⁷⁶ – was originally prescribed under Section 199 of the UK Enterprise Act 2002. This “dishonesty” requirement resulted in serious obstacles for the Office of Fair Trading (OFT, the CMA predecessor) and prosecutors in pursuing criminal cases because it was particularly difficult to prove in jury trials. The “dishonesty” requirement was subsequently lifted by the Enterprise and Regulatory Reform Act (2013), s. 47 (Norton Rose Fulbright, 2016, p. 14^[27]).

69. Finally, looking ahead, the use of algorithms may facilitate tacit collusion. This may decrease the “need” to engage in criminal conduct with the required state of mind, making it harder to capture such phenomena in a criminal enforcement regime (Ginsburg and Cheng, 2019, pp. 12-13^[35]).

4.6. Investigative and enforcement powers

70. In the context of criminal enforcement, depending on their competences and institutional settings, competition agencies engage in a reinforced co-operation with a number of different stakeholders within their own jurisdictions, including police officials, anti-corruption authorities, public procurement officers, prosecution authorities, and judges.⁷⁷

71. This sub-section focuses on the investigative powers available to competition agencies in criminal proceedings and on their co-operation with the judiciary (both prosecutors and courts). It does not address in detail the forms of co-operation between

competition agencies and public procurement officers. The OECD 2012 *Recommendation of the Council on Fighting Bid Rigging in Public Procurement* and 2009 *Guidelines for Fighting Bid Rigging in Public Procurement* provide extensive guidance in this regard.⁷⁸ Moreover, the need to engage in forms of internal co-operation between these authorities, in particular through formal evidence sharing mechanisms, was highlighted in the OECD 2010 Policy Roundtable on *Collusion and Corruption in Public Procurement*⁷⁹ and is addressed extensively in the Chapter on Relationships between Competition Agencies and Public Procurement Bodies of the 2015 ICN *Anti-Cartel Enforcement Manual*.⁸⁰ An example for improved co-ordination and co-operation between agencies that have parallel enforcement powers against bid rigging in public procurement is the Procurement Collusion Strike Force in the United States.

Box 4. The Procurement Collusion Strike Force in the United States

In November 2019, the DoJ announced the establishment of the Procurement Collusion Strike Force (PCSF). The PCSF is an interagency partnership to combat collusion affecting public procurement in the United States, and it is a good example of institutional co-operation between different agencies. It comprises the DoJ antitrust division, multiple US Attorneys' Offices, the Federal Bureau of Investigation (FBI), and the Inspectors General for multiple Federal agencies. Moreover, it is based on a decentralised (district-based) model, which allows tailoring the focus on specific contractors and government agencies in a region.

The PCSF has two main objectives: a) to deter and prevent antitrust and related crimes in public procurement, through outreach, training, assistance with procurement processes and co-operation in conducting investigations; and b) to detect, investigate, and prosecute crimes through better co-ordination and partnership in the law enforcement and inspector general communities.

Sources:

<https://www.justice.gov/procurement-collusion-strike-force>.

DoJ (2019), "Assistant Attorney General Makan Delrahim Delivers Remarks at the Procurement Collusion Strike Force Press Conference", 5 November 2019, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-procurement-collusion-strike>.

DoJ (2019), "Deputy Attorney General Jeffrey A. Rosen Delivers Remarks at the Procurement Collusion Strike Force Press Conference", 5 November 2019, <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-remarks-procurement-collusion-strike-force>.

4.6.1. Detection tools and investigative powers

72. Even though the mere introduction of criminal sanctions could increase the perception of likelihood of detection and action because it would be seen as an increased commitment of time and resources to prosecute this conduct (Beaton-Wells and Parker, 2013_[20]), the actual likelihood of detection (and enforcement) remains a key factor to ensure deterrence.⁸¹ In other words, having (even severe) criminal sanctions in place may not be sufficient if they are not enforced.

73. Criminal laws typically confer strong investigative powers to enforcement authorities. Wils (2005, p. 12_[8]) notes that, in the United States, the DoJ "*can make use of a full arsenal of criminal investigatory powers*". However, competition authorities' powers in criminal investigations vary significantly across jurisdictions and they are ultimately influenced by the competences assigned to competition agencies in the respective criminal enforcement frameworks. In some cases, authorities' access to certain investigative

powers/tools may be subject to the “qualification” of the crime or to minimum or maximum statutory terms of imprisonment under country-specific criminal laws.

74. In most cases, criminalisation would require competition agencies’ powers to be reinforced in order to investigate criminal conduct. Increased investigative powers often include the powers to search and seizure, to search private premises and to arrest and detain individuals. For instance, in Australia, criminalisation came with an increased investigative power to the Australian Competition and Consumer Commission (ACCC) in relation to search warrants, telephone interception and surveillance (Samuel, 2009, p. 3_[36]). In Colombia, officials of the Superintendence of Industry and Commerce (SIC) were assigned judicial police powers by the Attorney General’s Office to support prosecutors investigating bid rigging (Bacca Medina, 2017, p. 140_[37]). In Japan, a Criminal Investigation Department within the Japan Fair Trade Commission (JFTC) Investigation Bureau was established in 2006. In the United Kingdom, with criminalisation the OFT was granted the power of covert surveillance for criminal offences.⁸²

75. These powers may differ depending on whether the investigated conduct may be deemed a criminal offence. For instance, in response to the OECD 2017 Survey on *Investigative Powers*, three out of six competition agencies reporting to have wiretap authority specified that they can use this tool only in criminal investigations (OECD, 2019, p. 47_[17]). In other words, increased investigative powers for competition agencies may be strictly limited to investigations into criminal conduct, while “more traditional” detection tools such as screening mechanisms and access to databases of public tenders are equally available to both administrative and criminal investigations. Such screening initiatives include, among others, the Korean Bid Rigging Indicator Analysis System (BRIAS), Brazil’s screening system through data-mining (“Cerebro Project”), the United Kingdom’s new screening tool for procurers, and Russia’s “Big Digital Cat” web service.⁸³

76. Increased investigative powers go hand-in-hand with the need to meet a high(er) standard of proof. Moreover, these powers are typically accompanied by safeguards to ensure that the rights of defence and other rights of individuals (e.g. the right to privacy) are not unduly affected in the course of the investigation. For example, the power to search private premises may require reasonable grounds and be subject to prior approval by a judicial authority.⁸⁴

77. Co-operation mechanisms with police officials for dawn raids are present in several jurisdictions, already in the context of administrative cases. Besides dawn raids, broader co-operation with police officials is observed in many jurisdictions. For instance, Ireland ensures that experienced officials from the Garda Bureau of Fraud Investigation are seconded to the Irish Competition Authority. In Italy, the Italian Competition Authority (AGCM) and the Guardia di Finanza (i.e. the financial police) entered into an agreement to strengthen their co-operation and to regulate the exchange of information and documents.⁸⁵ In the United States, the DoJ works closely with the Federal Bureau of Investigation (FBI). These co-operation mechanisms may be strengthened in the context of criminal investigations.

78. Finally, granting competition agencies access to evidence collected by public prosecutors can indirectly increase the power to gather evidence by competition agencies as public prosecutors’ investigative powers often exceed the means that competition agencies can employ such as electronic eavesdropping. This is already the case in some administrative jurisdictions. For instance, in France, the competition agency can access the criminal investigation file.⁸⁶ In such cases, safeguards may need to be adopted to ensure that the investigated parties also have access to shared evidence, in particular when individuals are subject to criminal investigation.⁸⁷

Box 5. Access by competition agencies to evidence gathered by other authorities

EU

On 27 April 2017, the European Court of Justice (Court) ruled that in cartel cases the European Commission can rely on evidence that it obtains from non-competition authorities in EU Member States. In particular, the appellants challenged the admissibility of evidence the European Commission obtained from Guardia di Finanza (i.e. the Italian financial police), gathered as part of a criminal tax investigation. According to the Court, there is no general rule under EU law “preventing the Commission from using information transmitted by national authorities other than the Member States’ competition authorities on the sole ground that that information was obtained for other purposes”.

Further, the Court rejected the appellants’ argument that the European Commission violated their rights of defence by not informing them of the transmission of such evidence prior to the statement of objections.

The Netherlands

On 9 July 2015, the Dutch Court of Appeal (CBb) overturned two judgments of the Rotterdam district court concerning two cases of tendering agreements between two construction companies in Limburg and customer allocation agreements between waste collectors in the port of Rotterdam. The CBb ruled that – even though the Dutch Competition Authority (ACM) does not have the right to place wiretaps – it is allowed to use in its administrative proceedings data from wiretaps collected by the Public Prosecution Service in the context of a criminal law investigation.

Sources:

Case C-469/15 P, *FSL Holdings NV, Firma Léon Van Parys NV, and Pacific Fruit Company Italy SpA (“Pacific Fruit Group”) v. European Commission*, ECLI:EU:C:2017:308, paras 32-50.

(OECD, 2015^[38])

Briggs, M. (2015), *Dutch competition authority can use prosecutor’s wiretaps, court says*, <https://globalcompetitionreview.com/article/1062699/dutch-competition-authority-can-use-prosecutor%E2%80%99s-wiretaps-court-says>

CMS (2015), *Dutch Court of Appeal allows the use of wiretaps by competition watchdog*, https://www.cms-lawnow.com/ealerts/2015/07/dutch-court-of-appeal-allows-the-use-of-wiretaps-by-competition-watchdog?cc_lang=fr

4.6.2. Institutional design and co-operation with the judiciary

79. Detecting and investigating criminal violations of competition laws is just a first step. In order to ensure deterrence, such violations should be effectively prosecuted.

80. The literature identifies three main institutional models: a) a bifurcated judicial model in which specialised enforcement agencies bring formal charges before courts (e.g. the United States); b) a bifurcated agency model, in which specialised enforcement agencies bring formal charges before separate adjudicative agencies (e.g. Canada, with the Canadian Competition Tribunal); and c) an integrated agency model, with a specialised agency undertaking investigative, enforcement and adjudicative functions (the model generally adopted in administrative systems) (Trebilcock and Iacobucci, 2010, pp. 459-464^[39]). As to investigation and prosecution of criminal offences, the institutional design can take various forms ranging from a complete separation of competition agencies and

criminal prosecutors to a formal interdependence between the two authorities, either with separate or concurrent competences (Calliari, 2015^[28]).

81. The powers conferred on competition agencies as well as the degree of co-operation with prosecution authorities are shaped in different ways across jurisdictions. For example:

- In Australia, the ACCC created a serious cartel conduct unit working closely with the Office of the Commonwealth Director of Public Prosecutions (CDPP). The CDPP is independent from the ACCC and considers whether to initiate prosecution based on the Prosecution Policy of the Commonwealth (OECD, 2018, pp. 15-17^[40]).⁸⁸
- In Brazil, Federal and State prosecutors co-operate with the Brazilian Competition Authority (CADE) in cartel prosecutions, under the Brazilian Competition Policy System (BCPS), an institutionalised co-operation framework (OECD, 2019^[41]).
- In Colombia, the SIC and the Office of the Attorney General entered into an inter-administrative agreement to reinforce joint initiatives against bid rigging.⁸⁹
- In Denmark, the Danish Competition Council refers cases to the State Prosecutor for Serious Economic and International Crime (SEIC). In 2018, nine cases were referred directly to SEIC for criminal investigation (OECD, 2019, p. 3^[42]).
- In Greece, the Hellenic Competition Commission (HCC) is required to report competition infringements to the prosecutor within no more than ten days of issuing an infringement decision.⁹⁰
- In Ireland, following investigations by the Irish Competition Authority, charges are brought by the independent office of the Director of Public Prosecutions (DPP).
- In Israel, the Israel Antitrust Authority (IAA) has the power to prosecute criminal cases (OECD, 2018^[43]).
- In Italy, in January 2018, the Italian Competition Authority (AGCM) signed two Memoranda of Understanding with the Public Prosecutors of Milan and Rome. These memoranda set up an operational framework for the exchange of information within the respective areas of responsibility. In particular, the AGCM agreed to promptly transmit to the Public Prosecutors information and documentation they request, whenever criminal conduct occurs, with the possibility of criminal investigations to be launched in parallel with the administrative proceedings.⁹¹
- In Japan, the JFTC can file criminal charges with the Public Prosecutor-General.
- In Korea, the Korean Fair Trade Commission (KFTC) can file complaints with the Prosecutors' Office (PO).
- In the United Kingdom, the CMA – with concurrent jurisdiction on criminal offences – entered into two Memoranda of Understanding with the Serious Fraud Office (SFO, which has concurrent jurisdiction on prosecuting the criminal cartel offences in England and Wales, and in Northern Ireland) and the Crown Office and the Procurator Fiscal Service (COPFS, which can investigate and prosecute criminal cartel offences in Scotland), setting out the basis on which the authorities co-operate.⁹²

82. It is argued (Barnett, 2006^[6]) that, having the competition agencies in charge of investigating and prosecuting antitrust criminal offences – also in conjunction with other related crimes such as in the United States – may ensure that such cases are prioritised and get sufficient attention.⁹³ However, in some jurisdictions, there are constitutional or other restrictions in the legal framework preventing administrative bodies such as competition agencies from exercising criminal enforcement powers. In these jurisdictions, even though the enforcement of criminal law is entrusted to specific entities such as public prosecutors, competition agencies’ co-operation with public prosecutors (with different means and degree of involvement) is widely adopted: in some jurisdictions (e.g. France) the authority vested with criminal investigation powers may formally request the competition agency’s assistance in the criminal investigation. Moreover, having competition agencies in charge of investigating and prosecuting antitrust criminal offences often requires that they are conferred more powers and granted more resources (e.g. to ensure a widespread presence in their own jurisdiction). At the same time, competition authorities may not be technically prepared to exercise prosecutorial functions before criminal courts.

83. In many jurisdictions where prosecution authorities are in charge of prosecuting antitrust criminal offences, these authorities are decentralised and not specialised. Criminal prosecutors may not have sufficient expertise or a particular desire to prosecute antitrust cases. This may result in under-enforcement, especially in jurisdictions with prosecutorial discretion. That said, there are mechanisms to mitigate these risks. Firstly, the establishment of a centralised prosecutor dedicated to antitrust cases may address these issues (Wagner-von Papp, 2016, pp. 20-21^[44]). Secondly, the involvement of a competition agency in criminal trials may mitigate the risk linked to prosecution authorities’ insufficient degree of expertise and it could also have the function of protecting the effectiveness of its leniency programme (see 4.7 below). In practice, it was noted (Wagner-von Papp, 2016^[44]) that – with regard to France and Germany – there has been “*very little involvement*” of competition agencies in the actual prosecution, compared – for instance – to the investigation and prosecution of tax crimes in Germany, where tax authorities and public prosecutors have concurrent jurisdiction and, even when the public prosecutors take the lead, the tax authorities have information and participation rights. Thirdly, the limited interest/incentive for prosecution authorities to prosecute antitrust offences may be partially mitigated by the fact that often these crimes – for instance bid rigging cases – could be accompanied by other charges such as money laundering, false statements and fraud.⁹⁴

Box 6. The “Car Wash” case in Brazil

The “Car Wash” (“Lava-Jato” in Portuguese) case encompasses a set of investigations initiated in 2013. It addresses bid rigging, corruption and money laundering, targeting financial operators, politicians and company officials in the energy (Petrobras) and construction industries.

The initial investigation focused on money laundering and possible corruption schemes, but it also suggested that several construction companies were fixing prices and dividing markets in a number of government procurements. This led to the involvement of CADE. In addition to CADE, the Public Prosecutor’s Office and the Comptroller General’s Office carried out investigations.

This investigation triggered the need to enhance co-operation between investigation bodies. To this effect, in 2013, a new Anticorruption law (Law no. 12,846 of 2013) and a new Organized Crime Law (Law no. 12,850 of 2013) were adopted. Both laws introduced or enhanced leniency programmes, largely inspired by CADE’s leniency programme. As a result, the new Organized Crime Law led the Federal Public Prosecution Office to make extensive use of criminal leniency agreements in the Car Wash operation. Having multiple leniency programmes increases the need for co-operation between the competition agencies and other investigative bodies.

Source: (Burnier da Silveira and Oliveira Fernandes, 2019^[45])

84. Another key stakeholder in the judiciary are courts or juries. Indeed, as noted in 4.3, criminal enforcement requires having separate investigative/prosecutorial functions and adjudicative/decision-making functions. In many jurisdictions, criminal antitrust cases are heard by non-specialised judges, usually by ordinary criminal courts. Therefore, prosecution authorities may encounter difficulties in presenting conduct occurring in complex markets, and a non-specialised court or a jury of laypeople may not be very keen on dealing with complex economic crimes (so not only antitrust offences). This risk appears lower if criminalisation is only applied to hard core cartels, as in the United States, where these offences ultimately may be presented to a jury of laypeople.

85. To support non-specialised judges, procedural rules may allow courts to request an opinion on a specific case from the competition agency⁹⁵ or allow a competition agency to intervene as *amicus curiae* (i.e. someone permitted by the court to advise it in respect to some matter of law that directly affects the case in question). It should be noted that this instrument may not be available in jurisdictions where the competition agency has jurisdiction to prosecute criminal offences.

86. Finally, having high maximum sentences in the law may not be sufficient to guide judges or juries in their decisions. Sentencing guidelines may be a useful instrument to provide a methodology. However, this instrument is not available in all jurisdictions and, in some jurisdictions, (mandatory) guidelines may not be acceptable as they impact the judiciary’s independence. In the United States, the DoJ issued Federal Sentencing Guidelines (U.S.S.G.) in 1987 (further revised), but courts can depart from these guideline as affirmed by the US Supreme Court in *United States v. Booker*.⁹⁶

4.7. Criminalisation, leniency and other forms of co-operation

87. This sub-section focuses on leniency programmes and plea agreements, while other forms of “incentives” for companies to engage in ethical corporate behaviour and for individuals to report cartels are briefly described in the two boxes below.

Box 7. Corporate compliance programmes

It remains controversial whether the adoption of corporate compliance programmes should be a relevant factor in granting immunity or a reduction of the sanctions in either administrative or criminal enforcement systems.⁹⁷ Even though certain competition agencies and courts recognise that corporate compliance programmes may be taken into account in cartel enforcement, the effect of such programmes on sanctions differs across jurisdictions. That said, it does not seem that any jurisdiction has taken the view that having in place a compliance programme should result in an immunity from antitrust sanctions.

In 2019, the DoJ introduced a new approach to antitrust compliance programmes, rewarding and providing incentives for companies to engage in ethical corporate behaviour and it published written guidance containing the considerations weighted by the DoJ when evaluating compliance programmes in criminal investigations. Under this approach, the mere existence of corporate compliance programmes does not constitute a mitigating factor and programmes need to be evaluated. In essence, the DoJ will now assess compliance efforts in place at the time of the alleged conduct at both the charging phase and the sentencing phase. As to the charging phase, the Justice Manual was amended to allow prosecutors, subject to an assessment of the compliance programme at issue, to proceed with a Deferred Prosecution Agreement (DPA).⁹⁸ As to the sentencing phase, under the Sentencing Guidelines an “effective” compliance programme that meets the evaluation criteria can a) result in a reduction of the defendant’s culpability score; b) be relevant in determining the corporate fine; and c) be relevant for the DoJ’s probation recommendation.

Sources:

(Wils, 2013^[3]); (Geradin, 2013^[46])

(Delrahim, 2019^[47])

DoJ (2019), Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), <https://www.justice.gov/atr/page/file/1182001/download>.

Box 8. Whistle-blower systems

In the last decade, several jurisdictions adopted whistle-blower systems to allow outside informants to anonymously come forward, outside the context of leniency applications. These systems are not limited to criminal offences.

Jurisdictions with whistle-blower systems include Canada, the EU, Hungary, Korea, Romania, Spain, and the United Kingdom. In the United States, although there is no whistle-blower system applicable to antitrust criminal enforcement, it is worth noting that whistle-blowers actions under the False Claim Act (FCA), which provides rewards, have been associated with bid rigging cases involving supplies to US military bases in Korea and USAID infrastructure contracts in Egypt. Some of these systems also provide for rewards (e.g. Korea, Hungary, and the United Kingdom). Rewards (also called “bounties”) for whistle-blowers can be an effective tool to reduce costs of detection of cartels as well as to improve deterrence. Bounties in cartel cases could be paid to both companies and individuals.

According to Whelan (2014, pp. 134-136^[33]), there are two advantages of providing bounties in the context of criminalisation: a) the body exercising adjudicative functions (i.e. a judge or jury) may consider the use of bounty-seekers to be an “acceptable evil”, if such anti-competitive conduct is considered morally reprehensible; and b) the risk of facing criminal liability (including imprisonment) should refrain companies involved in cartels concerning different markets from taking turns to whistle-blow (and obtain bounties) for each cartel. However, jurisdictions may face cultural opposition, if cartels are not perceived as serious crimes. Despite these advantages, bounties should be employed with caution. Competition agencies should ensure that evidence collected in this way is corroborated by other sources. Moreover, sanctions should be put in place to deter bounty-seekers from submitting false and misleading information.

Sources:

(OECD, 2019, p. 33^[17]; OECD, 2013, p. 1^[48])

GVH, “Regular questions about the cartel informant reward”, https://www.gvh.hu/en/other/6429_en_regular_questions_about_the_cartel_informant_reward.html.

(Himes and Perez, 2019, p. 7^[49]; Zimmer, 2016, p. 32^[50])

4.7.1. The interplay between criminalisation and leniency

88. Leniency (or amnesty) programmes offer cartelists (companies and, in some cases, individuals) that self-report and hand over evidence either total immunity from fines or, in some jurisdictions, a reduction of sanctions that competition agencies would have otherwise imposed on them. They are largely employed as methods to increase detection and aim at overcoming the intrinsic secrecy of cartel conduct both in criminal and administrative regimes.⁹⁹ Moreover, leniency programmes can only work if companies and individuals perceive a risk that competition agencies would detect and establish a competition infringement without recourse to leniency. As the OECD (2019, p. 27^[17]) observed, “*discussions on leniency always recognised that leniency policies do not operate in a vacuum and need to appraise their interaction with criminal liability, settlement and early termination procedures ... as well as private damages actions*”. Therefore, it is essential to assess the relationship between criminalisation and leniency. In this regard, there is an open debate which mainly concerns whether criminalisation trends hamper or enhance the effectiveness of leniency, and in particular of administrative leniency programmes.

89. On the one hand, it is argued that “*sanctions against individuals ... can increase the effectiveness of leniency programmes as they are a powerful incentive for individuals to reveal information about existing cartels and to cooperate in investigations*” (OECD, 2005, p. 26_[2]). For example, Hammond (2010_[51]) observed that criminalisation resulted in an increase in the number of corporate immunity applications in the United States. Similarly, Brazil seems to have experienced an increased number of leniency applications, following criminalisation of its regime (Whelan, 2014, p. 137_[33]). This may reflect the inherent conflict between companies’ and individuals’ interests, with companies trying to anticipate individual leniency applications by their employees under the threat of criminal sanctions. That said, the empirical evidence supporting the view that criminal sanctions increase the number of leniency applications remains limited (Beaton-Wells, 2016, p. 6_[22]).

90. On the other hand, it is argued that, even absent any individual liability for cartel offences, competition enforcement regimes may put in place the right incentives for individuals to “blow the whistle” and co-operate with competition agencies, while – on the contrary – criminalisation may increase the efforts to conceal such conduct due to the higher risks that individuals may run, including being subject to incarceration (Whelan, 2014_[33]). In particular, it is argued that the introduction of criminalisation may have a chilling effect on leniency applications in administrative proceedings. In the context of the debate on the impact of criminal sanctions upon administrative leniency policies within the EU, Whelan (2014_[33]) observed that potential negative impacts could result from a) companies applying for leniency that care about the potential criminal consequences for their employees even in other jurisdictions; b) individuals applying for administrative leniency (on behalf of the companies) concerned about being exposed to criminal sanctions; and c) employees being exposed to criminal sanctions not willing to co-operate with their companies to gather and submit the information needed for administrative leniency applications.

91. Notwithstanding these opposite views, it cannot be discounted that the co-existence of criminalisation with administrative leniency programmes requires adjustments to provide the right incentives for individuals as well as to protect their rights. Indeed, leniency policies that are not aligned with possible parallel criminal procedures might lack effectiveness (OECD, 2019, p. 27_[17]).

92. Multi-jurisdictional criminal enforcement – or, more precisely, an insufficient harmonisation of the criminal consequences for individuals – also appears to impact leniency programmes by reducing, in the context of international cartels, the incentives to apply for administrative immunity in one jurisdiction if the same conduct can be criminally prosecuted in another jurisdiction (OECD, 2019, p. 32_[17]). For example, Ginsburg and Cheng (2019_[35]) note that “*ironically ... the global proliferation of criminal sanctions and leniency policies may have reduced the net incentive to report cartels*”. Furthermore, according to Klawiter (2019_[52]), the increased costs of obtaining leniency in multiple jurisdictions (together with the proliferation of damages actions) contributed to the recent decline of criminal enforcement in the United States.¹⁰⁰ In other words, facing criminal sanctions in some jurisdictions, companies and their employees might decide not to apply for leniency at all, and may be reluctant to co-operate even in countries where there are no criminal sanctions (OECD, 2018, p. 11_[53]).

93. Such risks for leniency applicants are further exacerbated if a case also concerns jurisdictions where a decision whether to criminally prosecute lies outside the sphere of competition agencies (see 4.6.2 above). As Beaton-Wells (2016, p. 9_[22]) notes “[*s*]uch a scenario cannot be dismissed as entirely theoretical given that international law does not recognise double jeopardy or ne bis in idem principles and it is unclear whether in such a

case authorities should or would take the prosecution of an individual in another jurisdiction into account either in deciding to prosecute or in assessing sentence".¹⁰¹ Similar concerns apply to plea agreements (see in 4.7.4 below).

4.7.2. Criminal immunity

94. To address the potential negative impact of criminalisation on administrative leniency programmes, several jurisdictions (e.g. Australia, Canada, Chile, Ireland, Mexico, the United Kingdom, and the United States) grant immunity from criminal charges to the first individual(s) reporting illegal conduct, admitting guilt and co-operating with competition agencies.¹⁰²

95. With a criminal immunity system in place, individuals would strongly co-operate and support the evidence gathering process within their companies to secure immunity (Whelan, 2014, pp. 136-137^[33]). In other words, this "dual effect" (administrative and criminal) of leniency seems instrumental to strengthen the co-operation of individuals involved in the cartel. In this regard, the EU "ECN+ Directive" states that, in principle, individual leniency applicants "*should [...] be protected from sanctions in relation to their involvement in the secret cartel covered by the application imposed by public authorities in criminal, administrative and non-criminal judicial proceedings pursuant to national laws that predominantly pursue the same objectives to those pursued by Article 101 TFEU, such as national laws on bid-rigging*".¹⁰³ In particular concerning criminal proceedings, according to the ECN+ Directive, EU Member States shall "*ensure that current and former directors, managers and other members of staff of applicants for immunity from fines to competition authorities are protected from sanctions imposed in criminal proceedings*", subject to certain conditions and active co-operation with the competent prosecuting authority.¹⁰⁴

96. Other key characteristics of a well-functioning leniency programme are transparency and predictability. In a criminalisation context, this translates into the certainty of criminal immunity for reporting individuals. An *ex ante* certainty of criminal immunity appears to ultimately require competition agencies to be in charge of prosecuting criminal cases such as in the United States, or at least having concurrent jurisdiction between the competition agency and public prosecutors such as in the United Kingdom. As affirmed in the EU ECN+ Directive, "*[l]egal uncertainty as to whether current and former directors, managers and other members of staff of applicants for immunity are shielded from individual sanctions such as fines, disqualification or imprisonment, could prevent potential applicants from applying for leniency*".¹⁰⁵ Therefore, discretion may not be sufficient to provide the right incentives to individuals – who generally have access to the information needed for a successful leniency application – to report cartels and to co-operate with their companies.¹⁰⁶ Indeed, for instance, in 2018, the Russian competition agency (FAS) noted that, with criminal immunity of individuals being within the competence of law enforcement bodies, it cannot relieve first leniency applicants and this may discourage leniency applicants (OECD, 2018, pp. 5-6^[54]).

97. Finally, criminal laws may also have general leniency provisions applicable to individuals helping to uncover crimes that could apply to antitrust offences. However, their application may be limited to certain specific crimes or to crimes with specific statutory penalties (e.g. minimum jail time).

Who has the power to grant criminal immunity?

98. As noted above, to provide the proper incentives, criteria to qualify for criminal immunity should be clear and transparent. The key point is that immunity shall be guaranteed. Co-ordinating a leniency programme and criminal sanctions (and immunity) raises more difficulties in jurisdictions where criminal prosecution is the responsibility of another authority which technically is not bound by decisions and policies of the competition authority. In such cases the competition authority might not have the ability to guarantee immunity from prosecution (OECD, 2003, p. 19_[9]). Moreover, in some jurisdictions, criminal laws may not even allow individuals to obtain immunity as this may conflict with the principles of mandatory prosecution (although exceptions to this principle do exist) and that it is ultimately left to judges to decide whether to impose sanctions. It should be noted that, from an incentive perspective, individuals may refrain from reporting their own conduct even if this would only result in indictment (with reputational consequences) and no ultimate sanction. So what seems to be most effective, although not always feasible, is granting immunity from prosecution rather than from criminal sanctions.

99. Jurisdictions differ as to the authority that has the power to grant criminal immunity, and in particular, whether a) this power is exclusively allocated to the competition agency; b) it requires a joint (negotiation and) approval by the competition agency and the public prosecutor; or c) the public prosecutor decides independently. Procedures also vary. For example:

- In Canada, the Competition Bureau may only recommend to the Public Prosecution Service of Canada (PPSC) that leniency applicants be considered for immunity or lenient treatment in sentencing (OECD, 2018, p. 3_[55]).¹⁰⁷
- In Chile, the first leniency applicants shall be exempted from criminal liability. For such purposes, the relevant individuals are identified in the competition agency's (FNE) "complaint" and then declared by the Competition Tribunal. Their criminal immunity is subject to the individuals submitting the same information that they had previously provided to the FNE to the Criminal Public Prosecutor and the competent criminal court, and testifying in the corresponding criminal trial (OECD, 2018, pp. 3-4_[56]).
- In South Africa, the corporate leniency policy does not provide for criminal immunity of individuals and the Competition Commission can only make a submission to the National Prosecuting Authority requesting that leniency be granted to the individuals who may otherwise face criminal prosecution (Morphet and Hlatshwayo, 2017, p. 38_[31]).

100. When the power to grant criminal immunity is not exclusively allocated to the competition agency, it is particularly important to involve the prosecution authorities at an early stage. For example, in the 2014 Peer Review of Romania, the OECD recommended a "*better and more systematic co-ordination with criminal prosecutors*" with further "*efforts to co-ordinate leniency and immunity programmes*" (OECD, 2014, p. 92_[57]).

101. Even where the power is assigned to competition agencies by law, it may require them to co-operate with prosecution authorities. For instance, in Brazil, where CADE was assigned the power to grant criminal immunity,¹⁰⁸ it has traditionally involved criminal prosecutors in co-signing leniency agreements (OECD, 2018, p. 4_[32]).¹⁰⁹ Calliari (2015_[28]) observed that this mechanism has worked, but it is a "*delicate balance*" that depends "*on the goodwill of the prosecutors*", so he proposed to put in place a system to ensure that individuals could reach parallel but simultaneous settlements with both CADE and criminal

prosecutors. In Brazil, such co-ordination is also needed because there are multiple leniency systems, with different authorities such as the Federal Public Prosecution Office and the Comptroller General with powers to grant immunity according to their own procedures and with different effects. It was observed (Burnier da Silveira and Oliveira Fernandes, 2019, pp. 146-147^[45]) that, within this framework, “*the absence of coordinated forms of leniency can lessen the incentives to collaborate with the authorities*”.

Who can benefit from criminal immunity?

102. There are open questions as to how to design this “dual effect” system of immunity. For instance, whether immunity granted to a company should extend to all its co-operating directors and employees and whether former directors, officers and employees can also qualify for immunity if they co-operate in the investigation.¹¹⁰ Other questions concern the cross effects of leniency applications on companies and individuals. For instance, open questions include whether immunity granted to a company should exclude immunity to individuals of the same company subsequently applying for (criminal) immunity or whether criminal immunity for individuals should result in an administrative immunity for their company.

103. Moreover, Whelan (2014^[33]) notes that to secure the advantages of criminal immunity in the conflict between companies and individuals, there must be the possibility for individuals to seek immunity without having to co-operate in the administrative immunity application of the company.

4.7.3. Other implications of criminal immunity

104. There are other potential issues that jurisdictions should consider when criminalisation with criminal immunity is adopted. These are briefly raised below.

105. Firstly, there are strategic considerations on the timing of criminal and administrative investigations, which – as mentioned above – are often conducted in parallel.

106. Secondly, the scope of protection granted to individuals awarded immunity is an important factor that impacts on the effectiveness of the leniency system. It has also implications as to the possibility to use evidence to prove other crimes. In fact, as mentioned above, cartel charges are often combined with other criminal charges such as bribery, corruption or false claims.¹¹¹ However, immunity from cartel charges may not always extend to other crimes. In Brazil, for instance, the law extends the scope of leniency protection including conspiracy, bid rigging and “*other crimes directly related to the practice of cartel*” (OECD, 2018^[32]).¹¹² However, there is no consensus on what falls under “related crimes”.¹¹³ In order to ensure more certainty, the leniency agreements signed in the “Car Wash” case explicitly stated that the benefits of the agreement, including the criminal immunity, did not apply to the crimes of corruption and money laundering (Burnier da Silveira and Oliveira Fernandes, 2019, p. 147^[45]).

107. Thirdly, disclosure rules in the context of criminal trials may require a higher degree of transparency. These could have implications on the confidential nature of leniency applications, which ensures in many jurisdictions the integrity of leniency programmes. In the United States, strict confidentiality is achieved through plea agreements (see 4.7.4 below) that avoid a full disclosure in court, although leniency applicants may have to disclose more in a trial of co-conspirators. In jurisdictions where plea agreements are not available or not widely adopted, it is more difficult to protect the confidentiality of leniency applications. It may also be problematic in cases of public

prosecutors requesting access to leniency applications as observed, for instance, in Chile (OECD, 2018, p. 6_[56]). Moreover, transparency rules in criminal trials may further discourage leniency applications by facilitating follow-on actions for damages. To mitigate the exposure of leniency applicants, the United States limited their civil damages exposure to the actual damages caused, excluding the possibility of civil plaintiffs to obtain treble damages and joint and several liability for damages caused by the overall conspiracy, provided that leniency applicants co-operate with private plaintiffs in their damage actions against remaining cartel members.¹¹⁴ This provision is set to expire in June 2020 due to a sunset provision in the legislation.

108. Finally, in practice, individuals granted criminal immunity may have less incentives to co-operate as witnesses in court proceedings (Whelan, 2014_[33]), where their testimony is required according to procedural rules and their duty to co-operate does not extend to (separate) criminal proceedings. Even when they co-operate in court proceedings, judges and juries may not view their testimonies favourably. Jury resistance to the testimony of leniency witnesses may be especially problematic in a trial concerning a two-party cartel. This was observed in the UK's failed prosecution of British Airways executives involved in the air cargo cartel. In that case, Virgin Atlantic had secured immunity and its employees had received no action letters from the OFT. It was noted (Beaton-Wells, 2016, p. 11_[22]) that “[t]his meant that only half of those responsible were facing criminal prosecution and sanctions, while the other half not only escaped these repercussions, but also continued working in the industry”.

4.7.4. Plea agreements

109. The US experience shows that plea agreements (also called “plea bargains”) are another tool often used in criminal enforcement systems.

110. Although there is no commonly agreed definition of plea agreements, through such procedures competition agencies and companies suspected of anti-competitive conduct generally agree on a number of substantive findings and procedural matters in exchange for expediting the case and a reduction in the sanctions (OECD, 2019, pp. 52-53_[17]).¹¹⁵ Moreover, there is no consensus on the use of plea bargaining in criminal law. For many authors, the debate about plea bargaining should be about whether this tool is compatible with the values of a criminal justice system and the rights of defendants (OECD, 2006, p. 36_[58]; Beaton-Wells, 2016, p. 10_[22]).

111. In the United States, where only the first leniency applicant gets full immunity, plea agreements are used to grant reduced sanctions¹¹⁶ for those companies and individuals who do not qualify for automatic leniency,¹¹⁷ but wish to co-operate.¹¹⁸ Also, individuals' co-operation at an early stage may qualify as “a mitigating factor” when imposing criminal sentences, even in cases where leniency is not available. In the interest of transparency and predictability, the DoJ makes public Model Plea Agreements available for both companies and individuals.¹¹⁹ The DoJ recently revised these two models to ensure – among other considerations – full co-operation from individuals, who can be asked to assist the investigation with “*affirmative investigative opportunities*” such as the participation in covert techniques.¹²⁰

112. Moreover, a tendency to prosecute a greater number of individuals for each company has been observed in the United States, with individuals being carved out from corporate plea agreements entered by “non-leniency” companies (Hammond, 2010, p. 1_[51]). The carved-out individuals may include “*culpable employees, employees who refuse to cooperate with the DoJ's investigation, or employees against whom the DoJ is still developing evidence*” (OECD,

2006, p. 165^[58]). The DoJ retains the discretion to prosecute these individuals for their participation in the conspiracy, regardless of the disposition of the case as to their company.

113. In other jurisdictions such as Canada the decision on whether to enter into plea bargaining is not with the competition agency. It is solely under the authority of the Attorney General, i.e. the independent prosecution authority. That said, in practice, there is significant co-operation between the Competition Bureau and the Attorney General throughout the enforcement process and the Competition Bureau participates in these discussions by providing support and advice to the Attorney General (OECD, 2006, pp. 83-84^[58]).¹²¹

114. Plea agreements also raise the question about the proper role of courts. Some observers have expressed a preference for more active courts to uphold the principle of judicial oversight. Courts have also insisted that they do not just rubberstamp a proposed settlement and judges may be reluctant to enforce plea agreements (OECD, 2006, p. 43^[58]).¹²²

Box 9. The Maxzone case in Canada

This case was an international price fixing cartel among aftermarket auto parts distributors. The Canadian subsidiary of one of the cartelists, Maxzone, entered into a plea agreement with the Canada Competition Bureau. As a result, the agency sought a fine of CAD 1.5 million (approximately EUR 1 million), but no prison sentence against any individuals.

In October 2012, the Canada's Federal Court accepted the recommendation on sentencing. However, in his judgement, Chief Justice Crampton observed that, in future cases, the prosecution's recommendation on sentencing should include more information on the seriousness of the conduct to support sentencing. Chief Justice Crampton also suggested that the Canada's Federal Court would require convincing reasons to refrain from imposing prison sentences on individuals in certain circumstances in the future.

This suggestion may have reflected the 2009-2010 amendments of the Canadian Competition Act increasing prison terms (and maximum fines). Prior to these amendments, individual offenders had been subject to house arrest or conditional sentences, instead of imprisonment. Moreover, there was criticism that the tough approach suggested in the *Maxzone* case would have reduced the incentive for cartel offenders to apply for leniency.

Sources:

(Norton Rose Fulbright, 2016, pp. 20-23^[27])
 R. v. Maxzone Auto Parts (Canada) Corp., 2012 FC 1117.
 (Grenfell, 2012^[59])

115. Finally, it is worth noting that – where the competition agency is not in charge of criminal prosecution – plea agreements may not be an effective tool because they often require an admission of guilt, with potential negative consequences for individuals then prosecuted for antitrust offences and other related crimes.

5. Enforcement and international co-operation in the context of criminalisation

116. Many hard core cartels have an international dimension, with cartelists from various countries colluding in multiple jurisdictions. This international dimension is also reflected in competition agencies' enforcement. As highlighted in the OECD *Competition Trends 2020*, the majority (68%) of global cartels – international cartels with a geographic range across more than one continent – were sanctioned by multiple jurisdictions (OECD, 2020, p. 12_[1]).¹²³ Hence, as more generally recognised in the context of cartel enforcement, international co-operation is an essential element to ensure effective criminal enforcement. That said, there are issues specific to criminal enforcement that deserve a dedicated discussion.

117. This Section looks at challenges for international co-operation between criminal and administrative/civil jurisdictions as well as at the additional co-operation forms available between criminal jurisdictions. It also describes the increasing efforts to prosecute individuals located overseas.

5.1. How to co-ordinate among different jurisdictions

118. In the 2013 OECD/ICN Survey on *International Enforcement Co-operation*, differences in enforcement systems (where criminal prosecution was possible vs. exclusively administrative/civil regimes) were considered to be among the most important limitations for international co-operation (OECD, 2013, p. 105_[60]). In particular, criminalisation may present practical disadvantages for international co-operation due to resistance by non-criminalised jurisdictions to co-operate (and in particular to share information) with jurisdictions in which enforcement proceedings may result in the incarceration of individuals (Whelan, 2014_[33]; OECD, 2012, p. 128_[61]).¹²⁴ So one of the questions to address is whether there is, in practice, a “reduced co-operation” between criminal jurisdictions and administrative jurisdictions.

119. This can result in a limited use of informal co-operation methods widely employed by competition agencies in administrative jurisdictions. Also, legal limitations exist. For example, Article 12(3) of EU Regulation No. 1/2003 prescribes that information exchanged between competition agencies “*can only be used in evidence to impose sanctions on natural persons where: i) the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof, and ii) 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 national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions*”. Moreover, in some instances, jurisdictions that allow their enforcement agency(ies) to exchange confidential information do so subject to conditions. Among the commonly identified conditions for the transmission of confidential information, the 2013 OECD/ICN Survey on *International Enforcement Co-operation* identified conditions restricting the use of the information to a non-criminal proceeding.¹²⁵ A best practice in this regard is that the requesting jurisdiction should ensure that its privilege against self-incrimination is respected, when using the exchanged information in criminal proceedings against individuals.

120. Legal limitations can also derive from the application of the “dual criminality” principle, which limits co-operation to cases when the antitrust offence is considered a crime both in the requesting and the requested jurisdiction.

121. Further obstacles may derive from the legal constraints applicable to the disclosure/sharing of information gathered in the context of criminal investigations, or under country-specific criminal procedure rules on the admissibility of evidence. For instance, in the United States, much of the information gathered by the DoJ in the course of a criminal investigation is statutorily protected from disclosure and such information cannot be exchanged absent appropriate court orders. Restrictions also apply to the introduction of evidence provided by other jurisdictions in a criminal trial in the United States, where information must meet the requirements of relevant federal rules of criminal procedure and evidence (OECD, 2012, pp. 269-271_[61]).¹²⁶

5.1.1. The Mutual Legal Assistance Treaties and antitrust mutual assistance agreements

122. A possible solution to some of these obstacles are the Mutual Legal Assistance Treaties (MLATs). MLATs are bilateral treaties of general application pursuant to which treaty counterparts agree to provide specific reciprocal assistance in criminal law enforcement matters. Even though the specific provisions of each treaty vary, MLATs normally allow the signatories to request assistance from each other, including the use of formal investigative powers – such as record collection and questioning of witnesses – and sharing of confidential information.

123. Although MLATs seem to partially resolve the limitations of the “dual criminality” principle (requiring that the conduct be criminal in both the receiving and requesting jurisdictions) as they could cover offences deemed criminal only in one (i.e. the requesting) jurisdiction (OECD, 2013, p. 53_[60]),¹²⁷ in practice, some MLATs adhere to this principle. Therefore, as noted in the 2012 OECD Roundtable on *Improving International Co-operation in Cartel Investigations*, MLATs are essentially a form of co-operation between criminal jurisdictions and they are unavailable to jurisdictions based on an administrative system of enforcement (OECD, 2012, p. 13_[61]).

124. The MLAT between Canada and the United States is probably one of the most frequently used MLATs in cartel cases. In 2012, Canada reported that the Competition 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” (OECD, 2012, p. 124_[61]). In 2001, the US-UK MLAT was amended by removing a side letter provision that had excluded antitrust from the scope of assistance.

125. Despite these examples, MLATs are not specifically designed for competition law enforcement. Moreover, it seems that MLAT are also complicated to employ when requests to obtain information for criminal cartel investigations are processed by central MLAT (not competition) authorities, which do not have experience with antitrust infringements (OECD, 2019, p. 87_[17]). Furthermore, as stated above, MLATs are relevant only in cases where both jurisdictions contemplate criminal antitrust enforcement. Consequently, they would function more effectively if criminalisation is largely adopted. Finally, Whelan (2014_[33]) notes that these are solutions working best at bilateral level between close trading partners (rather than at multilateral level), which would also justify the requested jurisdiction to invest resources in co-operating with the requesting jurisdiction.

126. Therefore, MLATs and other (more informal) co-operation mechanisms have their limitations. Antitrust mutual assistance agreements – although not widely adopted – can enable greater co-operation. For instance, the 1999 Agreement on Mutual Antitrust Enforcement Assistance signed between the United States and Australia provided for the signatory authorities to request broad assistance in criminal antitrust matters, including the

exercise of compulsory powers to obtain testimony and documentary information.¹²⁸ Australia reported that the ACCC has assisted the DoJ to execute search warrants in Australia and DoJ staff, who visited Australia in person, to gather information (OECD, 2012, p. 109^[61]).

Box 10. Examples of international (bilateral) co-operation

The US-Canada *Nishikawa Rubber* case

In 2016, a manufacturer of automotive parts, Nishikawa Rubber Co. Ltd, was charged in the United States with taking part in international bid rigging, which affected the United States and Canada. The company pleaded guilty in the United States and agreed to pay a USD 130 million (approximately EUR 120 million) fine.

The Canada Competition Bureau and the DoJ closely co-operated. In particular, the two agencies “*were able to identify affected sales of automotive body sealing products manufactured in the United States and then shipped to Canada for assembly into automobiles that were imported into the United States. These sales were included as affected commerce for purposes of calculating Nishikawa’s fine*”. Since the conduct primarily targeted the United States and the fine imposed was considered an effective remedy in both jurisdictions, the Canada Competition Bureau agreed to not pursue further enforcement action against Nishikawa Rubber Co. Ltd for this conduct.

The US-UK *Marine Hoses* case

This case relates to an international cartel among marine hose manufacturers. In this case, the European Commission, the OFT, the DoJ and the JFTC co-operated throughout the process.

At the investigation phase, the DoJ arrested and prosecuted individual offenders. Subsequently, the OFT prosecuted these offenders under UK law. At the prosecution phase, the US plea agreements with individual offenders included the admission of their cartel offence in the United Kingdom, and the obligation not to seek from the UK court a sentence of imprisonment shorter than the one agreed on in the US plea agreements. Although the OFT argued that the US plea agreements would not have legal effect under UK law, it was observed that the offenders clearly expected these to produce some effects in the United Kingdom.

Finally, at the sentencing phase, the US plea agreements provided for concurrent prison sentences to be served in the United States and United Kingdom. In other words, the US plea agreements allowed for the period of prison sentence in the United States to be offset by the period served in the United Kingdom.

Sources:

DoJ (2016), Press Release “Nishikawa Agrees to Plead Guilty and Pay \$130 Million Criminal Fine for Fixing Prices of Automotive Parts”, 20 July 2016, <https://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive>.

Canada Competition Bureau Press Release “Unprecedented cooperation with US antitrust enforcement authority leads to major cartel crackdown” <https://www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html>.

(Lobel-Lastmann, 2008^[62])

(Ince and Christian, 2008^[63])

DoJ (2008) Press Release “British Marine Hose Manufacturer Agrees to Plead Guilty and Pay \$4.5 Million for Participating in Worldwide Bid-Rigging Conspiracy”, 1 December 2008, <https://www.justice.gov/archive/opa/pr/2008/December/08-at-1055.html>.

5.2. Prosecution of individuals overseas

127. In principle, there are no restrictions on prosecuting individuals located overseas for criminal antitrust offences.

128. In 1999, for the first time, incarceration for a cartel offence was imposed against an individual located overseas. This was the result of a plea agreement between the DoJ and a Swiss executive involved in a global cartel in the vitamin sector.¹²⁹ Since the 1990s, the number of foreign defendants in the United States has risen (Ginsburg and Cheng, 2019, p. 20_[35]), and extradition is frequently sought. In 2001, the DoJ adopted a policy placing indicted fugitives on the INTERPOL “Red Notice” list, which essentially serves, in many INTERPOL countries, as request to arrest individuals with the objective of extraditing them (Hammond, 2010_[51]). Recent cases in the United States include the following: a) in January 2020, the DoJ secured the extradition from Italy of a Dutch national who engaged in a price fixing cartel in the air cargo industry and was a fugitive for almost ten years,¹³⁰ and b) in March 2020, the DoJ secured the extradition from Germany of a Korean national who engaged in a cartel in the automotive parts sector and was a fugitive for almost five years.¹³¹ Another recent example is the ongoing criminal case in the United States against Korean fuel suppliers who engaged in bid rigging conspiracies targeting US army operations in Korea.¹³²

129. Despite these cases, there are legal and practical obstacles to prosecuting individuals located overseas. Firstly, jurisdictions receiving an extradition request may have concerns over the extraterritorial application of criminal cases. Secondly, extradition can typically only be granted if the “dual criminality” requirement is met.¹³³ That said, in practice, as often cartel offences are linked with other crimes, an extradition request against a cartel offender may be successfully granted if grounded on other crimes, even absent the “dual criminality” requirement for the cartel offence.¹³⁴ In fact, it seems that – to date – extraditions to the United States solely based on an antitrust charge have occurred in only three cases.¹³⁵ Thirdly, it should not be underestimated that prosecuting individuals overseas may increase the duration of litigation and the resources required to prosecute a case, also considering that the extradition contemplates court proceedings in the country where the individual is located, and that incentives for fugitives to self-surrender may be particularly low if custodial sentences can be imposed. For instance, as mentioned above, a Dutch national indicted in the United States in 2010 for price fixing in the market for international air cargo shipments was a fugitive for almost ten years and extradited only in January 2020. That said, it is noted (Powers, 2020_[64]) that such cases are evidence of the competition agencies’ commitment to prosecute accountable individuals.

Box 11. The *Pisciotti* case

The first case of extradition to the United States based on an antitrust charge involved Romano Pisciotti, an Italian national and former executive of a marine hose manufacturer who was extradited from Germany in 2014 for participating in a conspiracy to rig bids, fix prices and allocate market shares of marine hose sold in the United States and elsewhere.

Mr. Pisciotti pleaded guilty and was sentenced to serve a total of two years in prison (with credit for the nine months he was held in the custody of the German government pending his extradition) and paid a criminal fine of USD 50 000 (approximately EUR 46 000).

Mr. Pisciotti opposed the extradition request and filed appeals, *inter alia*, to the Federal Constitutional Court in Germany. The extradition in this case was granted because the “dual criminality” requirement was met as bid rigging is a criminal offence under Section 298 of the German Criminal Code.

Following his extradition to the United States, Mr. Pisciotti brought an action for damages before the Regional Court of Berlin requesting that Germany be held liable for authorising his extradition. He claimed that Germany had breached the EU non-discrimination principle, by refusing to allow him to benefit from the prohibition of extradition provided for in the German constitution for all German nationals. This was in fact relied on by a German national involved in the same cartel and subject to a US arrest warrant.

The Berlin Regional Court referred the question to the Court of Justice for a preliminary ruling.¹³⁶ The European Court of Justice, in short, found the Germany did not breach EU law. It found that Germany could have pursued a less restrictive measure consisting in the surrender of Mr. Pisciotti to his Member State of origin (i.e. Italy). However, such a measure would only be available if Italy had issued a European arrest warrant, while numerous submissions of Member States emphasised the difficulties of this approach.

Sources:

DoJ (2014), Press Release “First Ever Extradition on Antitrust Charge”, 4 April 2014, <https://www.justice.gov/opa/pr/first-ever-extradition-antitrust-charge>.

DoJ (2014), Press Release “Former Marine Hose Executive Who Was Extradited to United States Pleads Guilty for Participating in Worldwide Bid-Rigging Conspiracy”, 24 April 2014, <https://www.justice.gov/opa/pr/former-marine-hose-executive-who-was-extradited-united-states-pleads-guilty-participating>.

Case C-191/16, *Romano Pisciotti v Bundesrepublik Deutschland*, Judgment of 10 April 2018, ECLI:EU:C:2018:222.

(Strange, 2019^[65])

6. Conclusion

130. This paper shows that a *prima facie* case can be made that enforcement against cartels and bid rigging offences would be more effective with criminalisation, and in particular with custodial sentences against individuals. Nevertheless, it must be noted that sanctions against individuals can only complement (and not replace) sanctions against companies. Contrary to other crimes such as embezzlement benefitting only the individual and victimising the company, antitrust violations are typically beneficial to the companies, and employees mainly act in the interest of their companies and they are motivated by the incentives that companies set for them (Wils, 2013_[3]).¹³⁷ Moreover, having more jurisdictions with criminal enforcement can increase deterrence by raising costs of entering or continuing to engage in cartels (Barnett, 2006_[6]).

131. To summarise the rationales for criminal sanctions, while simply imposing monetary fines against companies may not lead to sufficient deterrence, it remains unclear whether criminalisation (and custodial sentences) would solve this issue. More empirical studies are needed to test the two rationales of deterrence and retribution (moral stigma) in societies and business communities. A first question is how to measure the level of criminal enforcement. For instance, whether one should look at the trends in terms of jail time and criminal fines imposed, rather than the number of cartels detected or criminally prosecuted. However, it must be acknowledged that it is difficult to collect comparable data across jurisdictions. Criminal sanctions are not straightforward, and cannot be simply measured by the jail time imposed. Moreover, collecting data in decentralised enforcement systems may be complex.

132. Further research is also needed to have more visibility on the individuals that engage in such conduct to define the right mix of sanctions in each jurisdiction. Indeed, cartels can be organised at various levels – not necessarily by senior executives – of the organisation, with individuals having different information as to the likelihood of detection and expected sanctions, as well as having different expectations as to the level of risks and rewards of engaging in anti-competitive conduct (Stephan and Nikpay, 2015_[14]). The cost-benefit analysis for individuals varies according to their personal characteristics (e.g. risk aversion, specific monetary and career incentives, role in the organisation), as well as to the relevance of moral stigma.

133. When considering the introduction of criminal enforcement in existing antitrust regimes, as Kovacic (2016_[23]) argues, it is important to gradually build institutions before changing the law in the books because of the institutional interdependence of different features of antitrust systems, and the risk of affecting broader enforcement mechanisms.¹³⁸ The UK case is a clear example of the complexity deriving from the introduction of criminalisation and the need to continuously adjust it. Moreover, each jurisdiction should determine the “*right mix of sanctions*”, depending – among other factors – on social norms, legal framework, enforcement history, resources of competition agencies and the relationship between the competition agency and other prosecution authorities (OECD, 2005, pp. 26-27_[2]).

134. The introduction of criminal enforcement also requires advocacy efforts to educate stakeholders and the general public, not only explaining why an anti-competitive conduct is harmful, but also to prove that criminal enforcement is needed from a deterrence and/or retribution perspective (Beaton-Wells and Haines, 2010_[66]; O’Loughlin, 2016, pp. 136-143_[67]). Political support is essential, and it ultimately depends on whether the government and society share a normative commitment to criminalisation (Beaton-Wells and Parker, 2013_[20]). A lack of public support may also be reflected in the jury or courts’ reluctance to

convict cartel offenders, in particular with custodial sentences, which remain key to the deterrence objective of cartel criminalisation. It was also argued that competition authorities should develop a strong leadership and a credible record in imposing civil and administrative fines, before introducing criminal sanctions (Beaton-Wells and Parker, 2013^[20]). Finally, lawmakers need to acknowledge that there will necessarily be a time lapse between the time criminalisation is introduced (with large investments of resources) and the benefits that it may achieve in terms of deterrence (Whelan, 2017^[13]). Even in the United States the process was “*gradual, progressive, and incremental*” (O’Loughlin, 2016, p. 124^[67]). In other words, as Kovacic noted (2016^[23]), “*success requires years (more precisely decades) of arduous, sustained effort.*”

135. Introducing statutory criminal penalties without following up with actual criminal enforcement might convey a message of weakness of the competition authority and hence decrease (rather than increase) deterrence, insofar as it might even affect the credibility of administrative fines. Indeed, Professor Coffee (1992, p. 1889^[68]) noted that “[*t*]he limited empirical evidence on public attitudes toward white-collar crimes suggests that the public learns what is criminal from what is punished, not vice versa”. The perceived lack of enforcement in some jurisdictions may derive from the introduction of criminalisation into legal systems in the absence of a domestic culture and support by decisive stakeholders (e.g. prosecution authorities, courts). Similarly, introducing criminalisation and then applying an initial *moratorium* or a transitional period¹³⁹ for criminal enforcement may be counter-productive because it may not set the right message in terms of seriousness of the offence and commitment to prosecute these cases. Moreover, *moratoria* may not be a viable option in certain criminal regimes. Ultimately, it would be flawed introducing criminalisation to cure the problems of an ineffective administrative system, without ensuring significant criminal enforcement.

136. Furthermore, criminalisation increases the standard of proof and consequently the burden on competition agencies and/or prosecution authorities. So circumstantial evidence may not be sufficient to bring a criminal case, as shown in criminal jurisdictions where criminal convictions are essentially based on direct evidence. Therefore, should competition authorities be entrusted with the power to prosecute antitrust criminal offences, sufficient powers of investigation may be needed. These powers may require, in some cases, adjustments to institutional design.

137. Finally, institutional settings often require competition agencies to co-operate with other stakeholders within their own jurisdiction. Any form of co-operation adopted should ensure a sufficient degree of flexibility as to the various stakeholders involved as well as identifying enforcement priorities. Criminalisation also requires to re-think international co-operation, perhaps involving public prosecutors, who are entrusted with (exclusive) criminal law enforcement powers in many jurisdictions and have been so far less open to international debates (Calliari, 2015^[28]).

138. To conclude, criminalisation can only work as a complement to other penalties imposed on companies, and only for hard core cartels. However, not all enforcement regimes are currently built for it. Political and social support is also essential and a focus – at least initially – on bid rigging, given the direct impact on taxpayers, can help to ensure that there is sufficient buy-in by key stakeholders and the general public.¹⁴⁰ It is also crucial to constantly reassess the equilibrium within criminal enforcement and with (parallel) administrative/civil enforcement, both in terms of institutional settings and of sanctions that can be imposed.

Endnotes

¹ See, however, Wils (2013, p. 25_[3]) observing that “*one should be cautious with inferring from the number of infringements currently detected any conclusion as to the effectiveness of the current policies*”. With regard to the European Union, he notes that, in the short term, a stronger enforcement policy would detect more cartels that survived the previous enforcement framework, while positive effects could be observed only in the long term with regard to new cartels.

See also Ginsburg and Cheng (2019, p. 6_[35]) arguing that the enforcement against cartels is lumpy as it takes several years to develop a case resulting in a large number of sanctions in a single year.

² (Connor, 2016, p. 12_[18]) (“*there are a large number of real-world factors that suggest that under-deterrence of cartelization is the norm. First, we know that serial collusion by certain companies is very high – some large cartelists have been fined 30 or 40 times for price fixing in the past 20 years. True recidivism is less common but still frequent*”). See also, (Meurer, Kovacic and Marshall, 2018_[70]).

³ The ICStats builds upon international cartel data collected by Professor John Connor since 1985. It was acquired by the OECD in 2017 and can be accessed at <http://bit.ly/OECD-ICStats>.

⁴ For an opposite view, limited to the United States, see Werden, Hammond and Barnett (2011_[94])

⁵ In this regard, Wils argued that it is “*a bad idea to have only individual liability for antitrust infringements*”, and that three main reasons justify companies’ liability for antitrust violations: a) companies are best placed to prevent infringements (in the most cost-effective way); b) without being held liable (and benefitting from the infringements) companies would have the perverse incentive to encourage violations by their employees; and c) companies largely influence their employees’ conduct through targets and incentives.

⁶ The 2019 OECD *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, defines “hard core cartels” as “*anticompetitive agreements, concerted practices or arrangements by actual or potential competitors to agree on prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by, for example, allocating customers, suppliers, territories, or lines of commerce*”.

⁷ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, (2004), p. 408.

⁸ “*Cartel activity entails cooperation on business decisions, such as the choice of prices, outputs, or which customers to serve, and not also cooperation on business functions such as research or distribution*”.

⁹ Even when criminal enforcement is limited to bid rigging, actual enforcement can be significant. In some of these jurisdictions, the number of enforcement cases seems even higher than in jurisdictions where all hard core cartels are criminal offences. For instance, in Germany, between 1998 and 2008 over 260 individuals were indicted for bid rigging with more than 180 convictions (many serving jail time) (Shaffer, Nesbitt and Weber Waller, 2015_[7]).

¹⁰ DoJ (2019), “Assistant Attorney General Makan Delrahim Delivers Remarks at the Procurement Collusion Strike Force Press Conference”, 5 November 2019, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-procurement-collusion-strike>.

¹¹ See, *ex multis*, (Whelan, 2017, p. 9_[13]). See also OECD (2019, p. 62_[17]).

¹² Economic deterrence has two variants: “general deterrence”, i.e. deter others by punishing an offender, and “specific deterrence”, i.e. deter the offender from committing other crimes.

¹³ According to Wils (2005_[8]), however, damages actions do not address the problem of optimal fines being way too large because they would also exceed the companies' ability to pay.

¹⁴ Allocative inefficiency is estimated to be around 50% of the mark-up (citing (Easterbrook, 1985_[71])) or between 3% and 20% of the overcharge (citing (Connor and Lande, 2012_[72])).

¹⁵ For instance, Article 23(2) of EU Regulation No. 1/2003 (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, 4.1.2003, p. 1-25) imposes a ceiling of 10% of the company's turnover.

¹⁶ Although the latter may not be allowed in certain jurisdictions, e.g. in Australia (see <https://www.accc.gov.au/business/anti-competitive-behaviour/cartels>).

¹⁷ (Posner, 1980_[73]) and (Posner, 2010, pp. 282-284_[74]). For a critical view of these arguments, see (Ginsburg, 2018_[93]). For an attempt to reconcile economic theory with legal theory, with alternative models accounting for the benefits of incarceration and its "*valuable societal function*", see (Dau-Schmidt, 1984_[75]).

¹⁸ United States contribution.

¹⁹ (Barker and Reeves, 1977, pp. 630-631_[76]) (see, in particular, Arthur L. Liman: "*[t]o the businessman, however, prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations.*")

²⁰ Cartel studies generally conclude that about 15% to 30% of all conspiracies are detected. See (Connor, 2016, p. 12_[18]).

²¹ "[T]he optimal balance between corporate and individual penalties that would best serve deterrence is a difficult (and little-researched) issue in criminal jurisdictions."

²² In particular in jurisdictions like the United States, where treble damages represent a strong incentive for private parties to engage in antitrust litigation. It should be noted that under Section 4A of the Clayton Act, the victimised government can also claim treble damages for antitrust infringements. However, it has invoked this provision only in a very limited number of cases in the last 30 years.

For instance, Ducci (2018_[11]) noted that "*by increasing the probability of detection, private enforcement can mitigate some of the issues related to companies' inability to pay and need to resort to criminal sanctions*".

²³ Section 2(h) of the Irish Competition (Amendment) Act 2012 states that "[w]here a person is convicted of an offence under this Act the court shall order the person to pay to the relevant competent authority a sum equal to the costs and expenses, measured by the court, incurred by that competent authority in relation to the investigation, detection and prosecution of the offence, unless the court is satisfied that there are special and substantial reasons for not so doing."

²⁴ Ducci (2018_[11]) observes that cartels may be considered similar to a "victimless crime", i.e. crimes where the aggregate harm is significant while the impact on individual victims is minimal.

²⁵ (Barnett, 2006_[6]) ("*nothing is a greater deterrent ... than the threat of substantial incarceration in a U.S. prison*").

²⁶ According to Whelan (2013_[10]), "*one should create a criminal cartel offence that has a sufficient degree of moral content*".

²⁷ Whelan's analysis is based on Professor Stuart Green's previous work on white-collar crimes (Green, 2007_[69]).

²⁸ It also requires to establish that customers assumed that the cartelist competes with its competitors.

²⁹ See carve-out in the UK criminal system under Section 188A(1) of the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013 (c. 24). For an analysis, see Whelan (2017, pp. 22-23^[13]).

³⁰ (Shaffer, Nesbitt and Weber Waller, 2015, p. 28^[7]). Over 20 countries have criminalised cartels between 2000 and 2015. Criminal jurisdictions include over half of the EU Member States, although the Netherlands, Luxembourg and Austria (the latter except for bid rigging) have decriminalised competition law. They observed that this criminalisation trend appears to be “a product of transnational enforcement interests more than domestic bottom-up processes”.

³¹ The OECD Database on General Competition Statistics (OECD CompStats) currently covers data from competition agencies in 55 jurisdictions, of which 37 are OECD countries (36 OECD countries and the EU), 14 are Participants in the OECD Competition Committee, and 1 jurisdiction is an Associate to the OECD Competition Committee. The database currently covers the period 2015-2018.

³² Sokol notes that applying criminalisation to other conduct may be problematic because it could deter risk-taking behaviours, which may also have some offsetting pro-competitive justifications. Thus, deterrence would not be optimal.

³³ In Canada, bid rigging and cartels are considered *per se* illegal and subject to criminal sanctions under Sections 45 and 47 of the Canadian Competition Act.

³⁴ In Ireland, in addition to hard core cartels, other anti-competitive conduct can be prosecuted as criminal, but imprisonment only applies to hard core cartels (see <https://www.ccpc.ie/business/enforcement/criminal-enforcement/cartels/>).

³⁵ In New Zealand, criminalisation was introduced in April 2019 and will enter into force in April 2021. A previous criminalisation initiative was abandoned in 2015.

³⁶ In the United States, certain non-cartel antitrust infringements remain crimes “on the books”, but are not prosecuted in practice. In fact, the text of the Sherman Act covers all kinds of restrictive agreements and unilateral conduct. Sokol (2019^[24]) observes that the application of criminal sanctions to such conduct might be opposed through Constitutional arguments such as a) desuetude (i.e. law losing authority due to lack of usage, similar to issues of morality) and b) void for vagueness.

For a recent overview, see Norton Rose Fulbright (2016, pp. 6-9^[27]).

³⁷ See, *ex multis*, (OECD, 2018^[78]; Forrester, 2013^[77]).

³⁸ Although in Canada fines are imposed by a specialised tribunal, rather than directly by the administrative agency.

³⁹ Section 79 of the Australia Competition and Consumer Act 2010.

⁴⁰ Law against Economic Crimes (Law No. 8,137/90). Such tendency to imprisonment may also be observed in the 2011 amendment to the Brazilian criminal statute, which transformed imprisonment and pecuniary fines from alternative penalties to cumulative penalties.

⁴¹ Section 45(2) of the Canadian Competition Act (R.S.C., 1985, c. C-34) as amended by the Budget Implementation Act of 2009. See also <https://www.osler.com/uploadedFiles/17110-Significant%20Changes%20to%20Canada's%20Competition%20Law%20and%20Foreign%20Investment%20Regime.pdf>.

⁴² (OECD, 2018, p. 126^[78]).

⁴³ See <https://www.ccpc.ie/business/enforcement/criminal-enforcement/cartels/>.

⁴⁴ It is interesting to note that the Israeli Supreme Court, in reviewing a District Court’s conviction against two executives who engaged in a cartel in the electric pipes sector, established that, in

principle, jail time (not to be served in public service) is the proper sentence for cartelists given the harm caused to the market by such conduct (see OECD (2004, p. 10_[79])).

⁴⁵ Japan Amended Antimonopoly Act (2009).

⁴⁶ (OECD, 2018, p. 5_[80]). See also Mena Labarthe (2017, p. 29_[81]).

⁴⁷ Sections 73A-74 of the South Africa Competition Act No 89 of 1998.

⁴⁸ Antitrust Criminal Penalty Enhancement and Reform Act 2004 (ACPERA), Pub. L. No. 108-237, 118 Stat. 661 (2004). In addition to federal law, many states have criminal antitrust statutes that provide for jail sentences.

⁴⁹ For an overview of disqualification orders in selected OECD Members, see OECD (2019, p. 64_[17]).

⁵⁰ Company Directors Disqualification Act 1986 (CDDA).

See OECD (2016_[82]) for considerations on whether occupational bans (not limited to directors) should also apply.

⁵¹ See also McConnell, C. (2019), *Pushing antitrust forward with Putin's support: an interview with Igor Artemiev*, <https://globalcompetitionreview.com/article/1210817/pushing-antitrust-forward-with-putin%E2%80%99s-support-an-interview-with-igor-artemiev>.

⁵² See <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>. For a recent analysis, see Ginsburg and Cheng (2019_[35]) noting that a decline may also derive from the effective deterrence of enforcement at least among US companies.

⁵³ Case *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (see <https://www.accc.gov.au/media-release/australia%E2%80%99s-first-criminal-cartel-charge-laid-against-nyk>). See also OECD (2018, p. 29_[40]).

⁵⁴ For an overview and recent developments, see Norton Rose Fulbright (2016, pp. 20-23_[27]).

⁵⁵ For a summary of the various convictions in the *Home Heating Oil* case, see <https://www.ccpc.ie/business/enforcement/criminal-enforcement/criminal-court-cases/home-heating-oil-cartel/>. See also OECD (2006, pp. 116-117_[58]) (Ireland contribution).

⁵⁶ See <https://www.ccpc.ie/business/enforcement/criminal-enforcement/>. On landmark court judgements in Ireland, see Gorecki (2018_[83]).

⁵⁷ For instance, the Sherman Act does not provide criteria to guide the DoJ's choice between criminal and civil proceedings.

⁵⁸ See also literature cited at fn. 16 of (Wils, 2013_[3]).

⁵⁹ For instance, agents that engage on behalf of the company in price-fixing conduct.

⁶⁰ See OECD (2012_[84]) and the 2019 OECD Roundtable on *The standard of review by courts in competition cases*, <http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>.

⁶¹ According to some experts, this is the case also for the European (administrative) regime, where a right to a fair trial should already apply following *Menarini* (ECtHR, *A. Menarini Diagnostics srl v. Italy*, second section, 27 September 2011). For the "strengthening the rights" of defendants to meet Article 6 ECHR, see Whelan (2014, pp. 117-141_[33]).

⁶² Against such theory, Whelan (2014_[33]) notes that combining the two functions has its own high costs resulting from internal checks and balances and (full) judicial review.

⁶³ For instance, the privilege against self-incrimination is enshrined in the Fifth Amendment to the US Constitution, while the presumption of innocence is enshrined in Article 27 of the Italian Constitution.

⁶⁴ Another question is whether the company will pay (and is allowed to pay) for individuals' separate legal representation.

⁶⁵ 18 U.S.C. § 3282.

⁶⁶ These are issues often litigated in the US courts, since the 1910 US Supreme Court case *United States v. Kissel*, 218 U.S. 601 (1910).

⁶⁷ Law No. 12,529/2011. See also OECD (2019, p. 13 and 174^[41]) (The 2019 OECD *Peer Review of Brazil* noted that the statute of limitations in criminal cases (coupled with the length of the investigations and prosecutions) resulted in the majority of criminal defendants convicted for cartel crimes not serving their sentences and, therefore, recommended that Brazil amend its statute of limitations rules so that its length is set in advance, rather than depending on penalties imposed in each individual case).

⁶⁸ *Sanchez et al. v. United States*, no. 19-288.

⁶⁹ For instance, *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), and, more recently, *United States v. Champion International Corporation*, 557 F.2d 1270 (9th Cir. 1977).

⁷⁰ For instance, Supreme Court of Alberta, *Rex v. McGavin Bakeries, Ltd.*, 3 W.W.R. (N.S.) 289 (1951).

⁷¹ *Atl. Sugar Refineries Co. v. A.G.Can.*, [1980], 2 S.C.R.644.

⁷² Intent presupposes rationality (essence of economic deterrence). If not entirely rational, other forms of intention may be introduced in the defining elements of the cartel offences, but this increases the burden of proof (Whelan, 2013^[10]).

⁷³ Article L. 420-6 of the French Commercial Code.

⁷⁴ Wils (2005^[8]) questioned whether this results in “unfairness in the enforcement of competition law”.

⁷⁵ *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

⁷⁶ The applicable “dishonesty” standard was the criminal *Ghosh* test (R v Gosh ([1982] QB 1053).

⁷⁷ (OECD, 2019, p. 38^[17]) (“*The Italian competition authority considers co-operation with other institutions, including public procurement authorities, the judiciary (in the case of criminal investigations) and the Italian Anticorruption Authority to be particularly effective for cartel detection.*”)

⁷⁸ (OECD, 2012^[86]) and (OECD, 2009^[87]). See also (OECD, 2019^[88]) and (OECD, 2014^[89]).

⁷⁹ (OECD, 2010^[90]).

⁸⁰ (ICN Working Group on Cartels, 2015^[91]).

⁸¹ As noted in 2.1.2, cartel studies generally conclude that about 15% to 30% of all conspiracies are detected.

⁸² Sections 199-200 of the UK Enterprise Act 2002.

⁸³ (Jones and Kovacic, 2019, p. 8^[85]). See also FAS (2018), “Fas Creates a New Web-Service: “Big Digital Cat””, 22 October 2018, <http://en.fas.gov.ru/press-center/news/detail.html?id=53478>. Moreover, on 30 January 2018, the OECD held a one-day workshop for competition officials on cartel screening in the digital era (workshop materials are available at <http://www.oecd.org/competition/workshop-on-cartel-screening-in-the-digital-era.htm>).

⁸⁴ Such limitations are also observed in administrative jurisdictions. For instance, Article 21 of EU Regulation No. 1/2003 allows the European Commission to conduct inspections in other premises, including the homes of directors, managers and other members of staff of the companies investigated, but such decision “cannot be executed without prior authorisation from the national

judicial authority of the Member State concerned". A similar provision applies to EU Member States' competition agencies under Article 7(2) of the so-called "ECN+ Directive" (Directive (EU) No. 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market).

⁸⁵ Text of the Memorandum (in Italian) available at https://www.agcm.it/dotcmsDOC/allegati-news/Protocollo_GdF_AGCM.pdf.

⁸⁶ Article L. 463-5 of the French Commercial Code.

⁸⁷ It should be noted that information exchange between public prosecutors and competition agencies may be limited by strict confidentiality rules applicable to information gathered by competition agencies from interrogating individuals, prohibiting the use of such information in criminal proceedings.

⁸⁸ "The CDPP will only commence proceedings if it considers that: (i) there is sufficient evidence to prosecute the case; and (ii) it is evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest."

⁸⁹ SIC (2015), Press Release "Fiscalía y Superindustria firman convenio para fortalecer la lucha contra la cartelización empresarial y otras formas de colusión en contrataciones públicas", 5 December 2015, <https://www.sic.gov.co/noticias/fiscalia-y-superindustria-firman-convenio-para-fortalecer-la-lucha-contra-la-cartelizacion-empresarial-y-otras-formas-de-colusion-en-contrataciones-publicas>.

⁹⁰ Article 43 of the Greek Competition Act. See also OECD (2018, pp. 126-129^[78]) for examples of co-operation between the HCC and public prosecutors.

⁹¹ AGCM (2018), Press Release "The Italian Competition Authority and the Public Prosecutor's Offices of Milan and Rome signed a memorandum of understanding", 13 January 2018, <https://en.agcm.it/en/media/press-releases/2018/1/alias-2493> and full text (in Italian) available at https://www.agcm.it/dotcmsDOC/normativa/Protocollo_10-01-18_PrRM_Agcm.pdf and https://www.agcm.it/dotcmsDOC/normativa/Protocollo_11-01-18_PrMI_Agcm.pdf. See also (Pedersoli, 2018^[26]).

⁹² See <https://www.gov.uk/government/publications/cma-and-sfo-memorandum-of-understanding> and <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-cma-and-the-crown-office-scotland>.

⁹³ Barnett observed the importance for enforcers to charge antitrust crimes with other offences, also to induce co-operation against other members of the cartel.

See also O'Loughlin (2016, pp. 127-128^[67]) suggesting that the grand jury system in the US allows the DoJ "the opportunity to exploit its powers to help the investigation".

⁹⁴ Viros (2016, p. 25^[30]) refers to the "ancillary nature of criminal antitrust convictions" in France.

⁹⁵ See, for example, Article L. 462-3 of the French Commercial Code.

⁹⁶ *United States v. Booker*, 543 U.S. 220 (2005).

⁹⁷ Wils (2013^[3]) has shown a degree of scepticism as to the effects of compliance programmes in preventing violations. He observed that there is no empirical evidence in the antitrust field and that it may be impossible to gather due to the fact that infringements prevented by antitrust compliance programmes may be impossible to be accounted for as these cases are not dealt with by competition agencies. He also argued that as competition agencies are outside observers of companies' practices, it is practically impossible to provide a check list of required characteristics for such programmes to be effective and to be accounted for in the agencies' decisions.

⁹⁸ The conditions of a DPA are negotiated between the DoJ and the defendant. Under a DPA, the DoJ can bring charges against a defendant but agrees not to move forward on those charges, in exchange for the defendant agreeing to abide by certain requirements. If the defendant satisfies these requirements, the DoJ agrees to drop the charges. If the defendant violates the conditions of the DPA, the government can move forward with the prosecution.

⁹⁹ See Hammond (2010_[51]), describing Antitrust Division “carrot and stick” enforcement strategy.

For an overview of leniency programmes, see OECD (2018_[53]).

¹⁰⁰ This argument is also shared by Ginsburg and Cheng (2019_[35]), together with other possible explanations.

¹⁰¹ To counter this negative effect, it has been suggested that one possible solution could be a “unified” or “multi-jurisdictional” leniency system. However, there is a risk that applicants would co-ordinate to ensure that each of the cartelists gets immunity in one jurisdiction (see (Wagner-von Papp, 2016, p. 23_[44])).

¹⁰² In the United Kingdom, the CMA issues “no action letters”. A *pro forma* individual no-action letter is provided under Annexe B of the 2013 Guidance “Applications for leniency and no-action in cartel cases: OFT’s detailed guidance on the principles and process”, then adopted by the CMA (see <https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases>). On Mexico, see Mena Labarthe (2017, p. 29_[81]).

¹⁰³ Directive (EU) No. 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, recital 64.

¹⁰⁴ *Ibid.*, Article 23(2).

¹⁰⁵ *Ibid.*, recital 64.

¹⁰⁶ According to Wagner-von Papp (2016_[44]), the importance of granting automatic immunity from criminal prosecution has been demonstrated “*by the greater effectiveness of the 1993 immunity programme in the US compared to the previous programme that had offered discretionary immunity*”.

¹⁰⁷ The PPSC is a federal government organisation responsible for prosecutions on behalf of the Attorney General of Canada. The Director of Public Prosecutions (DPP) is the head of the PPSC.

¹⁰⁸ Law No. 12,529/2011 changed the competent authority to enter into leniency agreements to CADE, through its General Superintendence.

¹⁰⁹ “*This co-signing, however, does not mean that the [Federal Prosecution Service] is not going to prosecute crimes that are not related to the cartel conduct, but establishes an open line to negotiate collaboration agreements with that prosecution body.*”

¹¹⁰ See Canada Competition Bureau, “Immunity and Leniency Programs under the Competition Act”, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html>, para. 35; DoJ (1993), Corporate Leniency Policy, <https://www.justice.gov/atr/file/810281/download>, p. 4; and DoJ (2008), Frequently Asked Questions About the Antitrust Division’s Leniency Program and Model Leniency Letters (2017), <https://www.justice.gov/atr/page/file/926521/download>, question 24.

¹¹¹ For instance, in the United States for attesting to competitive bids under the FCA.

¹¹² Other crimes include “*those set forth in the General Procurement Act (Law No. 8.666/1993), and on article 288 of the Criminal Code (criminal conspiracy)*”.

¹¹³ The interpretation of “directly related” crimes may ultimately be decided by courts (see Calliari (2015_[28])).

¹¹⁴ ACPERA.

¹¹⁵ “The main difference between plea negotiation in the United States and settlements with the European Commission is that plea agreements in the United States typically require early, continued and substantive assistance with the investigation, including the provision of evidence and witnesses and can lead to a significant reduction of the fine. A European Commission settlement will grant a limited fine reduction in exchange for a waiver of certain procedural rights by the parties to the proceeding, but without assistance for the substantive part of the investigation”.

Settlement can also lead to criminal immunity, e.g. in Greece, where immunity from criminal prosecution applies to those who successfully conclude a settlement agreement.

¹¹⁶ Moreover, under corporate plea agreements, the DoJ routinely includes provisions that grant non-prosecution protection to most of the corporation’s employees, in exchange for their full, truthful, and ongoing cooperation with the investigation. Employees receiving this protection effectively are third-party beneficiaries of the corporate plea agreement. It is important to note that this excludes the individuals carved out of the terms of the corporate plea agreement.

¹¹⁷ This refers to “leniency” as used in the context of US criminal antitrust enforcement.

¹¹⁸ For instance, there were five guilty pleas in the recent investigation against bid rigging and fraud scheme inflating insulation prices.

According to the DoJ, plea agreements provide the following benefits to the bar, business community and judicial system: transparency, proportionality, certainty, expediency, finality, and co-operation (see OECD (2006, pp. 167-169_[58])).

The DoJ can also choose not to pursue additional conduct reported, either via sentencing guidelines credit or, in separate conspiracies, through the so-called “Leniency+ mechanism”.

¹¹⁹ DoJ, Model Annotated Corporate Plea Agreement (Last Updated 14 March 2019) and Model Annotated Individual Plea Agreement (Last Updated 31 December 2018), <https://www.justice.gov/atr/criminal-enforcement>.

¹²⁰ Powers (2020_[64]) also stressed the importance of timeliness of co-operation, which must begin “essentially at the same time as the organization is officially notified the criminal investigation”.

¹²¹ Canada contribution.

¹²² “But too much interference by courts undermines the effectiveness of plea agreements because it introduces uncertainty into the negotiations. Thus, there should be some sort of “dialogue” between the competition authority and courts”.

¹²³ Cartel agreements are considered to be “international” when at least two of the companies taking part in the infringement are headquartered in different jurisdictions, regardless of the geographic coverage of the cartel activities.

¹²⁴ In OECD (2012_[61]) Canada observed that “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”.

¹²⁵ (OECD, 2005_[2]), Annex 2 – Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations.

Notwithstanding such limitation, it was noted that “in some cases, national criminal courts/investigators can compel the agency to disclose the information received from a foreign enforcer” (see OECD (2013, p. 135_[60])).

¹²⁶ United States contribution.

¹²⁷ See also OECD (2005, p. 38_[2]): this was confirmed by the Canadian Court of Appeal, with regard to the US-Canada MLAT (“The court confirmed that the MLAT does not have “a reciprocal offence” or “dual criminality” requirement in terms of the “offence.” Rather, the MLAT sets out an

obligation to give effect to requests regarding certain “offences” as defined in the MLAT and to give certain kinds of assistance also as set out in the MLAT and subject to various stipulated limitations”); and OECD (2012, p. 216_[61]) (New Zealand contribution).

¹²⁸ Article IX of the Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, <https://www.justice.gov/sites/default/files/atr/legacy/2015/01/15/311076.pdf>.

¹²⁹ This was a landmark case in which the DoJ criminally prosecuted twelve companies and fourteen individuals, with eleven executives serving jail time (see Hammond (2010_[51])).

See Plea Agreement, *United States v Dr. Kuno Sommer*, <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/10/sommer.pdf>.

¹³⁰ DoJ (2020), Press Release “Former Air Cargo Executive Extradited From Italy for Price-Fixing”, 13 January 2020, <https://www.justice.gov/opa/pr/former-air-cargo-executive-extradited-italy-price-fixing>.

¹³¹ DoJ (2020), Press Release “Extradited Former Automotive Parts Executive Pleads Guilty of Antitrust Charge”, 3 March 2020, <https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge>.

¹³² DoJ (2019), Press Release “More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea - Two Additional Companies Agree to Plead Guilty and Enter into Civil Settlements; Indictment Against Seven Individuals Unsealed”, 20 March 2019, <https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense>.

¹³³ The country receiving an extradition request is not necessarily the fugitive’s home country/country of citizenship, but could also be the country where the fugitive is (even temporarily) located.

¹³⁴ See, for instance, the initial failed attempt by the United States to extradite Mr. Ian Norris from the United Kingdom (*Norris v Government of the United States of America and others* [2008] UKHL 16) (Stephan, 2008, pp. 11-16_[25]).

¹³⁵ DoJ (2020), Press Release “Extradited Former Automotive Parts Executive Pleads Guilty to Antitrust Charge”, 3 March 2020, <https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge>.

¹³⁶ Case C-191/16, *Romano Piscioti v Bundesrepublik Deutschland*, Judgement of 10 April 2018, ECLI:EU:C:2018:222.

¹³⁷ Incentives also include “*the pressure they feel from ambitious performance targets*”.

¹³⁸ For an overview of the factors enhancing the effectiveness of a criminal sanctions regime, see OECD (2005, pp. 28-29_[2]).

¹³⁹ In New Zealand, the Commerce (Criminalisation of Cartels) Amendment Act 2019 was passed in April 2019 and will only enter into force in April 2021 (see <https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/criminalisation-of-cartels-2018/>).

¹⁴⁰ Another way to ensure sufficient buy-in is to focus on cases concerning goods sold or services provided to consumers.

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