

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

Working Party No. 3 on Co-operation and Enforcement

**EXECUTIVE SUMMARY OF THE ROUNDTABLE ON CARTELS INVOLVING IMMEDIATE
GOODS**

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This Executive Summary by the OECD Secretariat contains key findings from the discussion held under Item III of the 122nd meeting of the Working Party No. 3 on 27 October 2015.

More documentation related to this discussion can be found at: www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm

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EXECUTIVE SUMMARY OF THE ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS

*By the Secretariat**

Considering the discussion at the roundtable on “Cartels Involving Intermediate Goods”, held by Working Party No.3 on Co-operation and Enforcement on 27 October 2015, the Secretariat’s background paper and the delegates’ written submissions and presentations, several key points emerged:

1. Cartels involving intermediate goods are increasingly in the radar of competition authorities. They may have specific features that differentiate them from cartels concerning final consumer goods.

Intermediate goods can be defined as parts and components, or any other item used as an input in the production of manufactured goods for final consumers, and are used at different stages of the value chain. In today’s increasingly globalised economy, value chains are often cross-border in nature. The experiences of competition authorities show that, although in general cartels tend to be more frequent with respect to final and consumer goods than intermediate goods, there have been several significant international competition cases involving intermediate goods, especially in the chemical, automotive and electronics industries.

Since intermediate goods are used as inputs in the production of manufactured goods at various stages of increasingly globalised value chains, cartels involving intermediate goods can often involve more than one jurisdiction; this is, for example, the case where cartelised intermediate goods are exported, or manufactured goods incorporating cartelised intermediate goods are sold across borders.

The Secretariat’s research suggests that there would be several differences between cartels involving intermediate goods and cartels in final goods: i) cartels seem more likely to be formed in final goods; ii) intermediate goods cartels tend to be of longer duration, suggesting greater stability; iii) intermediate goods cartels are, in general, apt to have wider geographic scope; and iv) intermediate goods cartels have been less often detected *ex officio* (i.e., detected through investigations rather than through self-reporting under leniency programmes), than cartels in final goods.

2. Cartels involving intermediate goods can often raise complex enforcement issues such as establishing jurisdiction, finding evidence and calculating fines.

Cartels involving intermediate goods can often raise complex enforcement issues such as establishing jurisdiction, collection of evidence and prosecution coordination, and calculation of fines, especially in parallel investigations.

* This executive summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the roundtable, the delegates’ written submissions and the Background Paper by the Secretariat.

Regarding investigation and prosecution, intermediate goods cartels pose specific challenges with respect to the jurisdictional reach of countries' competition laws. Many competition laws require considering the effects of the alleged anticompetitive practice in the relevant territory to establish jurisdiction. Also, in practice, when deciding whether to take forward a case, competition agencies weigh the significance and likely impact of the enforcement action against the resources that the investigation necessitates.

Concerning fines for cartel conduct in intermediate goods, parallel investigations of intermediate goods cartels in different jurisdictions may theoretically result in the same sales being taken into account more than once for fine calculation purposes (i.e., by more than one competition agencies). However, so far there have been few situations of such genuine double counting and, while not required to do so, most countries take fines imposed in other jurisdictions into account. An effective co-operation between the relevant agencies is particularly important in this respect.

3. Most competition authorities look at domestic cartel effects in order to establish jurisdiction, and take action when harm to domestic consumers is established.

Almost all competition agencies examine domestic effects when establishing jurisdiction to start enforcement action; i.e., they assess whether the alleged cartel has an anti-competitive effect on consumers in their jurisdiction, although the exact test differs from one jurisdiction to the other. For example, the US agencies assess direct, substantial and reasonably foreseeable effects within the US, while the EU relies on a theory of implementation in the EU. While these approaches are different, they ultimately rely on domestic effects of the relevant conduct as the jurisdictional trigger.

The extent of harm caused by the cartelised intermediate good is also a factor considered by competition authorities when deciding whether to pursue a case. Most competition authorities do not have jurisdiction over pure export cartels, in which all relevant goods are exported to other jurisdictions and there is no harm within the jurisdiction where the collusive agreement is reached. Even authorities with jurisdiction covering export cartels would not, in principle, give priority to or take action against cases of pure export cartels.

The most complex question on jurisdiction arises when there are *only* indirect sales of the cartelised product in the jurisdiction. "Indirect sales" occur when the cartelised component is sold abroad to a third party that incorporates it into a finished product which is sold into the relevant jurisdiction's territory by a third party, not the carteliser. Most delegations agreed that it would be possible to establish jurisdiction only on the basis of indirect sales of the cartelised intermediate goods in their jurisdiction. In practice, however, there are no cartel cases where a competition agency has claimed jurisdiction *exclusively* on the basis of indirect sales. Competition authorities take action primarily when there are direct sales of the cartelised intermediate goods or a mix of direct and indirect sales of the final goods in their jurisdiction. Also, if the overcharge from the cartel has been passed through in another jurisdiction, the competition authority may decide not to pursue the case.

Delegates mentioned that enforcement actions by other competition authorities would not preclude enforcement action by their competition authority for the same conduct, as long as there is harm from the conduct felt in their jurisdiction. However, many agencies do take into account enforcement actions by other agencies when deciding whether to bring a case and may desist, if they consider actions already taken to be sufficient.

4. There is a risk of double jeopardy or over-penalisation of the cartel behaviour in the case of parallel enforcement actions by more than one competition authority. Competition authorities may take into account enforcement activities by other competition authorities.

Delegates agreed that there may be a risk of double counting or double jeopardy (companies getting punished twice for the same cartel conduct) in international parallel cartel investigations. Such risk arises in particular when competition agencies take into account indirect sales in calculating the fines. This may require competition authorities to address legal claims such as *res judicata* (requesting that facts that have been judged on the merits in one jurisdiction are not re-litigated in another) and *ne bis in idem* (requesting that the same conduct is not punished twice). These issues are of particular importance in cartels involving intermediate goods, which often involve several jurisdictions.

The discussion showed that generally double jeopardy rules are construed narrowly and tend to include three elements: (i) same facts; (ii) same offender; and (iii) same protected legal interest. As this last factor links the fines to the cartels' impact in the jurisdiction, there appears to be little scope for relying on the principle of *ne bis in idem* in intermediate goods cartel cases.

Most competition agencies first look at direct sales in their jurisdiction to assess anti-competitive effects and, on this basis, calculate the fines. This avoids the risk of counting the same sales twice. Some competition authorities emphasised the significance of quantifying the degree of pass-through of the cartel overcharge, to adjust the sanctions and lessen the risk of double counting. Some delegates observed that international co-operation on evidence and data is necessary to establish the degree of the pass-through, and highlighted the importance of taking into account fines or sanctioning decisions already imposed by other competition agencies to minimise concerns about the fairness and proportionality of fines levied in multi-jurisdictional cases.

Legal certainty and transparency can be increased by agencies by clarifying in the national fining guidelines how indirect sales should be considered when calculating the fines. Guidelines also could be adjusted to calibrate the fine for indirect sales to reflect the actual effect (incorporating the concept of pass-through) in the jurisdiction.