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Working Party No. 3 on Co-operation and Enforcement

Executive Summary of the roundtable on Criminalisation of cartels and bid rigging conspiracies

Annex to the Summary Record of the 131st Meeting of Working Party No. 3 on Co-operation and Enforcement

9 June 2020

The Executive Summary by the OECD Secretariat contains the key findings from the roundtable on Criminalisation of cartels and bid rigging conspiracies held during the 131st Meeting of the OECD Working Party No. 3 on Co-operation and Enforcement of 9 June 2020.

More documentation related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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Executive Summary of the roundtable on Criminalisation of cartels and bid rigging conspiracies

By the Secretariat*

On 9 June 2020, Working Party No. 3 held a roundtable on criminalisation of cartels and bid rigging conspiracies.

Based on the background note prepared by the OECD Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. There is a trend towards the introduction of criminal sanctions, and more and more jurisdictions can impose criminal sanctions against individuals for cartels and bid rigging conspiracies. Despite this trend, there is no international consensus on criminalisation of cartels.

Criminal sanctions for cartels and bid rigging conspiracies have been on the rise in the last years. In particular bid rigging is increasingly dealt with as a criminal offence. Based on 2018 data, out of the 55 “CompStats” jurisdictions (including 36 OECD countries, the European Union, 14 Participants and 1 Associate in the OECD Competition Committee), 26 jurisdictions can impose criminal sanctions on individuals for cartel infringements while ten jurisdictions can impose criminal sanctions exclusively for bid rigging conspiracies. Data from these 55 jurisdictions also highlighted that the number of cartels for which a prison sentence was imposed increased from 7 cases in 2015 to 49 in 2018. Nevertheless, there are jurisdictions that rely exclusively on administrative/civil enforcement, arguing that there is insufficient recognition of the “immorality” of competition law infringements to justify criminal enforcement and that criminalisation of cartels may over-deter as well as affect detection tools such as leniency programmes.

Moreover, despite a widespread adoption of criminal sanctions, there is no uniformity in the way they are designed and implemented across jurisdictions. For instance, some jurisdictions criminalised hard core cartels, while others have limited the scope of criminalisation to bid rigging conspiracies. Furthermore, there is also no consensus on custodial sentences as opposed to other criminal sanctions for individuals. For instance, imposing jail time may not always ensure sufficient deterrence, so other sanctions such as financial penalties, debarment or disqualification could serve as a strong tool to deter individuals from engaging in cartel behaviour.

Finally, among criminal enforcement regimes some jurisdictions lack actual enforcement, especially with regard to custodial sentences.

2. Two theories of punishment have emerged in the criminalisation debate: the economic deterrence theory (i.e. a sanction against criminal conduct can only be justified if it prevents or reduces future crimes) and the retribution theory (i.e. criminal punishment is justified by the fact that the individual engaged in a prohibited and morally wrong conduct). The deterrence theory seems to have gained more traction.

* This executive summary does not necessarily represent the consensus view of the Working Party No. 3. It identifies key points from the discussion at the roundtable, including the views of a panel of experts, the delegates’ oral and written contributions, and the background note prepared by the OECD Secretariat.

The deterrence theory applied to criminalisation of cartels and bid rigging conspiracies argues that imprisonment seems to be the most effective punishment, while monetary fines against individuals or companies may not lead to sufficient deterrence. Companies that benefitted from offences can easily compensate fines imposed against individuals. Effective fines against companies, it has been argued, would need to be so high that they would raise legal challenges and could result in negative externalities, such as risks of liquidation and market exit of the fined company.

However, there are questions as to the possibility to achieve optimal deterrence through criminal sanctions and as to how to measure the deterrent impact of criminalisation. Imprisonment and other criminal sanctions (e.g. community service or disqualification orders against companies' directors) are often complemented with other remedies, including pecuniary sanctions, disqualification from public bids and adverse publicity orders imposed against companies. Moreover, sentences of imprisonment are often for a short term or suspended.

Finally, under the retribution theory, cartels and bid rigging conspiracies are considered to amount to stealing or cheating. However, public's views diverge across jurisdictions and, at least in some jurisdictions, it seems that there is thin empirical evidence on a general perception of cartels being considered as morally wrong.

3. Cartels and in particular bid rigging conspiracies are often part of a wider set of criminal conduct and can involve, for example, fraud, corruption or money laundering. Competition authorities can benefit from close co-operation with other enforcers, such as public prosecutors, fraud or anti-corruption investigators.

When cartels and bid rigging conspiracies are part of a wider set of criminal offences, enforcement actions can benefit from a co-ordinated approach, exchange of information and mutual trust. Competition authorities often need to increase the awareness of public prosecutors and have to co-operate with a number of stakeholders. To this purpose, detection and investigation tools have to be effective and aligned with the tools available to other law enforcement bodies.

The involvement of competition authorities in prosecuting criminal conduct differs across jurisdictions. When administrative and criminal cartel proceedings are conducted in parallel by different authorities, co-ordination is even more crucial and its absence can affect cartel enforcement as a whole. Purely administrative jurisdictions can also benefit from closer co-operation with public prosecutors, since, as mentioned above, cartels can be part of a wider set of offences and may not necessarily be brought to the attention of the competition authority at the outset.

4. While criminal sanctions can be a strong deterrent, it ultimately takes time and significant resources to ensure that a criminal enforcement regime – resulting in meaningful custodial sentences – is actually effective.

Not all competition regimes are designed for successful criminalisation. There is a need for jurisdictions to gradually build effective institutions before introducing criminalisation; and experience shows that the introduction of criminal enforcement requires significant advocacy efforts to educate stakeholders and the general public before becoming effective.

Moreover, criminalisation requires significant investments in building enforcement know-how and experience by competition authorities, as well as reinforced powers of investigation such as the powers to search and seizure, to search private premises, and to arrest and detain individuals. These new powers require, in some cases, adjustments to institutional designs.

5. Integrating criminal enforcement in existing civil or administrative regimes often requires important procedural adjustments that have an impact on the cost of investigating and prosecuting antitrust offences.

Criminal antitrust sanctions are likely to raise the standard of proof from, for instance, a “balance of probability” test with strong and convincing evidence to a “beyond reasonable doubt” standard. This may increase evidentiary requirements and extend the length of investigations. Another question that may complicate enforcement is whether and how to prove criminal intent.

While due process is already a focal point of both criminal and administrative/civil antitrust proceedings, criminal enforcement can trigger additional due process requirements. These may result from applying to antitrust enforcement criminal law principles and procedural rules (such as presumption of innocence and the right against self-incrimination) with stronger safeguards to protect rights of defence. These safeguards can impact competition authorities’ information gathering process and the length of investigation procedures. In addition, evidence obtained in criminal proceedings may not be available to parallel administrative proceedings and vice versa.

6. Leniency programmes do not operate in a vacuum, and criminalisation influences the incentives of prospective leniency applicants.

It is important to consider the relation between criminalisation and (administrative) leniency and whether criminalisation hampers or enhances the effectiveness of leniency programmes. When faced with the question whether criminal sanctions should be introduced, jurisdictions should carefully balance the expected benefits from increased deterrence against the potential costs of less effective detection tools.

Transparency and predictability are key in leniency programmes. In a criminalisation context, this translates into certainty of criminal immunity or, in some jurisdictions, of reduction of criminal sanctions for reporting individuals. In principle, this requires competition authorities to prosecute or be in control of criminal cases. In some jurisdictions where competition authorities are not in charge of prosecuting criminal cases, mechanisms of enhanced co-operation with public prosecutors are in place to mitigate the risks of leniency applicants being prosecuted (or not being granted a reduction in the criminal sanctions).

7. International co-operation is an essential element to ensure effective cartel enforcement. However, legal and practical obstacles exist for co-operation between criminal and administrative regimes.

In the last years, there have been successful cases of co-operation between criminal jurisdictions in international cartel cases. However, criminalisation presents practical challenges for international co-operation due to obstacles for administrative jurisdictions to co-operate (and in particular to share information) with jurisdictions where enforcement proceedings may result in criminal sanctions, and in particular in the incarceration of individuals. These obstacles may restrict the use of informal co-operation methods. Legal limitations to co-operation also exist because 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 jurisdictions.

In principle, there are no restrictions on prosecuting individuals located overseas for criminal antitrust offences. For example, the number of foreign defendants in the United States has risen in the last years and prosecutors frequently seek extradition. However, in particular smaller jurisdictions face obstacles when trying to prosecute individuals located overseas.