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This document reproduces summaries of contributions submitted for Item 1 of the 131st OECD Working Party 3 meeting on 9 June 2020.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

Please contact Ms Sabine ZIGELSKI if you have any questions about this document
[Email: Sabine.Zigelski@oecd.org, Tel: +(33-1) 45 24 74 39]

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Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on access to the criminalisation of cartels and bid rigging conspiracies – Summaries of contributions (131st Meeting of the Working Party No 3 on Co-operation and Enforcement on 9 June 2020). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Australia

Since the early twentieth century, the number of countries with criminal cartel laws increased from three to over thirty jurisdictions. Over the last two decades, there has been steady and substantial growth in active enforcement under criminal cartel laws around the world. In 2009, the Australian Parliament amended the national competition laws to introduce a parallel regime of civil contraventions and criminal offences in respect of cartel conduct (which comprises price fixing, output restriction, customer or territory allocation and bid rigging).

The Australian Competition and Consumer Commission (ACCC) is Australia's competition regulator and is responsible for enforcing the Australian competition laws, which are now set out in the *Competition and Consumer Act 2010 (CCA)*. In relation to criminal cartel conduct, the ACCC is responsible for investigations and the independent national prosecutor (the Commonwealth Director of Public Prosecutions or CDPP) instigates cartel prosecutions.

Since 2009, the ACCC has invested substantial resources and made significant operational changes to develop its criminal cartel enforcement capacity. It has taken a number of years for the ACCC to adapt its investigative processes to the requirements of criminal investigations and embed its new capability.

As at May 2020, ACCC investigations led to the CDPP taking prosecutions against three companies who have pleaded guilty or have indicated an intention to plead guilty. The CDPP has also commenced prosecutions against 5 companies, a trade union and 15 individuals.

The ACCC has become very experienced in some critical criminal investigative techniques including search warrants. It also relies heavily on a sophisticated cartel immunity and co-operation program and recently adopted an anonymous whistle blower tool.

The ACCC's cartel enforcement program also involves proactive strategies, such as community education, collaboration with domestic and international agencies, and proactive intelligence gathering.

In Australia, since the criminalisation of cartels, domestic and international co-operation has become increasingly important and useful. The ACCC has dedicated significant resources into developing its relationship with other agencies involved in the process for obtaining criminal sanctions, such as the CDPP and the Australian Federal Police. This has been coupled with capacity building work with international counterparts.

International co-operation has allowed more open dialogue between competition agencies about what works well in each jurisdiction and this has allowed for the adoption of more effective enforcement strategies. The ACCC has access to a number of international agreements and treaties that support the co-operation.

As the lead Australian cartel enforcer, the ACCC is continuing to review and improve its relevant policies and practices, build its criminal investigative capacity and deepen co-operation with the CDPP and other Australian and international enforcement partners.

Australia has made considerable progress in establishing an effective criminal cartel enforcement regime. Nevertheless, substantial challenges remain to achieve a sustainable program, which remains an effective deterrent to competitors who collude to deny Australians the benefits of competition.

Austria

In Austria, a company may face two different sanctions for bid rigging: cartel fines imposed by the cartel court upon application of the Austrian Competition Authority (“BWB”) and criminal sanctions imposed by the criminal court. Moreover, Austrian criminal law provides for penalties (up to three years imprisonment) imposed on employees of companies involved in bid rigging. Criminal offences are not pursued by the BWB but by the public prosecution. Yet it is common practice that the BWB and the public prosecution co-operate and co-ordinate their investigations. Evidence and data gathered in investigations by the public prosecution can be used by the BWB in competition cases. This also applies vice versa.

The Austrian leniency programme proves very successful in fighting cartels: Since 2004, with the entry into force of the leniency program, the BWB has received 104 leniency applications. In the context of bid rigging, a consequence of the dual enforcement system in Austria is that a company applying for leniency may put its employees at risk of criminal prosecution. With this in mind, the Austrian leniency programme contains the possibility of a "criminal immunity" for the employees, if the company significantly contributed to the detection of the cartel infringement. Due to its effectiveness, the Austrian leniency system served as a model for the ECN+ directive.

Belgium

On criminal sanctions

The BCA can only impose administrative sanctions. Cartel violations by undertakings can be sanctioned with fines of up to 10% of the worldwide turnover in the last fiscal year. Penalty payments can be imposed of up to 5% of the daily turnover per day of lack of compliance.

Cartel violations by individuals can be sanctioned with fines of 100 to 10 000 euro.

Bid rigging is considered to constitute a cartel violation. The BCA has consistently decided that it has jurisdiction with regard to collusion between undertakings in respect of a public tender, but not with regard to the respect of the public procurement rules. The Conseil d'Etat has jurisdiction with regard to the administrative law aspects of an infringement of the public procurement rules.

Belgian law only provides for criminal sanctions in competition cases with regard to bid rigging.

Bid rigging can be sanctioned with prison sentences of 15 days to 6 months and fines of 100 to 10 000 euro.

Criminal sanctions can only be imposed by the Criminal law courts, or on appeal by the Courts of appeal, in cases brought by a Public prosecutor. The competition authority can file a complaint. It could probably also intervene as a third party, and it can act as *amicus curiae* – but neither has ever happened in criminal cases.

The Courts can use evidence provided by the BCA. The professional secrecy rules do not apply when asked as witnesses in court.

The BCA is not entitled to obtain evidence from the Public prosecutor, but if provided by him, by a party or third party, the BCA can use this evidence.

On leniency

We have seen in recent years a significant drop in the number of leniency applications, but not in the number of new cases. This indicates that in recent years complaints, informants and the authority's own investigations gradually became a more important source of new cases.

The BCA does not credit corporate compliance programs.

There is no leniency program in criminal law.

BIAC

In 2003, the OECD held a roundtable discussion on a related topic entitled “Cartel Sanctions Against Individuals.” Various scholars, enforcement agency officials, and other commentators have contributed to the discussion on that issue, as well as a related but separate issue on criminalization of cartels. In this paper, *Business at OECD* discusses some of these commentaries and studies. It also offers several observations for further consideration.

The ultimate question may be whether it is more desirable to criminalize cartels and bid rigging conspiracies as an alternative or complement to other methods of combating these undisputedly anticompetitive types of conduct. For those jurisdictions that are considering a criminal cartel enforcement program, it will be useful to consider the following questions: (1) what do we really mean by “criminalization” of cartels and bid rigging conspiracies?; (2) what can be the realistic goals of criminalization of cartels and the effectiveness to achieve such goals?; (3) what are some of the most pressing intra-jurisdictional challenges in criminalizing cartels?; and (4) what are some of the most problematic inter-jurisdictional obstacles or complications to address? We discuss each of these questions in turn. For this session, we assume that “criminalization” means individual criminal sanctions, including not just a possibility but a realistic likelihood of incarceration.

Reasonable persons may disagree on the need for or desirability of criminalizing cartels. There appears to be no consensus or objectively reliable and conclusive support for the premise that individual criminal sanctions (especially substantial jail time) are more effective to deter cartel violations than a non-criminal cartel enforcement program with large administrative fines. The calculus becomes even more complicated when factoring in the role and effect of private cartel enforcement.

It has also recently been observed in this Working Party that leniency applications have declined significantly in recent years, particularly as relates to international cartels. This raises additional questions as to whether further expansion of criminal penalties would be beneficial to overall cartel enforcement measures.

In designing and implementing a criminal cartel enforcement program, there are numerous internal issues within the relevant jurisdiction—such as reconciling its criminal cartel enforcement program with that jurisdiction’s existing leniency program and also with the rest of its criminal justice system—that need to be addressed in tandem with a particular jurisdiction’s decision to criminalize cartels. Similarly, there are significant external reconciliation issues vis-a-vis other jurisdictions.

Business at OECD believes that consideration of further criminalization of cartel conduct requires further study and should be approached with caution. If a particular jurisdiction chooses to adopt a criminal cartel enforcement program, it must have a clear understanding of how the program will perform its intended functions, interact with other national and international enforcement regimes, and achieve desired results.

Canada

In Canada, bid-rigging and agreements between competitors to fix prices, allocate markets or restrict output (conspiracies) are criminal offences. Bid-rigging is punishable by a fine in the discretion of the court or a term of imprisonment of up to 14 years, or both. The penalties for conspiracy are imprisonment for a maximum term of 14 years, a fine not exceeding \$25 million, or both. In addition, courts may issue orders prohibiting the continuation or repetition of the offence. The Competition Bureau (the “Bureau”) may also use other tools to promote compliance with the Competition Act (the “Act”), such as, information visits and warning letters.

Section 36 of the Act provides a right of private action for the recovery of damages if there has been a violation of the criminal provisions of the Act. In addition, the federal government, as well as some provincial and municipal governments, may debar suppliers convicted of conspiracy or bid-rigging offences from their procurement processes.

The Bureau investigates alleged offences under the Act and may refer matters to the Public Prosecution Service of Canada (“PPSC”) for prosecution. In terms of sentencing, the PPSC considers recommendations from the Bureau, but is not bound by them. The PPSC makes sentencing submissions to the court, which has the sole authority to determine appropriate sentences with reference to the sentencing objectives and principles set out in Canada's Criminal Code and relevant case law.

Although the Act provides for terms of imprisonment of up to 14 years, Canadian courts have not imposed a custodial prison sentence for a conspiracy or bid-rigging offence in over 20 years (individuals have received conditional sentences). Legislative changes and recent jurisprudence suggest that cartelists face an increasing possibility of imprisonment in Canada. If the Bureau obtains evidence that an individual has committed a criminal offence, it will not hesitate to recommend to the PPSC, where appropriate, that the individual be charged and if convicted, sentenced to serve a term of imprisonment. The Bureau believes that in order to achieve effective deterrence, individuals must face a very real prospect of serving time in prison.

Chile

Cartels are illegal under Chilean law since 1959, when the first Chilean Competition Act was enacted. Cartels have been a civil violation ever since, subject to fines and other sanctions. Cartels were also a criminal offence from 1959 to 2003, when the criminal provision in the Competition Act was repealed. In 2016, criminal sanctions for cartels were re-enacted.

The civil cartel offence includes concerted practices and agreements among competitors to fix prices, limit output, allocate markets, rig bids, establish market conditions or exclude competitors. The criminal cartel offence only covers agreements to fix prices, limit output, allocate markets, or rig public tenders.

While both companies and individuals can be liable for the civil offence, only individuals can be punished criminally. Civil sanctions include fines, modification or termination of contracts, the dissolution of companies or other forms of organisations, and administrative debarment. Criminal sanctions include prison sentences from three to 10 years and director disqualification.

Procedurally, the civil investigation is entrusted to the National Economic Prosecutor's Office ("FNE"). The FNE has criminal-like investigative powers. Civil prosecution can be brought before the Competition Tribunal ("TDLC") by the FNE or private plaintiffs. TDLC's rulings are reviewed in appeal by the Supreme Court. A criminal investigation can only start if a claim is filed by the FNE, once there is a final ruling establishing a civil cartel offence. Criminal investigations are carried out by the Criminal Prosecutor Office (*Ministerio Público*), and prosecution is carried out before ordinary Criminal Courts.

Leniency is available for the first two applicants. The first applicant receives immunity from civil and criminal liability. The second applicant receives a reduction in fines and criminal sanctions. The benefit can only be granted by the FNE.

No cartels have been criminally prosecuted yet. This is mainly because the amendment of the Competition Act that reinstated the criminal cartel offence is recent. Given the special procedural design provided by the amended Competition Act, for a criminal case to be filed, a cartel functioning after 2016 needs to be fully investigated and civilly prosecuted before the TDLC and eventually the Supreme Court before a criminal proceeding can take place.

Colombia

This work will address some of the most relevant issues for the debate on criminalisation of cartels and bid rigging conspiracies that were identified by the Secretariat: actual enforcement of criminal antitrust offences in the Colombian jurisdiction, the evident effects of criminalisation on administrative leniency programmes and due process and co-operation challenges related to the different degree of investigative and enforcement efficiency of the administrative and criminal authorities.

We will further these concerns through first, the description of the elements of the criminal offence and the range of sanctions available in our jurisdiction, as well as the underlying motivations for such legal treatment. Second, the explanation of the process applicable for obtaining criminal sanctions, the investigative and enforcement powers/tools available in our jurisdiction and the co-operation dynamics among authorities when pursuing these cases. Finally, we will refer to the actual record of Colombian criminal enforcement on individuals and the challenges that approach.

Croatia

In its written contribution, Croatian Competition Agency shortly presents the legislative framework on cartels, including on method of setting of fines. On the point of criminalisation of cartels, in the national criminal law there is a provision on bid rigging; however, so far there has been no practice involving criminal prosecution of this type of cartelisation.

Egypt

Cartels are prohibited and severely sanctioned under the Egyptian Competition Law (“ECL”) due to the harm and damage it causes to the effective competition on the market and the consumer. Similarly, bid rigging, being a form of cartel, causes similar harm to the market as well as harm to the public interest. Bid rigging directly affects the public resources and the government, preventing it from selecting the best offer presented among the bidders. Hence, cartels and more specifically bid rigging are criminalised under Article 6 ECL.

The criminal nature of bid rigging under ECL means that persons, not undertakings, can be sued by the criminal public prosecution, which create a general deterrence for not committing such crimes. On its end, ECA uses all available legal enforcement tools to detect the bid rigging crimes including, but not limited to, holding hearing sessions, performing dawn raids and obtaining relevant documents and information.

Moreover, ECA has placed great effort with regards to amending various pieces of legislations that govern public procurement, organising workshops and drafting guidelines, in order to better detect bid rigging and enhance their criminal enforcement. ECA aims to spread awareness regarding this anti-competitive behaviour in all the concerned bodies in Egypt through co-operating with several state agencies, especially those involved in the process of public procurement. ECA aims to regulate anti-competitive conduct in the market through spreading competition law knowledge among bidders and market players as a whole, enabling ECA to better fight and detect bid rigging.

Finland

The Finnish Competition Act includes sanctions that are based on an administrative model, not criminal. However, there has been constant debate on whether the antitrust sanctions in the Competition Act should be based on criminal liability, although the sanction system is still administrative. On the other hand, it cannot be fully excluded that certain bid-rigging arrangements can constitute a fraud under the Finnish Criminal Act. Individuals involved in cartel activities can also be banned from business activities. This contribution is a short summary of the debate and developments on antitrust sanctions in Finland.¹

¹ This contribution deals with sanctions that can be imposed when substantive competition rules have been infringed. In addition, the Finnish Criminal Act contains provisions on certain **procedural violations** like obstructing the Competition Authority to carry out its duties, providing either false documents or oral information to the Competition Authority, or breaking the seal installed by the Competition Authority.

Hungary

Under Hungarian law, administrative and criminal sanctions are available for the punishment of bid rigging conspiracies. Administrative sanctions are imposed by the Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) and the contracting authorities. The GVH may impose a number of different sanctions, but fines remain its most effective sanctioning tool. Contracting authorities may exclude bidders from public procurement procedures for infringing competition law rules. Criminal sanctions are only imposed by courts, as a result of a criminal procedure. Criminal sanctions may only be imposed in the case of bid rigging offences.

The GVH does not participate in procedures in which criminal sanctions may be imposed, nor does it have any investigative rights in relation to criminal procedures. Generally, the criminal procedure is commenced on the completion of the GVH's administrative procedure. The GVH sends its decision to the criminal investigative authorities, but administrative and criminal authorities are not bound by each other's decisions, however the GVH and the criminal investigation authorities may choose to co-operate with each other in certain cases. Upon formal requests, administrative and criminal investigation authorities may obtain evidence from each other to support their investigations.

In our jurisdiction, leniency applications enable new cases to be initiated, while also serving as a tool for supporting enforcement in ongoing cases. The leniency rules have been harmonised with the Criminal Code, with the result that the submission of a leniency application may also have a positive effect (in case of an immunity application the perpetrator shall not be prosecuted, while in case of a leniency application for a reduction the penalty to be imposed on the perpetrator may be reduced without limitation or even dismissed if all the conditions are met) on the outcome of a criminal procedure concerning the perpetrators of bid rigging in public procurement procedures. In the GVH's practice the existence of effective ex-ante or ex-post compliance programmes can be taken into account as a mitigating circumstance when setting the fine. On the other hand, the operation of a compliance programme in a negligent manner may result in a higher fine.

Israel

The criminal prosecution of cartels and bid rigging cases is one of the Israel Competition Authority's (the "ICA") primary roles. Since its establishment in 1994, the ICA initiated dozens of criminal investigations of cartels and bid rigging cases in a broad array of sectors. The ICA has indicted over 50 cartels and bid rigging cases and more than, 350 participants (individuals and corporations) have been found guilty.

As shall be discussed in its contribution, ICA's experience shows that the success of criminal enforcement of cartel and bid rigging is not instant. It is a gradual process, still underway. It requires considerable agency resources, continually invested in order to improved capabilities, and excel. It has been built, over the years, step-by step through establishing public awareness and obtaining judicial recognition that cartel offenses deserve severe punishment including custodial sentences.

ICA's contribution discusses the normative framework, which allows for the execution of this mission, as well as an overview of the evolution of enforcement, reflecting a trend of stricter enforcement and imposing harsher punishments. We further provide insight on practical aspects including the establishment of an investigations department and an in-house criminal prosecution. Lastly, we comment on recent years' developments in relation to deceit violations and anti-money laundering provisions, which have become part of cartel and bid-rigging investigations and indictments - reflecting the full story of the violations which occur during the implementation of an illicit cartel agreement.

Korea

Where a business entity engages in any illegal cartel conduct or requires any other business entity to engage in such conduct, the Korea Fair Trade Commission (hereinafter referred to as the “KFTC”) may take necessary measures such as a cease-and-desist order or imposition of surcharges. The KFTC may also refer the entity or individuals who are engaged in the cartel conduct to the prosecution to have them punished by imprisonment or be imposed a criminal fine. In accordance with the leniency program, those who are granted the status by the KFTC are eligible for exemption from the criminal charge.

The Korean Ministry of Justice (hereinafter referred to as the “KMOJ”) oversees prosecution in the Republic of Korea through the law enforcement of the Korean Prosecution Service (hereinafter referred to as the “KPS”). The KPS is in charge of the investigation and prosecution of antitrust cases, and it also operates a special task force for forfeiture regarding bid-rigging in government procurement and cartel cases. The KMOJ has general jurisdiction over antitrust criminal law enforcement, while specific investigation and prosecution of antitrust crimes are handled by the KPS and its regional Prosecutors’ Offices. The KPS may start criminal investigation with information gathered from the KFTC and a receipt of its complaint or leniency program. In practice, even if the KFTC decides not to file a criminal charge, the KPS may request the KFTC to file a criminal complaint against a business entity or an individual whenever it recognizes the need to pursue a criminal charge. In this case, the KFTC reports the case to the Prosecutor General for criminal accusation upon the request.

This report reviews legal provisions and procedures related to applying criminal charges against illegal cartel conducts and bid-rigging conspiracies, and introduces cartel cases punished by criminal sanctions in Korea.

Mexico

In Mexico, absolute monopolistic practices (which include bid rigging) are related to what is referred to as hard-core cartels. The competition law considers these practices to be illegal *per se*. Moreover, these practices are subject to administrative fines, to criminal sanctions, and are liable to competition damages actions under the civil law.

Criminal sanctions apply to all types of cartel offenses established in article 53 of the competition law and are only applicable to individuals. Also, the law includes exception of criminal liability to those economic agents who were granted the benefit of the Commission's leniency and immunity program, increasing incentives to join it.

The Federal Criminal Code provides the criminal sanctions for cartels, which range from five to ten years, as well as fines ranging from approximately USD 4,195 to USD 41,950 for those individuals that ordered, executed or carried out cartel activities.

Once a Statement of Objection is issued, the Head of the Investigative Authority of COFECE has the discretionary power to file a criminal complaint before the Office of the Attorney General. Criminal prosecution of cartel conducts corresponds to this office and its adjudication to the Federal Courts.

The Investigative Authority has filed two criminal complaints, both related to bid-rigging cases in the public health sector. The first complaint was lodged in 2017 and the second complaint in 2019. COFECE has the intention to continue filing criminal cases as they have an important deterrent effect for cartel conduct and a good incentive for requesting leniency.

Today informal international co-operation in enforcement cases is crucial to COFECE because there are several impediments to carry out co-operation in the context of criminal cases, and to date there are no mutual legal assistance treaties in antitrust criminal matters in force. In order to overcome these challenges, voluntary waivers granted by economic agents are the only possible measures available to formally co-operate with competition agencies from other jurisdictions.

Poland

Polish authorities operating within the areas of competition law, public procurement and criminal law are well equipped with instruments to combat bid rigging

The scope of the bid rigging prohibition and related sanctions arising from anti-trust law and criminal law, reflect common areas as well as certain differences.

The degree of synergy between competition law and criminal law in counteracting bid rigging agreements in Poland is currently quite high.

Lawmakers have rightly observed the need to introduce amendments to provisions concerning bid-rigging offences in penal law.

It is necessary to foster further cooperation between authorities competent to counteract bid rigging, and especially mutual exchange of information and evidence, in order to improve the effectiveness of identifying conspiracies. The expected development of case law should contribute to the removal of all doubts as to the ability of the President of UOKiK to use evidence collected in the course of an operational control within the criminal proceedings.

Leniency programme is functioning properly as regards anticompetitive agreements in general, however the instrument is not yet completely effective with respect to bid rigging.

An expected positive change will be the implementation of Article 23 of Directive ECN+, which will provide protection for members of senior management and employees of the applicant for leniency against sanctions imposed in criminal proceedings, which will translate into a higher attractiveness and effectiveness of the leniency programme.

Portugal

The Portuguese Competition Authority (Autoridade da Concorrência, AdC) considers the fight against cartels as one of its main priorities, given the harm they cause to the economy and consumers, both intermediate and final. Coordination by competing firms through price fixing, geographic or customers' market allocation, or the limitation of production to raise prices is deemed as one of the most serious infringements of competition law.

In this contribution, we carry out an assessment of the legislative framework for cartels in Portugal, sharing some milestones and recent developments in the AdC's fight against cartels, particularly considering the case of bid-rigging in public procurement. In addition, we share our practical experience, taking in consideration the relevance of a continuous cooperation at the EU and international level in the fight against cartels, as these anticompetitive conducts meet no borders.

Under the Portuguese Competition Act, cartels are administrative offences and not criminal offences. Therefore, the AdC may impose fines both to undertakings and individuals and decide to apply other ancillary administrative sanctions.

The current system of administrative sanctions has allowed for effective enforcement of competition rules against cartels.

One of the possible ancillary sanctions is the exclusion from public contracting procedures. For instance, in the cartel case in railway maintenance services, the participation in a cartel resulted in the imposition by the AdC of a ban from participating in tenders relating to the market for maintenance services for track equipment on the national rail network, for a period of two years, for two of the companies involved.

While the Portuguese legal framework does not foresee criminal sanctions for cartel behavior, it envisages the criminal sanctioning of some of the facts which constitute a cartel when the latter takes place in the context of bid-rigging and under certain circumstances, leading to a disruption of public tenders.

In respect of the interplay between administrative and criminal proceedings, the implementation of the ECN+ Directive will potentially bring changes. In particular, by foreseeing the protection of immunity applicants from criminal sanctions under certain circumstances, it may create further incentives for the cooperation of companies and respective staff, managers, and board of directors involved in anticompetitive practices, and potentially enhance the efficiency of the leniency programs.

Russian Federation

The Criminal Code of the Russian Federation provides for criminal liability for restricting competition by concluding a cartel prohibited by antimonopoly legislation. Sanctions can take the form of fines, prohibition of engaging in certain activities or occupying certain positions, community service or imprisonment for up to 7 years. The Criminal Code of the Russian Federation provides for sanctions limited to individuals, there is no criminal liability for legal entities in the Russian Federation.

Administrative liability is provided for both individuals and legal entities in accordance with the Code of Administrative Offences of the Russian Federation. Administrative penalties include fines (provided for individuals and economic entities), as well as disqualification (applicable only to individuals).

The Civil Code of the Russian Federation in conjunction with the Law on Protection of Competition allow a person who has suffered from an antimonopoly violation to recover both actual damage and property benefit.

In accordance with the legislation of the Russian Federation, offenders have the opportunity to apply for a leniency programme (exemption from liability) entrenched in Notes to Article 14.32 of the Code of Administrative Offences (administrative liability) and in Note to Article 178 of the Criminal Code (criminal liability).

In order to ensure economic security of the Russian Federation, to counter the challenges and threats to economic security, to prevent crises in the resource-based, production, scientific, technological and financial sectors, as well as to prevent a decline in the quality of life of the population, Order of the Government of the Russian Federation No. 1314-r of June 17, 2019 «Interdepartment programme for exposing and suppressing cartels and other competition-restricting agreements for 2019 - 2023»² was approved.

² <http://government.ru/docs/37183/> (document is available only in Russian)

Spain

The CNMC (National Commission on Markets and Competition) has increased both the antitrust action and the effectiveness of its fight against cartels, especially bid-rigging cases. This is reflected in the CNMC action plans, where clearly one of the priorities is the fight against anti-competitive activities in public tendering, taking into account also the very positive results of the Spanish leniency programme -in terms of the number of leniency applications filed and in the results obtained from the investigation and valuation of the leniency requests submitted-.

Besides, in addition to sanctioning undertakings participating in cartels, following a ruling Supreme Court, since 2016 the CNMC has imposed penalties on natural persons for infringements of the competition law, as a mechanism to increase the dissuasive power of competition authorities' actions against anti-competitive conducts. Under Spanish law, competition offences are exclusively subject to administrative sanction, although the Criminal Code criminalises certain conducts that bear some similarities to competition offences, in particular some actions falling within the concept of a cartel. Therefore, the transposition of Directive (EU) 2019/1, of 11 December 2018 (ECN+ Directive) could clarify the interrelationship between the enforcement procedure in competition matters and criminal law, in particular, with the aim of protecting leniency applicants against future penalties in criminal court proceedings and in order to avoid unnecessary procedural costs and investigative efforts, especially when sanctioning bid rigging, which is a priority for the CNMC. This is reflected in the Case S/DC/0598/16 *Electrificación y electromecánica ferroviarias*, detected thanks to the leniency programme, in which natural persons were also penalised and in which the procedure for a ban from government contracting was activated for the first time.

To reinforce cartel detection, a proactive approach to boost ex officio proceedings is also a priority for the CNMC, with initiatives such as setting up a mailbox for whistle-blowers; specific training for public procurement officials to detect bid-rigging cases; screening of public procurement data; the creation of systems for the automatic detection of signs of possible fraudulent tenders; and finally, on 20th February 2020 the CNMC opened a public consultation on a draft guide for compliance programmes in relation to competition law.

Chinese Taipei

The sanction measures adopted by each country vary due to difference of circumstances and necessities in each country. As to current enforcement of Chinese Taipei, it may not be denied that administrative authorities' conducting of administrative actions is obviously more efficient than prosecution and trial conducted by the judicial branch. Therefore, when system design is considered, it seems that administrative liabilities on concerted actions are still not easy to be completely abandoned.

However, deterrence arising from criminal liabilities shall not be overlooked. If the FTC includes grant of search and seizure powers as goals of legislative amendment, under current thinking of judicial professionals that criminal investigations must be differentiated with administrative investigations, whether to impose criminal liabilities at concerted actions in lieu of administrative liabilities will be an issue for continual discussion.

And as to bid rigging, because government procurement projects are specifically regulated by another act and controlled by another competent authority, Chinese Taipei FTC does not deal with bid rigging of government procurement projects since 1999. As to private enterprises' public tendering, although in theory, the FTC may intervene in accordance with the FTA, in practice, the FTC seldom gets involved for private enterprises have greater incentives and capabilities to create their own prevention mechanism.

Ukraine

In 1994 – 2003 Ukrainian legislation provided for criminal liability for concerted anticompetitive practices of economic entities. The Ministry of Internal Affairs was in charge for the investigation and establishing the fact of crime for cartels. However not a single criminal investigation was opened into this offence. Therefore, in 2003 Ukrainian Parliament decriminalised anticompetitive practices and established penalty up to 10% of the entity's annual revenue for the last financial year preceding the year in which the penalty is imposed.

To detect and justify the violation, the AMCU, as a state body with a special status, interacts with various law enforcement agencies and competition authorities in the exchange of information and the use of tools that are not within the functions of the AMCU. Any information obtained during the investigation can be used by law enforcement authorities as evidence in court - regardless of which of the authorities or agencies provided this information. In case of detection of possible criminal offences, the Antimonopoly Committee of Ukraine should report the circumstances to the necessary law enforcement authorities (most often interacts or can interact with State Bureau of Investigation and the Security Service of Ukraine). This rule also applies in the reverse order when circumstances of anticompetitive practice are discovered.

Interaction between the AMCU and other competition authorities is based on the provision and receipt of limited information, solely based on international treaties of Ukraine, which are ratified by the Verkhovna Rada of Ukraine. According to this, international co-operation is limited by the confidentiality issues in certain extend.

Table 1. Consequences of the criminalisation of violations of the law on the protection of economic competition in Ukraine

Advantages	Disadvantages
<p>enhancing the general and special preventive effect of liability for anticompetitive concerted practices of economic entities;</p> <p>possibility of using the means of operational and forensic activity in the investigation of anticompetitive concerted practices of economic entities;</p> <p>stimulation of the co-operation between employees of economic entities participating in concerted actions and governmental authorities to expose and prove the anticompetitive concerted practices of economic entities.</p>	<p>in empowering the AMCU to investigate criminal cases - the need to introduce a higher standard of proof for which the AMCU has to build the experience, the need to review the procedural principles of the AMCU substantially;</p> <p>in the case of empowering law enforcement authorities to investigate criminal cases under the violations of the legislation on the protection of economic competition - there is a possibility of parallel investigation practices. Under certain circumstances, such cases may become conflicting.</p>

Despite the absence of criminal responsibility, effective interagency co-operation is successfully implemented in the process of detecting anticompetitive concerted practices. An example of such co-operation is AMCU's Decision dated 02.11.2017 No. 612-p in which the AMCU took into account the materials provided by the National Anti-Corruption Bureau of Ukraine. As a result, eight companies were prosecuted for anticompetitive concerted actions regarding bid-rigging conspiracies.

To encourage participants to fair competition, the Law of Ukraine "On the Protection of Economic Competition" includes the leniency clause. Perhaps, due to the high conditions of evidence or due to the lack of criminal responsibility, this practice is quite rare.

United States

The United States Department of Justice, Antitrust Division has a long history of aggressively prosecuting hard-core cartel offenses – price fixing, bid rigging, and market/customer allocations – as criminal violations. The decision to pursue hard-core cartel behaviour criminally and the Division’s approach to criminal investigations have led to significant deterrence of these activities for many years. The Division’s approach is characterised by its unwavering commitment to ensuring predictability and transparency in its criminal antitrust enforcement efforts, using all the tools available to maximise the detection of cartel activity, and seeking severe sanctions for both corporations and individuals after guilt is established.

This submission provides an overview of key aspects of the United States’ efforts to prosecute criminal violations of its antitrust laws. It begins with an overview of the investigative tools used by Division prosecutors in their investigation of cartel activity, including the Division’s Leniency Program. It then explains the United States’ system of sanctioning cartel behaviour, which includes individual sentences of imprisonment and multiple layers of potential sanctions for corporations, including criminal fines, civil penalties, and administrative debarment. Finally, the submission discusses several recent and notable developments in the Division’s criminal enforcement efforts, including (1) the employment of rarely used civil recovery statutes when the government itself is a victim of a criminal antitrust conspiracy; (2) the creation of an interagency effort specifically targeting cartel offenses affecting public procurement; and (3) enhanced incentives for corporations to improve compliance programs addressed specifically to the prevention of cartel offenses.