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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Background Note

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Background Note ¹--

1. Introduction

1. The number of cartels with international dimensions makes co-operation between cartel enforcers in different jurisdictions imperative for domestic enforcement to be truly effective. The introduction of competition law in more jurisdictions highlights the potential for co-operative relationships based on a shared commitment to fight cartels. Success in discovering and prosecuting international cartels will require competition authorities to significantly improve their ability to co-operate. While co-operation between cartel enforcers has become more common, and has delivered significant successes, there seems to be scope for increasing the intensity and improving the quality of co-operation between authorities on cartel investigations.

2. Co-operation in cartel enforcement is a topic that continues to be widely discussed in many fora and is of considerable interest to competition enforcers and the private sector alike. The OECD has contributed to these discussions and has fostered co-operation through its own instruments and reports, as have others.

3. On the face of it, there is more co-operation between competition authorities in merger review than cartel investigations because the nature of the proceedings is different. Unlike a cartel case, where parties are investigated for alleged infringements of the law, merger review is an authorisation process. In the latter, the parties have all the incentives to co-operate with the reviewing authorities and to ensure consistent outcomes through effective co-operation between the authorities involved. Conversely, in cartel cases the investigated parties have no interest in the authorities co-operating, which may only result in multiple sanctions, unless they are in leniency/amnesty programmes. Therefore, creating the incentives for co-operation in cartel investigations rests largely with competition authorities.

4. The purpose of this paper is to build on previous OECD work and to consider country experiences with co-operation, in order to examine developments in light of the existing frameworks for co-operation in cartel cases. The paper is organised around five main parts:

- The first part will review the principle of comity and how it has developed over time, and its application to cartel co-operation.
- The second part will look at the contribution of the OECD instruments through a review of the main findings of the reports on the implementation of the 1998 OECD Hard Core Cartel Recommendation.

¹ This background paper was prepared by Hilary Jennings with research support from Sarah Long, OECD Competition Division, Secretariat.

- The next section will analyse the instruments used in international co-operation, both competition-specific tools as well as mechanisms of a more general application, and analyse their effectiveness in cartel investigations over the years.
- This is followed by an overview of the key challenges, drawing a distinction between challenges common to all jurisdictions, and those of particular relevance for developing and emerging economies.
- The last part of the paper considers the instruments developed in the tax area and how these facilitate international co-operation between tax authorities. It discusses what insights these may offer for cartel enforcement.

5. A number of points emerge from the paper. These include:

- There are a number of co-operation instruments but none is optimal and not all are available to all jurisdictions.
- There is frequent informal co-operation but formal co-operation on cases is less extensive.
- A number of challenges exist and progress on addressing them requires a combination of political commitment, in the case of legislative change, and innovation.
- Developing and emerging economies face additional hurdles that prevent them from accessing co-operation mechanisms.
- Solutions to the international co-operation challenges faced by enforcement authorities in other policy areas could provide avenues to explore in cross-border cartel enforcement.

2. Comity – a defining principle of international co-operation

6. Comity is the legal principle whereby a country should take other countries' important interests into account while conducting its law enforcement activities, in return for their doing the same. For over 100 years, public international law has acknowledged comity as a means for tempering the effects of the unilateral assertion of extraterritorial jurisdiction. Comity is therefore a horizontal, sovereign state -to-sovereign state concept, as laid down by the United States Supreme Court in *Hilton v Guyot* in 1895.² It is not the abdication of jurisdiction; instead, it is the exercise of jurisdiction with an accompanying understanding of the impact that the exercise of jurisdiction may have on the law enforcement activities of other countries.³

Jurisdictions apply international comity principles in many substantive areas of law (e.g., tax, insolvency, anti-bribery, environmental regulation) to ensure that complex cross-border enforcement problems are resolved in a manner that balances the policy and enforcement concerns of the states involved.

International co-operation in the competition field employs two types of comity: negative comity and positive comity.

² 159 U.S. 113 (1895), 163-64: “Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.’

³ The US Supreme Court relied on international comity to restrict the extraterritorial scope of US antitrust law in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

2.1 *Negative comity*

7. *Negative or traditional comity* involves a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests. The OECD's successive Recommendations on co-operation in competition matters (the most recent in 1995) recommended that in seeking to implement negative or traditional comity a country should:

*(1) notify other countries when its enforcement proceedings may affect their important interests, and (2) give full and sympathetic consideration to ways of fulfilling its enforcement needs without harming those interests.*⁴

2.2 *Positive comity*

8. *Positive comity* involves a request by one country that another country undertake enforcement activities in order to remedy allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country. The term "positive comity" appears to have been coined during the negotiation of the 1991 Co-operation Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws ("the 1991 EC-US Agreement").⁵ However, the underlying concept was decades old. Positive comity provisions have been included in the OECD Recommendations on co-operation since 1973, although the term "positive comity" has not been used specifically. The 1995 OECD Recommendation sets out that a country should:

*(1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis in considering its legitimate interests.*⁶

9. There is a difference between positive comity and investigatory assistance, which is distinguished in the OECD's 1995 Recommendation. Positive comity involves investigating anti-competitive practices and remedying them if possible in order to assist the requesting country. The proceedings are therefore conducted by the requested country. On the other hand, investigatory assistance, such as information sharing or gathering information on behalf of a foreign country involves a request for assistance in the requesting country's enforcement action. They are similar, but raise different legal and political issues.⁷ An effective and efficient investigation process may often go beyond an either-or model and require a wider range of co-operative activities, with both countries engaging in investigative activities at some point (or points).

10. The OECD Recommendation does not refer to categories of positive comity, but it is useful to identify several categories:

- *A case-specific positive comity arrangement* is an understanding between a requesting and a requested country concerning a matter the requested country agrees to investigate.

⁴ OECD (1995), at I.A1 and I.B.4.b.

⁵ 1991 US/EC Agreement, OJ 1995 L 95/45, corrected at OJ 1995 L 131/38, Article V.

⁶ OECD (1995), at I.B.5.b-c.

⁷ Zanettin (2002), p.183.

- *Allocative positive comity* is a case-specific positive comity arrangement under which the requesting country undertakes to defer or suspend action during the course of the requested country's proceeding.
- *Co-operative positive comity* is any case-specific positive comity arrangement that does not constitute allocative positive comity.⁸

11. The potential benefits of positive comity will largely depend on the extent to which competition authorities are willing and able to create a co-operative culture in which authorities can justify bringing cases primarily for the benefit of others on the basis of the benefits that they expect to receive from cases brought by others. The benefits include:

- *Improved effectiveness.* By invoking a requested country's laws, positive comity can provide a remedy for illegal conduct that the requesting country cannot remedy itself due to jurisdictional problems.
- *Improved efficiency.* Since positive comity results in an investigation by the country in the best position to gather the necessary facts, it can improve efficiency by reducing investigation costs and the risk of inconsistencies.
- *Reducing the need for sharing confidential information.* Since the proceeding is handled by the competition authority with the best access to the evidence, there is likely to be less need for sharing confidential information.⁹

12. The OECD's Positive Comity Report in 1999 considered the potential of positive comity in hard core cartel cases where a requesting country acknowledges that it does not have or may lack jurisdiction. Co-operative positive comity could be beneficial as part of a co-ordinated challenge in which, for example, a requested country takes the lead initially with the understanding that roles may shift and that there may be multiple investigations. The report recognised that allocative positive comity has limited potential in hard core cartel cases because injured countries are likely to want to impose their own remedies.¹⁰ Positive comity is also unlikely to be available in most export cartel cases because such cartels are seldom illegal in their home countries.¹¹

13. Positive comity provisions are now included in many bilateral co-operation agreements between countries. The first wave of co-operation agreements was limited to negative comity principles of avoiding harm to other countries.¹² This changed with the 1991 EC-US Agreement referred to above. It was the first time that positive comity was included in a bilateral agreement on co-operation in antitrust matters.¹³ The principle laid down in Article V of the 1991 EC-US Agreement was further consolidated in the Positive

⁸ OECD (1999), p.21.

⁹ OECD (1999), p.22-23.

¹⁰ Ibid, p.15.

¹¹ The challenge of export cartels is discussed below.

¹² Starting with the 1976 Germany –US Antitrust Accord and followed by the 1982 US-Australia Agreement and the 1984 US-Canada Memorandum of Understanding.

¹³ “First generation agreements” are formal bilateral co-operation agreements incorporating the negative comity principle. In contrast, “second generation agreements” incorporate a positive comity principle. “Third generation agreements” refer to antitrust mutual assistance treaties which as a result of domestic law amendments provide for more extensive co-operation.

Comity Agreement signed by the European Community and the US in 1998.¹⁴ The United States and Canada entered into a similar agreement in 2004.¹⁵

14. Agreements concluded since the 1991 EC-US agreement then have been inspired by the spirit and sometimes wording, of both the OECD Recommendations and the early positive comity agreements, concluded by the US, EU and Canadian authorities.¹⁶ Formal co-operation agreements containing positive comity provisions may commit countries to sympathetic consideration of each other's comity requests, but the countries remain free to make their law enforcement decisions as they choose.

15. There was an initial enthusiasm for positive comity, which was particularly strong after the signing of the 1998 EC-US Positive Comity Agreement. However, expectations have since been lowered. It is regarded sceptically by academics¹⁷ and appears to have been a little used instrument, despite its potential.

Positive comity has been employed infrequently and with limited success

In the 1997 *SABRE/AMADEUS* case. The United States (US) Department of Justice (DoJ) requested that the European Commission investigate under EU competition rules, alleged anti-competitive conduct by a European carrier owned computer reservation system, Amadeus, that was preventing the American Airlines owned SABRE system from competing in certain European countries.¹⁸ As a result the European Commission initiated an investigation and subsequently issued a statement of objections against Air France in March 1998 indicating that the airline had abused its dominant position. Ultimately SABRE reached a settlement guaranteeing it non-discriminatory access to European markets, making the need to render a decision superfluous.¹⁹

While, not a formal request, in the *IRI/AC Nielsen* case, the US DoJustice closed its investigation into AC Nielsen's retail tracking service because AC Nielsen had entered into a settlement with the European Commission that would effectively deal with the DoJ's concerns. Since an investigation had already been launched by the European Commission, there was no point in the DoJ making a formal positive comity request. It was instead decided to allow the European Commission to take the lead.²⁰

¹⁴ Agreement Between the European Communities and the Government of the United States of America Regarding the Application of Positive Comity Principles in the Enforcement of their Competition Laws, OJ 1998 L 173.

¹⁵ Agreement Between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws (2001).

¹⁶ Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition Laws and Deceptive Marketing Practices Laws, 3 August 1995, 4 *Trade Reg. Rep.* (CCH); Agreement Between the European Communities and the Government of Canada Regarding the Application of Their Competition Laws, OJ 1999 L 175. The first agreements concluded between more mature competition regimes and newer regimes contained more or less the same provisions. See for example the US-Israel Antitrust Agreement and the US-Brazil Agreement, signed in 1999 and the US-Mexico Agreement in 2000.

¹⁷ Atwood (1992), p. 84.

¹⁸ US DoJ Press Release, *Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting US Airlines Computer Reservations Systems* (28 April 1997).

¹⁹ European Commission 30th Report on Competition Policy (2000).

²⁰ US DoJ Press Release, *Justice Department Closes Investigation into the Way AC Nielsen Contracts its Services for Tracking Retailers* (3 December 1996).

16. The infrequent use made of positive comity also suggests that countries have not been able to apply it in an entirely satisfactory manner. If the few cases to date are not considered to be shining examples of its efficiency, then its limited use may be explained by a perception that positive comity has limited value.²¹ Positive comity is not a principle of national law and it has no legal force. The use of positive comity is therefore discretionary and left to the goodwill of competition authorities. Moreover, despite its voluntary nature some countries may be concerned that positive comity requests might limit their control over the use of their (typically) limited resources and might affect their discretion on prioritising their enforcement activities. The experience of positive comity in bilateral agreements has been somewhat of a damp squib.

17. There may be other explanations for the lack of positive comity requests, or at least formal requests:²²

- The expansion of enforcement capacities and the uptake of competition laws worldwide. There may be more domestic enforcement capacity and effectiveness to resolve problems without the need to call on the support of another authority. Alternatively, exporters may have more confidence in the foreign authority's credibility and may be more prepared to make complaints directly rather than going through the process of persuading their national government and competition authority to deputise the foreign competition authority to look into the conduct.
- Disparities between the authorities involved in terms of size or power may be a contributing factor in the stagnation of positive comity. Smaller or less powerful authorities may be less likely to interact frequently or to have a recurring need to rely on one another, in contrast, for example to the similarly placed US and EU authorities who interact and assist one another regularly. In the absence of these factors larger authorities may have lower incentives to respond to the needs of the smaller authorities. Also, smaller jurisdictions simply may not have the resources to help foreign counterparts or it may be politically unpalatable for them to rely on foreign authorities to remedy conduct that is harming their consumers.

2.3 *Enhanced comity*

18. A proposal that gained traction in the business community at the end of the 1990s and early 2000s, to overcome some of the limitations experienced with negative and positive comity, was the principle of "enhanced comity". According to the principle of enhanced comity, jurisdiction should be allocated to the state whose competition regime is best equipped to establish an infringement and enforce any sanctions or remedies.

19. The combination of an increasingly global economy and the proliferation of competition regimes around the world increase the likelihood of cross-border investigations with more authorities devoting resources to the same investigations, as well as the potential for inconsistent or conflicting competition law enforcement. Enhanced comity principles go beyond the existing model of parallel (but co-ordinated) investigations to include, for example, non-binding deference to a jurisdiction with a greater interest to investigate the case on behalf of all interested jurisdictions. Such a system could avoid the imposition of inconsistent remedies and significantly reduce the costs of the co-ordination of multiple proceedings for both the enforcement authorities and the parties involved.

20. The concept has had limited application, with one notable exception – the European Competition Network.²³ The need to withdraw national sovereignty in favour of another jurisdiction makes enhanced

²¹ Marsden (2011), p. 307.

²² Ibid, pp. 307, 309-10.

comity a challenging prospect. The concept raises complex questions. What degree of deference to another authority is feasible in multi-jurisdictional investigations? Could an authority with comparatively lesser interest in investigating the conduct defer to those more substantially concerned? How to identify the best-placed authority to take the lead in the investigation? How to ensure that the interest of the other jurisdictions be preserved? Would an integrated or work-sharing approach be possible? Could one or the other authority become the *de facto* lead authority and be responsible for investigating the conduct, possibly with the participation or monitoring by staff from another authority?

Examples of enhanced comity in other regulatory fields²⁴

Other regulatory fields have adopted enhanced comity principles, for example cross-border insolvencies and environmental regulation.

Cross-border insolvencies. The Model Law on Cross-Border Insolvency, adopted by UNCITRAL in 1997 incorporates a number of enhanced comity mechanisms. These include a requirement, when there are multiple recognised foreign insolvency proceedings and no bankruptcy proceedings pending in the jurisdiction considering the matter, that the courts should grant relief consistent with the recognised proceedings occurring in the country where the debtor's centre of interest is located.

Hazardous waste. The Basel Convention governs the trans-border shipment and disposal of hazardous wastes.²⁵ A party to the Convention can prohibit the importation of hazardous or other wastes for disposal, and other parties to the Convention are required to prohibit export of the prohibited waste to the prohibiting country. The Convention also establishes a notification and consent system for the exportation and importation of waste. Thus, the Basel Convention exemplifies an enhanced comity principle whereby under certain conditions one country should defer to the stronger interests of another country, even if it is against their interests (or the interests of companies domiciled within its borders) to do so.

3. The Development of co-operation in cartel investigations

3.1 The OECD Hard Core Cartel Recommendation

21. In 1998 the OECD initiated a new era in anti-cartel programmes with the adoption of the Council Recommendation Concerning Effective Action against Hard Core Cartels.²⁶ The 1998 Recommendation condemns hard core cartels as the most egregious violation of competition law. It calls upon member countries to take two sorts of actions – one relating to their individual enforcement programmes and one relating to co-operation:

- First, the Recommendation encourages each Member country to ensure that its competition laws effectively halt and deter hard core cartels. Members are urged to ensure that their sanctions and investigatory powers are adequate and that their exclusions and authorisations of what would otherwise be hard core cartels are both necessary and no broader than necessary to achieve their overriding policy objectives.

²³ See discussion below at section 4.2.

²⁴ For an in-depth discussion of co-operation in the tax/fiscal area see section 7 below.

²⁵ Basel Convention of the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done Mar. 22, 1989, 1673 U.N.T.S. 125.

²⁶ C(98)35/FINAL.

- Second, the Recommendation urges each Member to review all obstacles to law enforcement co-operation against hard core cartels. Members are reminded *a)* that they have a common interest in preventing hard core cartels, *b)* that while there should be effective safeguards for confidential information, information sharing with foreign authorities has been beneficial when it has been possible, and *c)* that most countries' laws continue to prevent their competition authorities from such information sharing. The strongest forms of co-operation mentioned in the Recommendation – referred to in this report collectively as “information sharing” – were:
 - gathering confidential or non-confidential information on behalf of a foreign authority, using compulsory process where necessary; and/or
 - sharing with a foreign competition authority confidential information and/ or non-confidential investigatory information that is contained in an authority's files.²⁷

22. The Recommendation also includes a positive comity provision, which urges Member countries to seek ways in which their "co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries."

3.2 *The OECD's Hard Core Cartel Reports*

23. Following the adoption of the Recommendation, the OECD's Competition Committee submitted three reports to the OECD Council on the implementation of the Recommendation. Each of these reports studied developments in international co-operation to highlight the incidence of co-operation among authorities and trends in co-operation efforts.

24. The first OECD Hard Core Cartel Report in 2000 noted that due primarily to the restrictive laws in most Member countries, competition authorities had far more success in implementing the Recommendation's call for action with respect to their individual enforcement programmes than its call for engaging in co-operative law enforcement.

25. Two surveys were conducted on international co-operation in cartel investigations and cases, one in 1999 and a second in 2001. In the second, questionnaires were issued both to Member countries and to non-member invitees to the OECD Global Forum on Competition.²⁸

26. The responses disclosed that there had been relatively little co-operation among national competition authorities in cartel investigations and cases prior to 1999. Most of the responding countries had neither made nor received any requests for co-operation in the period covered by the questionnaire. Of those that did, the most active were the US and Canada. One important reason for there being so few

²⁷ Many enforcement authorities in other fields, for example tax, are authorised by law to engage in such information sharing whereby the requested assistance satisfies any requirements set forth in the laws of the requested country – for example, a finding that there are adequate safeguards for confidential information and that the co-operation would be consistent with national interests. Although the Recommendation notes the benefits that have resulted from the use of information sharing in appropriate circumstances, it does not call upon all Member countries to authorise this strongest form of co-operation, but rather leaves it to each country to decide what forms of co-operation are suited to its needs and to the common interest in more effective action against hard core cartels.

²⁸ In the 1999 questionnaire countries were asked for information about instances in which they had either requested or responded to requests for information from a foreign competition authority in connection with a cartel investigation. They were also asked for their views on the costs and benefits of international co-operation, and on impediments to such co-operation.

instances of co-operation was that many cartel cases that were prosecuted in the relevant period did not have an international dimension, that is, they occurred in and affected solely one jurisdiction. In other instances, countries had not prosecuted any cartel cases in the period. It was also clear, however, that where co-operation would have been useful it was significantly constrained by the inability of countries to disclose confidential information to foreign authorities.²⁹

27. The responses to the second questionnaire in 2001 described a different situation. There had been more international co-operation in the intervening period. As noted in the Second Cartel Report from 2003³⁰, it was especially strong between a relatively small group of jurisdictions that had developed close working relationships. The most active co-operative relationships in cartel investigations were between:

- the European Commission and EU Member states;
- the United States and Canada;
- the European Commission and the United States and Australia and New Zealand.

28. Other countries had also engaged in co-operation in one or more cases, including Brazil, Denmark, Estonia, Israel, Italy, Korea, the Netherlands, Spain and the Russian Federation. The Second Report also noted that the number of international co-operation agreements was growing significantly. In most cases co-operation was limited to informal co-operation where authorities informally discuss such matters as investigative strategies, market information and witness evaluations, but do not exchange evidence that is generated by an investigation and is protected by domestic confidentiality laws.

29. The OECD's Third Cartel Report in 2005³¹ highlighted the use of new investigative strategies, such as co-ordinated simultaneous inspections in several jurisdictions, and confidentiality waivers in cases of simultaneous leniency applications. This report also highlighted the increased exchange of know-how and expertise in cartel enforcement, in particular in the field of investigative techniques. There was a growing network of bilateral co-operation agreements not just between OECD members, but also between OECD members and non-members.

30. Most of the reported cases of successful co-operation relied on informal co-operation which, despite its limitations, was considered to be contributing significantly to more effective enforcement. The 1995 OECD Co-operation Recommendation continued to provide the framework for exchanges of non-confidential information, especially between OECD members that had not entered into bilateral agreements. The inability to exchange confidential information was highlighted as a serious impediment to cartel investigations. OECD members reported more use being made of international agreements which authorise formal co-operation, where these exist. The Third Cartel report was produced in 2005, a year after the entry into force of the new legal framework in the European Union, which introduced far-reaching co-operation mechanisms within the European Competition Network.³²

3.3 The OECD Best Practices for Formal Information Exchange in Hard Core Cartel Investigations

31. In light of the laws in many countries preventing competition authorities from exchanging confidential information in cartel investigations, or severely restrict their ability to do so, the OECD's

²⁹ OECD (2000).

³⁰ OECD (2003).

³¹ OECD (2005).

³² See Section 2.2 below.

Competition Committee developed Best Practices for the formal exchange of information in cartel investigations in 2005.³³ The Best Practices aim to identify safeguards that countries can consider applying when they authorise competition authorities to exchange confidential information in cartel investigations.

32. The Best Practices are based on the following principles:

- International treaties or domestic laws authorising a competition authority to exchange confidential information in certain circumstances should provide for safeguards to protect the confidentiality of exchanged information. On the other hand, such safeguards should not apply where competition authorities exchange information that is not subject to domestic law confidentiality restrictions.
- Member countries should generally support information exchanges in cartel investigations. It should, however, always be at the discretion of the requested jurisdiction to provide the requested information in a specific case, or to provide it only subject to conditions, and there should be no obligation to act upon such a request. A country may decline a request for information, for example, because honouring the request would violate domestic law or would be contrary to public policy in the requested jurisdiction. In addition, information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty/leniency programmes.
- When initiating an exchange of information, jurisdictions should act with the necessary flexibility in light of the circumstances of each case. They should consider engaging in initial consultations, for example to assess the ability of the jurisdiction receiving the request for information to maintain the confidentiality of information in the request as well as the confidentiality of information exchanged.
- Appropriate safeguards should apply in the requesting jurisdiction when it is using the exchanged information. In this context, the Best Practices address in particular the use of exchanged information for other public law enforcement purposes, disclosure to third parties, and efforts to avoid unauthorised disclosure.
- Information exchanges should provide safeguards for the rights of parties under the laws of member countries. The Best Practices specifically mention the legal professional privilege and the privilege against self-incrimination. Regarding legal professional privilege, whichever of the levels of protection is higher – that of the requesting or the requested jurisdiction – should be applied. The requesting jurisdiction should ensure that its privilege against self-incrimination is respected when using the exchanged information in criminal proceedings against individuals.
- In light of concerns that prior notice to the source of information can severely disrupt and delay investigations of cartels, the Best Practices advise against giving prior notice to the source of the information, unless required by domestic law or international agreement. Competition authorities may, on the other hand, consider ex-post notice if such notice would not violate a court order, domestic law, or an international agreement, or jeopardise the integrity of an investigation.

33. The OECD's Hard Core Cartel Recommendation has raised the awareness of governments around the world about the importance of investigating and prosecuting hard core cartels. Since 1998 cartel enforcement has become the key priority for both OECD and non-OECD member competition authorities. In parallel, procedural reforms have introduced leniency programmes and strengthened the investigatory powers of competition authorities worldwide. Deterrence has become a watch word, with many authorities

³³ OECD Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations, DAF/COMP(2005)25/FINAL.

increasing fining levels. Some have introduced individual, criminal or civil, penalties as a means to reinforce their enforcement activities against cartels. Alongside this, there is a sense that international co-operation among enforcers in cartel investigations continues to increase. Fora such as the International Competition Network's (ICN) Cartel Working Group, initiated in 2004, provide a platform for authorities to share expertise regarding the challenges of cartel enforcement. Its annual workshops provide a venue for anti-cartel enforcers from around the world to come together, learn from each other, and develop close working relationships that can serve as the basis for future co-operation.

4. Instruments, incidence and illustrations of co-operation in cartel investigations

34. International co-operation between competition authorities in cartel investigations takes place in a multiplicity of forms. It can take place at the bilateral, regional, or multilateral levels. It can be based on formal instruments such as a national legal provision or an agreement between jurisdictions or competition authorities. It may be based on a waiver from a provider of evidence. It can be informal, in that it is not based the framework of a specific co-operation instrument, and so normally involves general forms of co-operation, such as technical assistance, or exchanges of public or authority information. The different instruments and tools as well as the various types of co-operation involved in cross-border cartel cases creates a complex web of differing levels of possible engagement between authorities. The drivers for co-operation and the instruments and networks that underpin it are equally distinct across different jurisdictions and groupings of countries. In spite of all of these variables there is agreement between cartel enforcers that international co-operation is a key tool to ensuring that cartel conduct that touches upon several jurisdictions is dealt with effectively and optimally. Means of facilitating international co-operation are therefore actively pursued.

4.1 *Non-competition-specific co-operation instruments*

35. Some co-operation is facilitated by instruments with broad application across multiple enforcement areas like Mutual Legal Assistance Treaties (MLATs), extradition treaties and letters rogatory (letters of request).

4.1.1 *Mutual Legal Assistance Treaties*

36. Many countries have entered into MLATs. They are bilateral treaties creating reciprocal international obligations between the signatories and are not specific to competition investigations. An MLAT normally allows the signatories to request various types of assistance from each other, including the use of formal investigative powers and sharing of confidential information. MLATS are therefore potentially powerful tools, but they have traditionally been restricted to criminal matters. MLATs require the underlying offence to be a crime in at least the requesting country's jurisdiction. In most jurisdictions, cartel conduct is not a crime and so MLATs are little used in cartel investigations.

37. Although a significant number of MLATs exist (the US, for example, has entered into MLATs with approximately 70 countries³⁴), not all MLATs can be used for co-operation in cartel cases. There may be an explicit exclusion for competition matters from the scope of the treaty, as is the case in the Switzerland-US MLAT.³⁵ Some MLATs also require that both jurisdictions treat the conduct under investigation as a crime ("the dual criminality requirement").

³⁴ See the written contribution by United States to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)46](#).

³⁵ The previous exclusion of competition matters was removed from the 1994 US-UK MLAT in 2001.

38. When applicable, MLATs are generally the most effective means of cross-border evidence gathering in competition cases. They provide a mechanism for the signatories to obtain a wide variety of legal assistance for criminal matters generally, including the compulsory taking of evidence on oath and the execution of searches of domestic and business premises. Unlike “soft” co-operation agreements, MLATs oblige the parties to assist each other by obtaining evidence located on the requested nation’s territory and, it is not permissible for the requested country to refuse its aid unless the offence is political or military, or compliance would jeopardize national security or prejudice its own investigations.

Co-operation on the basis of a MLAT

The Canada-US MLAT was relied on to co-ordinate investigations into the plastic dinnerware and thermal fax paper cartels.³⁶

In *Plastic Dinnerware*, the US requested Canadian assistance under the MLAT to execute simultaneous search warrants. The Canadian Competition Bureau was involved in the analysis of the documents which revealed that the conspiracy had no effect on the Canadian market. The collected evidence ultimately led to a price-fixing prosecution by the US Department of Justice. It highlights that under an MLAT, assistance can be provided even if the anti-competitive conduct has no effect in the requested country. The information could be jointly shared and analysed without need for the investigated parties to grant confidentiality waivers, because it was ordered by Court subpoenas under the MLAT.

In *Thermal Fax Paper*, the Canadian Bureau notified the US Department of Justice of a price-fixing conspiracy affecting the North American market. On the basis of the MLAT the two authorities were able to share documents obtained by subpoenas and search warrants, share documents obtained from foreign defendants pursuant to plea agreements jointly interview witnesses and jointly analyse documents collected. As a result, Japanese, US, Canadian firms were fined in both the US and Canada, while US and Japanese nationals were fined in the US.

39. MLATs are not specifically designed for competition law enforcement and therefore have limited use in cross-border cartel cases. Different legal standards may be required by both the requesting and the requested jurisdiction or the availability of certain investigatory methods may differ. For example, the law of some jurisdictions requires that in order to be used in court, evidence gathered pursuant to an MLAT needs to be gathered respecting the rights of defence applied in the requesting jurisdiction. Certain investigatory methods, such as interception of private communications, available to the requesting jurisdiction, may not be available to the requested jurisdiction. Another important characteristic of MLATs is that they operate through the normal criminal justice enforcement and not administrative, channels. The Justice Ministry rather than the competition authority may be the central authority in the administration and exercise of powers under MLATs. This can make the length of proceedings a problem. Legal challenges can also significantly delay the value of any co-operation under MLATs and may serve as a disincentive for relying on MLATs to obtain information.³⁷ MLATs may be difficult for developing and emerging economies to use precisely because of these limitations.³⁸

³⁶ *Plastic Dinnerware Price Fixing Probe Nets Indictment, Guilty Plea Agreements*, 66 Antitrust & Trade Reg. Rep (BNA) 661 (1994); *US and Canadian Prosecutors Attack Cartel Behaviour by Fax paper Distributors*, 67 Antitrust & Trade Reg. Rep (BNA) 108 (1994).

³⁷ See for example the arguments put forward in Canada regarding transmission of seized records to the US pursuant to the Canada-US MLAT in *Canada (Commissioner of Competition) v. Falconbridge Ltd.* [2003] O.J. No. 1563 (Ont. C.A.).

³⁸ Although note the US-Brazil MLAT, which has been used in at least one of the SDE’s investigations. See the contribution by Brazil to UNCTAD’s Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy on “Recent experience with international co-operation”, (2006).

4.1.2 *Extradition Treaties*

40. Extradition treaties also require the underlying conduct to be a crime in both jurisdictions. Given the relatively small number of jurisdictions to have made cartels a criminal offence, the proportion of extradition treaties that can be deployed for cartel cases is even smaller than for MLATs. In 2005 a British national became the first overseas executive from any jurisdiction whose extradition was ordered to the United States. The British House of Lords overturned the extradition order on the cartel charge on the basis that at the time of the alleged offence, price fixing was not a criminal offence in the UK and therefore was not an extraditable offence.³⁹ However, the ruling does not seem to preclude extradition applications for price fixing that occurred after price fixing was made a statutory crime in Britain under the 2002 Enterprise Act.⁴⁰ It remains to be seen how the extradition of cartel suspects develops between jurisdictions where cartel conduct is a crime.⁴¹

4.1.3 *Letters Rogatory*

41. Competition authorities can also use letters rogatory in order to obtain assistance from abroad in the absence of an MLAT or executive agreement. This is a formal request whereby one court requests a foreign court to perform a judicial act, such as taking evidence, serving a summons, or other legal notice. The process is usually time-consuming and cumbersome. Some countries insist that the requests be submitted through the diplomatic channel. Nevertheless, there appears to have been some reported use of judicial assistance in international cartel cases, for example in the US investigation into bid rigging for USAID-funded projects where the German justice authorities made 100 police officers available to execute search warrants at multiple locations across Germany.⁴²

4.2 *Regional Trade Agreements which include competition provisions*

42. Regional agreements can also provide for co-operation on competition matters. There are currently 214 Regional Trade Agreements (RTAs) in force listed on the World Trade Organisation website, of which 98 contain competition provisions.⁴³ In the competition sphere there are a number of well known RTAs including the EU, COMESA,⁴⁴ WAEMU,⁴⁵ CARICOM,⁴⁶ ASEAN,⁴⁷ NAFTA⁴⁸, MERCOSUR,⁴⁹ and the Andean Community.⁵⁰ RTAs are no longer strictly based on geographic location, and they can be

³⁹ Ultimately, following an unsuccessful appeal to the European Court of Human Rights, Mr Norris was extradited to the Eastern District of Pennsylvania, to stand trial for obstruction of the US DoJ's criminal investigation of a cartel among carbon manufacturers, but not for the price-fixing count.

⁴⁰ Norris v Government of the United States of America and others, [2008] UKHL 16.

⁴¹ See Joshua, Camesasca, Jung, (2008) for a discussion of developments in extradition and MLATs.

⁴² Hammond (2002).

⁴³ See World Trade Organisation RTA database.

⁴⁴ Common Market for Eastern and Southern Africa.

⁴⁵ West Africa Economic and Monetary Union.

⁴⁶ The Caribbean Community.

⁴⁷ Association of Southeast Asian Nations.

⁴⁸ North American Free Trade Agreement.

⁴⁹ Mercado Común del Cono Sur (Brazil, Argentina, Paraguay and Uruguay).

⁵⁰ Members include Bolivia, Columbia, Ecuador, Peru and Venezuela.

agreed bilaterally between individual countries (Free Trade Agreements), between one country and a group of countries (plurilateral agreements), or between regions or blocs of countries (multilateral agreements).

43. In 2006 a paper was commissioned by the OECD Joint Group on Trade and Competition to examine competition provisions in regional trade agreements.⁵¹ Out of the 86 agreements analysed for the paper, 68% were between developing or emerging economies (South-South), 27% were between developed and developing countries or emerging economies (North-South) and only 5% were between developed countries (North-North). All of the analysed RTAs referred generally to anti-competitive behaviour or practices. However the scope and content of the provisions vary. Some RTAs have very broad and non-binding language with no definition of the types of practice considered anti-competitive,⁵² while others mandate the parties to prohibit very specific types of practices within their jurisdiction.⁵³ Most agreements fall somewhere in between the two.⁵⁴

44. In the course of negotiating FTAs, building in co-operation between the competition authorities in the countries forming a free trade area ensures that one country's antitrust policy (or lack thereof) does not undermine the advantages of the free trade arrangement for the other parties involved. In short, competition law and competition law enforcement co-operation is believed to play an important role in the fulfilment of the objectives of an FTA.⁵⁵ However it is unclear whether provisions in a FTA that contain generally worded obligations in relation to competition law enforcement co-operation are more or less effective than a competition-specific co-operation agreement.

45. Regional competition agreements, notably those with a functioning competition authority, offer deeper levels of integration and a higher degree of co-operation on competition enforcement than bilateral agreements. They offer scale economies in enforcement, particularly important for developing and emerging economies.⁵⁶

46. However, despite their potential, the effectiveness of some RTAs is questionable. A study by UNCTAD noted that RTAs are criticised for falling short of the level of co-operation envisaged by many of the signatories, especially developing countries.⁵⁷ Both political and capacity constraints reduce their effectiveness.⁵⁸ Even among regional organisations with regional competition frameworks such as COMESA, UEMOA, CARICOM, MERCOSUR and the Andean Pact there has not been much success in enforcement co-operation. Nevertheless, the UNCTAD study argued that developing countries benefit from concluding RTAs with competition provisions. This is attributed to the knock-on effects of RTAs of propagating competition laws in developing countries and the accompanying capacity building that many RTAs entail, rather than actual co-operation on cases.

⁵¹ Solano and Sennekamp (2006).

⁵² Free Trade Agreement between Chile and Central America (1999), Agreement between New Zealand and Singapore on a Closer Economic Partnership (2001), Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (2004).

⁵³ CARICOM.

⁵⁴ For an analysis and taxonomy of competition provisions in bilateral, trade and regional agreements which include competition provisions see, for example: Dabbah (2010); Papadopoulos (2010); Holmes, Müller, Papadopoulos (2005).

⁵⁵ Marsden and Whelan (2005).

⁵⁶ Gal (2011), p 256.

⁵⁷ Alvarez, Clarke and Silva (2005).

⁵⁸ Sokol, (2011) p. 203.

47. One example of a well-functioning regional agreement is the EU and its European Competition Network. This provides a framework for co-operation between the EU member states' competition authorities in cases where Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) are applied. The European Competition Network (ECN) is widely accepted as the model of regional co-operation. It is established under a European Council Regulation⁵⁹ (the "Modernisation Regulation") and is based on a system of parallel competences which allows all national competition authorities (NCAs) to apply the same competition rules.⁶⁰

48. The ECN facilitates case allocation to the authority "well-placed" to deal with the case and ensures a consistent application of the EU's competition rules. The ECN is an informal network in that it does not take 'decisions' and cannot compel its members to act in a certain way. It is, however, expected that the constructive dialogue will help solve most of the issues which may arise. Should a deadlock occur, the Commission retains the power to relieve national competition authorities of their competence by opening proceedings. The Regulation creates a number of co-operation mechanisms for the purpose of case allocation and assistance. National competition authorities (NCAs) should inform each other before or without delay after starting the first formal investigative measure, and make relevant information available to other NCAs.

49. As regards cartel investigations, it is worth pointing that the ECN enables the NCAs to exchange confidential information, and to use such information as evidence in their respective proceedings, subject to the various information obligations in their country. All NCAs have the power to exchange and use information which has been collected by them for the purpose of applying competition law. Information exchange should take place between the NCAs, as well as between the Commission and an NCA. The possibility to exchange confidential information between EU competition authorities without the consent of the parties is unique to the ECN,⁶¹ and considerably enhances the power of EU competition authorities to deal with cartels. However, it is subject to certain limits, in particular due to the fact that some national jurisdictions within the EU have criminal sanctions for infringements of competition law, while others do not. Furthermore, in order to ensure the good functioning of leniency programmes it is important that information obtained from a leniency applicant cannot be used against that leniency applicant by another authority. Considerable work has been done within the ECN to minimise any negative consequences resulting from the lack of harmonisation of leniency programmes across EU Member States, notably through the development of the ECN Model Leniency Programme.

50. The Regulation also allows for an NCA to request another NCA to collect information and carry out fact finding measures on its behalf. The NCA acting on behalf of another NCA acts pursuant to its own procedural rules and powers of investigation. The Commission can also request an NCA to carry out an inspection on its behalf. The European Commission also co-operates closely with NCAs in its own investigations, as it requires the assistance of the relevant NCA's officials to perform investigations or dawn raids in the territory of a Member States. In order to ensure a consistent approach, NCAs must send the Commission a summary of the case and proposed decision before it is adopted, to ensure it does not run counter to the decisions previously adopted by the Commission.

⁵⁹ Council Regulation No 1/2003 of 16 December 2002. See also Commission Notice on co-operation within the Network of Competition Authorities (2004/C 101/03).

⁶⁰ Commission Notice on co-operation within the Network of Competition Authorities, OJ 2004, C 101, 03.

⁶¹ With the exception of exchange between the Commission and the EFTA Surveillance Authority under the European Economic Area agreement.

ECN co-operation in practice: the Flat Glass cartel

In 2007 the Commission fined four manufacturers of flat glass €486.9 million for their involvement in a cartel which co-ordinated price increases and other commercial conditions. Flat glass is used in the construction sector for windows, glass doors and mirrors, and the companies included Asahi (Japan), Gurdian (USA), Pilkington (UK) and Saint-Gobain (France). Between 2004 to 2005 the German, French, Swedish and UK competition authorities all exchanged information related to these companies. The information included customer letters and/or informal complaints regarding parallel price increases. The Commission initiated the investigation on the basis of this market information, which showed the “excellent co-operation” within the ECN and co-ordinated dawn raids were conducted in 2005. Neelie Kroes, Competition Commissioner at the time, commented that the case demonstrated clearly “the benefits of enhanced co-operation between the Commission and National Competition Authorities”.⁶²

51. The specificities of the ECN are a common legal framework and the supremacy of EU law, the European enforcement institutions and courts. It can, however, provide a useful guide for regional co-operation. The functioning of the ECN emphasises that key to co-operation is formalising: (i) how to obtain evidence of anti-competitive practices taking place abroad for use in national investigations and courts; and (ii) how to share information with other countries so that they can prosecute the same infringements.

4.3 Competition-specific bilateral co-operation agreements

4.3.1 Bilateral agreements

52. Competition-specific bilateral co-operation agreements have proliferated since 1976 when the first one was concluded between the United States and Germany.⁶³ The agreements have evolved from these early incarnations which were either defensive or provided only for vague and general principles of co-operation. More recent agreements, signed since the 1990s, have been inspired by the OECD Recommendations on international co-operation and the principles of positive comity. On the face of it, therefore, these second generation agreements demonstrate greater commitment to strengthening co-operation in the enforcement of competition law at the international level. The agreements between the EU, Canada and the US were the forerunners of a growing network of bilateral agreements with and between younger competition jurisdictions.

53. The bilateral agreements concluded since the 1991 EU-US Agreement typically contain the same structure as that agreement and contain more or less the same provisions. These agreements provide for notification where either signatory becomes aware that its enforcement activity may affect the interests of the other. They also usually involve provisions on co-ordination of parallel investigations where appropriate and practicable, and include both positive and negative comity principles. Provisions in the agreements to supply information on anti-competitive activities are subject to national confidentiality laws. Thus, they generally provide for case-specific co-operation. Many of these bilateral agreements also allow for consultations, periodic visits and staff exchanges between the authorities.

54. It is generally agreed that elements of these bilateral agreements have largely been a success. Reports of competition authorities notifying each other of investigations, sharing non-confidential

⁶² European Commission Press Release, *Antitrust: Commission Fines Flat Glass Producers € 486.9 million for Price Fixing Cartel*, IP/07/1781, 28 Nov. 2007.

⁶³ Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, 23 June 1976, 4 *Trade Reg. Rep.* (CCH) 13501.

information, and co-ordinating investigations, have become routine. The terms of many of these second generation bilateral agreements appear to show an impressive commitment to co-operation in international enforcement. However, co-operation agreements are more prevalent between developed countries with large multinationals likely to operate in each other's territory. There is, arguably, not the same level of willingness for large developed countries to sign agreements with smaller or developing countries. This reticence may be explained through concern that an agreement will place more demands on the larger, more experienced authority in a jurisdiction "home" to multinationals carrying out anti-competitive practices in these small or developing countries. Vice versa, the number of companies from developing country whose practices have an impact on developed country markets is likely to be less.⁶⁴

55. Bilateral agreements constitute soft law, as they express a desire to consult and co-operate and do not limit the discretion of the regulatory authorities.⁶⁵ Although these are binding international agreements, signed by governments,⁶⁶ they do not amend domestic laws that prohibit the sharing of confidential business information without the provider's consent, and the agreements specifically allow the requested party to take its own national interests into account in determining whether and to what extent to provide the requested co-operation. The net effect, in the case of parallel investigations, is that authorities can only share confidential information if the source of the information grants a waiver.

4.3.2 *Antitrust Mutual Assistance Agreements*

56. Antitrust mutual assistance agreements enable greater co-operation than traditional bilateral co-operation agreements. The greater level of co-operation is enabled by domestic laws that permit certain assistance to be provided pursuant to the mutual assistance agreement that otherwise could not be provided, particularly in terms of access to foreign-located evidence and information sharing. There are few examples of third generation agreements in force. The first example is the Co-operation and Co-ordination Agreement between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission signed in 1994, and updated in 2007. However, this did not provide for the exchange of confidential information. The 1999 Antitrust Mutual Enforcement Assistance Agreement was signed between the United States and Australia.⁶⁷ This provided a vehicle for the signatory authorities to request broad assistance in criminal and civil non-merger antitrust matters, including the exercise of compulsory power to obtain testimony and documentary information.⁶⁸

4.3.3 *Memorandums of Understanding*

57. Non-binding memorandums of understanding (MOUs) between countries amount to a "getting to know you" best endeavours agreement between competition authorities. MOUs do not necessitate a formal international agreement. These executive agreements may memorialise existing working relationships, or they may mark a new level of engagement between competition authorities. The recent signing of the Sino-US MOU was characterised by the then US Department of Justice Assistant Attorney General as "... a reflection of that relationship, and, by establishing a framework for enhanced co-operation among our agencies, the Memorandum of Understanding also allows us to move to the next chapter in our

⁶⁴ See Jenny (2002) and (2006).

⁶⁵ Stephan (2005).

⁶⁶ Or on a delegation of authority to the competition authority.

⁶⁷ Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, 1999, [1999] ATS 22.

⁶⁸ See Section 4.4 below for a discussion of the limited additional benefits of antitrust mutual assistance agreements.

collaboration on competition law and policy matters.”⁶⁹ MOUs provide a tentative first step in the process of establishing a longer-term co-operation framework. Some MOUs go further and are more in line with the bilateral co-operation agreements described above.⁷⁰

4.4 Provisions in national laws

58. Some national laws provide a direct legal basis for co-operation between authorities or jurisdictions, while others provide a mandate to enter into co-operation agreements with other jurisdictions. In either case, jurisdictions with laws directly permitting co-operation also have bilateral co-operation agreements in place with other jurisdictions, suggesting that bilateral agreements have added utility.⁷¹

59. National laws may provide statutory “gateways” for voluntary disclosure to foreign law enforcement authorities of information gathered in the course of the requested country’s own investigations. This would permit the sharing of information relating to criminal or civil investigations of the requesting authority.

60. The UK’s Enterprise Act permits disclosure to an overseas public authority of information which the Office of Fair Trading (OFT) has obtained under its statutory powers of investigation, in order to facilitate the exercise by the overseas authority of any function relating for the purposes of civil or criminal antitrust cases in those jurisdictions, including cartels.⁷² Currently, when the OFT proposes to disclose information to an overseas authority it has to have regard to certain considerations set out in the Act. The OFT must conduct an assessment in individual cases of the safeguards that exist in the overseas jurisdiction for the handling of the disclosed information. It must also consider whether the disclosure might harm the legitimate business interests of the undertaking or the interests of the individual to which the information relates.⁷³

61. The UK’s overseas disclosure information gateway has been used, for example by the Australian Competition and Consumer Commission in the *Marine Hose*⁷⁴ cartel investigation, which were described by the ACCC as decisive for its investigation.⁷⁵ Nevertheless, the process can be lengthy and resource intensive (both for the OFT and the overseas authority).⁷⁶

⁶⁹ Varney (2011).

⁷⁰ See for example the Memorandum of Understanding Between the Commissioner of Competition (Canada) and the Fiscal Nacional Economico (Chile) Regarding the Application of their Competition Laws (2001).

⁷¹ ICN (2007), p.13.

⁷² United Kingdom Enterprise Act, Chapter 40, s243 (2002), the overseas disclosure information gateway.

⁷³ There are a number of important limitations to the disclosure of information to overseas public authorities. First, where the OFT has obtained a statement from an individual under compulsion, it will not ordinarily disclose it to an overseas public authority. Second, where an individual has voluntarily provided information as part of a leniency application, the OFT would not disclose such information to an overseas public authority for purposes of a criminal prosecution unless the individual was to be granted immunity from the requesting authority. Third, the OFT would also not disclose information contained in a corporate leniency application except for purposes of enforcement against a company or individual other than the provider of the information.

⁷⁴ ACCC v Bridgestone Corporation & Ors [2010] FCA 584.

⁷⁵ See Australia’s written contribution to the 2012 Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)36](#).

⁷⁶ The OFT has therefore proposed that amendments could be made to the legislation to allow an up-front assessment of which jurisdictions have sufficient legal safeguards. This would obviate the need to conduct

62. The German Act Against Restraints of Competition provides not only for wide co-operation between the authorities which are members of the European Competition Network, but also extends this co-operation to competition authorities outside the EU. However, the Act restricts the sharing of confidential information without a waiver from the source of the information.⁷⁷

63. Australia has amended its competition law with the effect that the ACCC is permitted under section 155AAA of the Competition and Consumer Act 2010 to disclose “protected information” to a foreign government body if it decides that such disclosure will enable or assist the body to perform its functions, or exercise its powers, and if it is considered appropriate to disclose the information in the circumstances. This gives the ACCC broad discretionary powers when it comes to sharing protected information with overseas authorities. The Act does not set out what the ACCC should take into consideration in its decision whether to disclose information. However, it is the ACCC’s policy to weigh up certain factors depending on the circumstances. These may include: Australia’s relations with other countries; the impact of disclosure on domestic and international cartel programmes, including the ACCC’s leniency policy.⁷⁸

64. Australia’s new information gateway has been used by the New Zealand Commerce Commission (NZCC) on a number of occasions. In an investigation into price fixing by air ambulance services the NZCC requested transcripts of confidential interviews of some common witnesses. The ACCC specified conditions on the disclosure of information from the transcripts during the investigation, which the NZCC agreed to in the form of a signed undertaking.⁷⁹

65. New Zealand is expected to enact a new statute, the Commerce Commission (International Co-operation and Fees) Bill (the “Bill”), which will enable the NZCC to provide investigative assistance to overseas regulators with which it has a co-operation agreement.⁸⁰ This will include carrying out search warrants and enforcing information notices. To ensure appropriate safeguards for reciprocity and confidentiality purposes, the Bill provides that New Zealand would not enter into a co-operation agreement “without reasonable confidence in the other party’s provisions for these matters.”⁸¹ The Bill will enhance co-operation generally with other jurisdictions, but is expected to be used most often with the ACCC given the close geographic and economic ties between the two countries.⁸²

66. Instead of directly authorising co-operation with other jurisdictions, the United States introduced legislation to mandate for the conclusion of competition-specific co-operation agreements. The International Antitrust Enforcement Assistance Act (IAEAA) adopted in 1994, allows the US to enter into bilateral “antitrust mutual legal assistance agreements” on the basis of which assistance can be provided to

a full assessment of the relevant statutory disclosure conditions each time a disclosure is to be made. OFT (2011), p. 130.

⁷⁷ Section 50(b) German Act Against Restraints of Competition.

⁷⁸ See Australia’s written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)36](#).

⁷⁹ Borrowdale (2011).

⁸⁰ This is intended to mirror the existing Australian Mutual Assistance in Business Regulation Act 1992, which enables bodies like the ACCC to assist foreign regulatory investigations, although it does not allow for information to be released to the foreign authority.

⁸¹ The Bill and explanatory materials are available on the website of New Zealand’s Parliamentary Counsel Office.

⁸² See New Zealand’s written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)14](#).

foreign authorities in civil or criminal investigations and information exchanged, which would normally be prohibited by law. In theory, this permits countries to conduct joint, or at least co-ordinated, antitrust investigations without the need to seek waivers from the parties supplying the information. Enabling legislation for the conclusion of third generation agreements recognised that effective international co-operation required greater ability to exchange information with overseas competition authorities.

67. But the IAEEA requires reciprocal commitments from the foreign jurisdiction involved. This includes equivalent legislation that guarantees sufficient protection to the confidential information that is shared. Only then can the US enter into an expanded co-operation agreement with that jurisdiction. Most countries currently lack the legal framework that would permit them to enter into this type of agreement.⁸³ Perhaps reflecting the limited additional benefits of antitrust mutual assistance treaties, thus far only Australia has taken advantage of the IAEEA. Australia entered into the US-Australia Mutual Assistance Agreement in 1999, and has relied on the agreement to obtain information at least once.⁸⁴

4.5 Co-operation based on confidentiality waivers provided by the leniency applicants

68. The ICN states that “[t]he introduction of leniency programmes in more jurisdictions should be singled out as an increasingly important driver of co-operation between agencies, via waivers of confidentiality from immunity/amnesty applicants.”⁸⁵

69. Today a large number of countries have leniency/amnesty policies in place. Leniency policies induce cartel members to break ranks, report the existence of the cartel and co-operate with the investigation in exchange for immunity from or reduction of any sanctions that may ordinarily be imposed. They represent a very – if not the – most effective current tool in the fight against cartels.

70. Leniency applications submitted simultaneously to more than one competition authority had increased in number at the time of 2005 OECD Third Cartel Report and that pattern seems unlikely to have diminished. Simultaneous leniency applications often include waivers of confidentiality rights. Such waivers create more opportunities for multi-jurisdiction co-operation by enabling the competition authorities involved to share information they have received via the leniency applications and conduct co-ordinated investigations.⁸⁶ The value of waivers was summed up by Scott Hammond, Deputy Assistant Attorney General US Department of Justice, in a speech in 2003 at a time when an increasing number of jurisdictions were considering adopting leniency policies.

“Just as it has become the norm that companies will simultaneously seek leniency in the United States, the EC, and Canada (and often in other jurisdictions as well), applicants commonly consent to the sharing of their information between the jurisdictions where they have sought leniency. Thus, we routinely discuss investigative strategies and co-ordinate searches, service of subpoenas, drop-in interviews, and the timing of charges with the EC and Canada in order to avoid the premature disclosure of an investigation and the possible destruction of evidence.”⁸⁷

71. The adoption of a leniency policy is a tool that can facilitate co-operation with other countries that have leniency programmes. Without one, applicants have no reason to consent to information sharing

⁸³ Swaine (2011) p. 19.

⁸⁴ First (2001). See also Australia’s written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)36](#).

⁸⁵ ICN (2007), p 31.

⁸⁶ OECD (2005), p. 33.

⁸⁷ Hammond (2003).

with jurisdictions where leniency is not available. ASEAN has explicitly recognised this point in its Regional Guidelines on Competition Policy.⁸⁸ The simple existence of a leniency programme, however, may not be sufficient to incentivise potential applicants to come forward. Jurisdictions need credible cartel enforcement programmes in place in order for leniency policies to be effective.⁸⁹ For example, the lack of fully functioning leniency programmes backed by effective cartel enforcement has been identified as a challenge in achieving successful co-operation to tackle cross-border cartel within Southern Africa.⁹⁰

72. Waivers of confidentiality by the leniency applicants enable authorities to exchange information quickly and at an early stage which facilitates co-ordination of the initial steps in an investigation. This may avoid the need to use official channels in formal co-operation procedures and the ensuing delay this can entail.

73. Some competition authorities are considering making leniency conditional on waivers being granted by the applicant precisely because of their usefulness. Even if not formalised in leniency policies, the trend among the more established cartel enforcers is to require waivers and for these to be more expansive, enabling not just the exchange of information but also evidence.

74. In light of the growing number of leniency programmes around the world there is value in eliminating conflicting requirements between the policies.⁹¹ Competing requirements or crucial inconsistencies in leniency programmes in the relevant jurisdictions may force the applicant to choose whether and where to apply. Similarities in leniency programmes, especially with respect to the requirements placed on leniency applicants, reduce the complications inherent in a multijurisdictional filing and encourage companies to apply in multiple jurisdictions. Pragmatically speaking, by aligning a leniency programme with those of major jurisdictions such as the US and the EU (which are similar in all material aspects) a country may attract more leniency applicants.

75. Therefore, apart from contributing to the improvement of leniency programmes, convergence of leniency policies brings about a distinct set of benefits for their effective functioning insofar as it reduces complications in reporting global cartels in various jurisdictions. This was recognised in ASEAN's Regional Guidelines on Competition Policy.⁹²

4.6 Informal co-operation

76. The term "informal co-operation" has come to refer to all co-operation among competition authorities that does not include sharing confidential information or obtaining evidence on behalf of another authority. This type of co-operation is more common than the formal variety, no doubt because it is easier to conduct and it does not confront the legal constraints on the exchange of confidential information that exist in every country.

77. Despite its limitations, informal co-operation can contribute to more effective enforcement. Conferences, bilateral meetings, and other exchanges of know-how spread both expertise and mutual

⁸⁸ ASEAN, *Regional Guidelines on Competition Policy*, 2010, 6.9.5.3.

⁸⁹ The three essential components that must be in place before a jurisdiction can successfully implement a leniency programme: severe sanctions, heightened fear of detection, and transparency in enforcement policies.

⁹⁰ Skata (2011), p.18.

⁹¹ See BIAC's written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)57](#).

⁹² See 6.9.8 of the Guidelines.

understanding. Bilateral co-operation agreements can facilitate case-specific co-operation by further clarifying the parties' understanding of each others' systems and expectations. Case specific informal co-operation can include discussion of investigation strategies, market information, witness evaluations, sharing leads and comparing authority approaches to common cases. The information or assistance obtained in these instances can streamline the investigative strategy and help focus an investigation.

78. Informal co-operation is often underpinned by the personal contacts and trust built through participation in the competition networks, many of which have emerged in recent years. International and regional forums, such as the OECD, UNCTAD, ICN, ASEAN, APEC, African Competition Forum and ICAP, all provide avenues for authorities and staff to get together, share ideas, practices and develop understanding of each other's legal frameworks and institutions. This helps with the creation of "pick-up-the-phone" relationships and institutionalising co-operation between authorities. The provision of capacity building is a means of building technical expertise as well as fostering mutual understanding and future co-operation.

79. Informal co-operation has been key to progressing a number of cartel investigations. In the *Marine Hose* case, the Australian Competition and Consumer Commission relied on information and documentation provided informally by the US Department of Justice (DOJ), as well as information provided formally by the UK's Office of Fair Trading.⁹³ Brazil's investigation of the *Lysine* cartel was initiated following its staff becoming aware of the US DOJ's investigation during a conference they attended in Washington. The information regarding the prosecution was already public and the US DOJ subsequently provided the Brazilian authorities with document and leads. In the Vitamin cartel, Brazil's investigation was aided by informal leads provided by the Canadian Competition Bureau.⁹⁴ This exchange was attributed to the professional relationships developed between the staffs of the Brazilian and Canadian authorities.

80. The absence of a formal co-operation agreement does not prevent the exchange of non-confidential information, nor does it prevent the co-ordination of surprise inspections. For example, the Competition Commission of South Africa (CCSA) conducted simultaneous raids in 2007 with the EU and the US Department of Justice on several companies suspected to have been engaging in collusive practices. It was the first time the CCSA had co-ordinated a raid with other competition authorities.⁹⁵

81. Practice suggests that co-operation in the detection and investigation of cartels often involves a mixture of formal and informal co-operation between competition authorities. The existence of international agreements does not guarantee co-operation, nor does their absence preclude it. The advantage of the complex web of international agreements that exist between governments or their authorities is that it offers a formal framework for co-operation, despite the legal limits. In turn, the conclusion of international agreements signals a willingness and the ability to engage in a constructive dialogue with foreign peers. The challenge for competition authorities from developing countries, in particular, is to identify the right balance between what can be achieved through informal co-operation and what requires more formal mechanisms.

⁹³ See case example below.

⁹⁴ De Araujo(2002), pp.5, 7.

⁹⁵ See South Africa's written contribution to the 2008 OECD *Roundtable on Cartel Jurisdictional Issues, Including the Effects Doctrine*, DAF/COMP/WP3/WD(2008)92 (unpublished) and to the 2012 OECD Global Forum on Competition, DAF/COMP/GF/WD(2012)51.

4.7 *Recent examples of co-operation in cross-border cartel cases*

4.7.1 *The Marine Hoses Case*

82. From 1986 to 2007 the producers of marine hose operated a worldwide cartel aimed at price fixing, market sharing, customer allocation, restricting supplies and bid rigging. The companies used private email accounts, private telephone numbers and code names to conceal the cartel. One company acted as the co-ordinator, to which the other companies passed customer information about impending marine hose contracts. One company applied simultaneously for leniency in Japan, the US and the EU, exempting it from any fines and triggering co-ordinated actions among the investigating authorities.

83. The Marine Hose cartel case demonstrated an unprecedented level of co-operation between the UK, US and EU competition authorities investigating the case. The US Department of Justice used relatively aggressive enforcement techniques, including informants, wiretaps and FBI raids, and obtained court approval to covertly audio and videotape a meeting of the cartelists in a hotel room in Houston, Texas. It was following this meeting in May 2007 that the eight non-US executives involved in the cartel were arrested by the US authorities. At the same time as the US investigation, an eleven month long investigation by the UK's Office of Fair Trading (OFT) was carried out involving onsite searches and interviews. The European Commission also carried out a parallel investigation and conducted surprise co-ordinated inspections in France, Italy and the UK, alongside their counterparts from the national competition authorities.

84. One of the groundbreaking aspects of the Marine Hose case was the plea agreements which allowed the three UK citizens to plead guilty in the US, but then travel back to the UK to be tried, and serve a sentence there. This was the first British criminal prosecution of a cartel by the OFT, and demonstrates the extent of the co-operation between the OFT and the US DOJ.

85. US,⁹⁶ UK,⁹⁷ EU,⁹⁸ Australian⁹⁹ and Japanese¹⁰⁰ competition authorities all brought proceedings in the cartel case. The Australian Competition and Consumer Commission (ACCC) attributes the successful outcome of its proceedings to the assistance of both the DOJ and OFT, who provided documents that were significantly important to Australia's case. The information required was obtained informally in the case of the US-based information from the DOJ but formally for the UK-based information from the OFT under the relevant sections of the UK Enterprise Act. The ACCC and OFT had also been in close co-operation informally before the formal request was made.¹⁰¹

86. In Japan, fines were imposed on one of the Japanese companies involved and 'cease and desist orders' were imposed by the Japan Fair Trade Commission on all the other companies involved. The case marked the first time the JFTC had issued cease and desist orders on foreign companies in an international cartel.

⁹⁶ *U.S. v. Bridgestone Corp.*, Criminal No. H-11-651.

⁹⁷ *R v. Whittle, Allison, and Brammar*, [2008] EWCA Crim. 2560, [2009] Lloyd's Rep. FC 77.

⁹⁸ COMP/39.406 — *Marine Hoses*.

⁹⁹ *ACCC v Bridgestone Corporation & Ors* [2010] FCA 584.

¹⁰⁰ Japan Fair Trade Commission Press Release, *Cease and Desist Order and Surcharge Payment Order against Marine Hose Manufacturers*, 22 February 2008.

¹⁰¹ See Australia's written contribution to the 2012 Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)36](#).

4.7.2 *The Air Cargo Case*

87. Between 2000 and 2006, a number of major international cargo airlines conspired to inflate the price of shipping goods by air. The airlines co-ordinated their action on fuel and security surcharges over the six year period. The contacts on prices between the airlines initially concerned only fuel surcharges, ensuring that worldwide airfreight carriers imposed a flat rate surcharge per kilo for all shipments. The airlines extended the cartel further by introducing a security surcharge and refusing to pay commission on surcharges to freight forwarders (their clients). The refusal to pay a commission ensured the surcharges did not become subject to competition through the granting of discounts to customers. In total 22 airlines were fined for their involvement in the cartel, and prosecutions brought against 21 individuals. Lufthansa and its subsidiary Swiss received full immunity from fines under the EU leniency programme and benefited from leniency/immunity programmes in many other jurisdictions.

88. On 14 February 2006, competition regulators raided the offices of airlines in countries around the world to investigate if they had been involved in the cartel. The US, EU, Australia, New Zealand, Canada and Korea all initiated proceedings. In the US the DOJ brought prosecutions against 22 airlines, imposed fines of more than USD 1.8 billion, the highest fines imposed in a US antitrust investigation to date, and sentenced 6 executives to imprisonment. In Australia the ACCC brought prosecutions against 15 airlines and imposed fines amounting to AUD 46.5 million. In New Zealand the New Zealand Commerce Commission initiated proceedings against 13 airlines and 7 executives. In Canada the Bureau received guilty pleas from 6 airlines and imposed fines of over CAN17 million. In Korea the KFTC brought prosecutions against 19 airlines, and administered fines of USD18 million. In the European proceedings the EU fined 11 air cargo carriers a total of 799 million Euro, although reductions were given for carriers which co-operated under the EU's leniency programme.

89. The global enforcement of the Air Cargo cartel demonstrated that a company with worldwide operations can no longer expect a case to be closed after it is settled in one jurisdiction. Instead, companies must reach agreements with all the other jurisdictions in which its conduct may have an effect. The Air Cargo case has highlighted that to the private sector that "enforcement agencies co-operate with one another and admissions, testimony and documents produced to one will be shared across borders."¹⁰² However it has raised concerns among the business community as to how this information may be used in follow on class actions.

5. Challenges to effective international co-operation in cartel investigations

90. The increasing number of countries with cartel prohibitions and the consequent need for competition authorities to co-ordinate investigations of cartel conduct with cross-border effects has highlighted the constraints of the current system for international co-operation. Some of these constraints are common to competition authorities in both developed and developing countries; others are more specific to new and less experienced authorities.

5.1 Problems common to all jurisdictions

5.1.1 Exchange of confidential information

91. One of the most sensitive areas of co-operation concerns the exchange of confidential information and data between competition authorities. A recent ICN Report highlights these shortcomings.¹⁰³ The reasons for these problems can be found in the restrictions on the sharing of

¹⁰² Evans and Booth (2010).

¹⁰³ ICN (2007).

confidential information under the respective domestic laws. Most national laws do not permit the sharing of confidential information from a competition authority's investigation file, nor do they permit an authority to use its compulsory gathering powers on behalf of a foreign competition authority. With the very few exceptions described in the sections above, the majority of instruments and agreements in the antitrust field do not permit the exchange of confidential information.

92. For example, Turkey found that the absence of a formal co-operation mechanism authorising the exchange of confidential information with the European Commission limited its ability to investigate cartels. In one case, Turkey investigated suspected cartel activity in the gas insulated switchgear industry, which appeared to operate outside Turkey, but affected the Turkish market as well. The same suspected cartel was simultaneously investigated by the European Commission. Despite Turkey's request for co-operation, however, the Commission was unable to exchange any confidential information in the absence of an instrument authorising the exchange of confidential information. The inability to obtain information from abroad significantly impeded Turkey's ability to investigate this cartel.¹⁰⁴

93. In the *Vitamins*¹⁰⁵ and *Graphite Electrodes*¹⁰⁶ cases, the 2003 OECD Hard Core Cartel report noted that other competition authorities came to know about the cartels and opened investigations when the prosecutions in the EU, United States and Canada became public. In a few cases, informal discussions with the US/EU authorities, and their supply of non-confidential information, helped the other competition authorities.¹⁰⁷ However, many OECD members emphasised that their investigations of these cartels were hampered by not being able to access information held by foreign competition authorities, but protected under confidentiality restrictions.

94. In the antitrust context the rationale for limiting authorities' powers to freely exchange confidential information is to avoid reducing the incentives for firms to co-operate under authorities' leniency policies, and therefore the effectiveness of national cartel enforcement programmes as a whole.

95. Similarly, there is a concern that, once exchanged, confidential information submitted to an authority in one jurisdiction may get into the public domain (e.g. because of the more relaxed rules on access to a competition file in the requesting country) or may simply become discoverable in the receiving jurisdiction. This may expose the source of the information to the risk of private actions and ensuing damages. This risk is particularly high if the information can be used before courts where punitive damages can be awarded to successful plaintiffs, as is the case of treble damages in the US. Such concerns have recently surfaced following the judgement of the Court of Justice of the European Union in the *Pfleiderer* case.¹⁰⁸ The Court concluded that plaintiffs in private actions could, under certain circumstances, have access to the competition authority's file, including evidence submitted under the leniency programme. According to the Court of Justice, it is up to each national court of the EU Member States vested by a damage claim to balance, on a case-by-case basis, the interest of the private litigant to recover damages from anti-competitive conduct versus the legitimate concern over the effectiveness of the leniency programme.

¹⁰⁴ OECD (2005), p. 32.

¹⁰⁵ Case COMP/E-1/37.512 – *Vitamins* [10.01.03] OJ L 6/1, see paras 155-157.

¹⁰⁶ Case COMP/E-1/36.490 — *Graphite electrodes* [18.07.01] OJ L 100/1.

¹⁰⁷ For example, Brazil's informal co-operation with the US in the *Vitamins* case, see above.

¹⁰⁸ C-360/09, *Pfleiderer AG v. Bundeskartellamt*, judgment of the European Court of Justice of 14 June 2011.

Pfleiderer: Access to leniency documents and private enforcement of EU competition law

The issues surrounding granting access to leniency documents have been the focus of a recent European case *Pfleiderer v Bundeskartellamt*.¹⁰⁹ In *Pfleiderer*, a customer of the undertakings which had been fined for involvement in a cartel of decorating paper, requested full access to the case file from the Bundeskartellamt. When the Bundeskartellamt refused access to the leniency documents, *Pfleiderer* took the matter to the local German court (Amtsgericht). The Amtsgericht made a reference to Court of Justice of the European Union (ECJ), on the question of whether refusing access to leniency documents was contrary to EU law. In its decision the ECJ recognised that allowing third parties to access leniency documents could compromise leniency programmes. However, this was not a sufficient reason to defeat the well established right for individuals to claim damages for loss caused by anti-competitive conduct.¹¹⁰ In the absence of a binding EU regulation on the subject, it is therefore up to national courts to decide on a case-by-case basis whether documents submitted under leniency programmes should be made public.

Some commentators expressed concern that the judgment heightened the tension between leniency policies and private action, with the risk of “*dire implications for cartel enforcement.*”¹¹¹ It is argued that infringing firms’ incentives to enter into an amnesty/leniency programme will be critically affected if the evidence they provide can be used against them by private plaintiffs. However, such fears may be overstated. First the increasing size of penalties, the inherently unstable nature of cartels and a general drive towards good corporate governance should continue to encourage companies to enter leniency programmes. Second, there may be indirect ways of seeking these documents, and, in any case, there are unlikely to be many situations in which grounds for action are entirely dependent on ‘fringe’ documents contained within competition authority case files.¹¹² Following the ECJ’s judgment in *Pfleiderer*, the case was sent back to the German courts and on 30 January 2012 the Bundeskartellamt’s original decision to refuse access to leniency documents was upheld by the Amtsgericht¹¹³ The ruling represents an important precedent for Germany, and the Federal Ministry of Economics intends to codify the protection of leniency documents in the amendments to the German competition law which are currently in progress.¹¹⁴

5.1.2 *Different definitions of what constitutes “confidential information”*

96. There is no common definition of confidential information in the competition field. Differences in how competition authorities or courts define confidential information in cartel cases can represent an obstacle to effective co-operation. Since, as discussed above, many international co-operation instruments do not allow for the exchange of confidential information, in most cases the requested authorities must demonstrate that the information is not confidential before they are allowed to share it with the requesting authority.¹¹⁵ This can be a time consuming process and errors can expose the requested authority to legal liabilities.

¹⁰⁹ Ibid.

¹¹⁰ Ibid, see paragraphs 26 - 28 of judgment.

¹¹¹ Stephan (2011).

¹¹² Brown (2012).

¹¹³ Bundeskartellamt Press Release, *Decision of Local Court of Bonn Strengthens Leniency Programme*, 30 January 2012.

¹¹⁴ Ibid.

¹¹⁵ Similar issues arise with regard to information which is considered to be covered by the client-attorney privilege in one jurisdiction but not in other jurisdictions. The OECD Best Practices for Information Exchange provide useful guidance to competition authorities in cases where the rights of defence and legal systems differ (Section IIC “Protection of Legal Professional Privilege”).

97. Some authorities define information as confidential by the way it is collected (i.e. any information collected during an investigation is confidential). Other authorities consider the nature of the information, whereby information is confidential if its disclosure would harm the commercial interest of the source which provided it (i.e. information related to price, sales, costs, customers and suppliers). In the latter case, it can be difficult to distinguish between what is commercially sensitive or not. If in doubt, the risk of litigation may discourage authorities from disclosing such information to foreign authorities.¹¹⁶

5.1.3 *Civil/administrative versus criminal regimes*

98. Cartels are criminally prosecuted in some jurisdictions, but not others, and this places additional limitations on the ability of the respective authorities to exchange information and evidence between civil and criminal jurisdictions, and the ability to assist in their respective investigations.

99. For example, on one occasion the European Commission, the US Department of Justice, the JFTC and the Canadian Competition Bureau mounted co-ordinated actions against a suspected world-wide speciality chemicals cartel. However, the evidence gathered by the EU in its dawn raids was off-limits to the US investigators because of the prohibition and use restrictions imposed by what was then Article 20 of EU Regulation 17/1962, which prevented its use for criminal purposes.¹¹⁷

100. As discussed above, criminal jurisdictions may be able to use MLATs to obtain foreign-located documents and witness testimony in international cartels investigations. However, this is limited to jurisdictions which both treat cartels as a criminal infringement. The US for example, cannot share confidential information with the EU pursuant to a MLAT because the EU imposes only administrative penalties for competition law violations. There is, consequently, a lack of “dual criminality”.

101. Criminal sanctions for cartel conduct have been introduced or are currently being considered in a number of countries. This could, potentially, facilitate co-operation and create a “virtual” alliance among jurisdictions that have criminalised cartels. As a previous Assistant Attorney General at the US Department of Justice remarked “[h]aving colleagues in other jurisdictions focused on criminal enforcement also leads to greater success in our own prosecutions here at home, with easier access to evidence and witnesses.”¹¹⁸ That said, this trend towards criminalisation is not yet matched by a comparable criminal enforcement record. Outside of the US, very few jurisdictions have actually prosecuted cartels under their criminal provisions, but instead continue to investigate their cartels under their civil/administrative powers. This significantly limits the scope for co-operation on parallel investigations.

102. For example, many developing and emerging economies have not criminalised cartel conduct. In addition, many of these countries do not have a fully functional civil/administrative cartel programme in place. Pursuing individual sanctions has long been considered the most effective way to deter and punish cartel activity by holding culpable individuals accountable through seeking jail sentences. However, the criminalisation of cartel conduct has some way to evolve in both developed and developing countries before it becomes a means for effective co-operation as opposed to a hurdle.

5.1.4 *Other common hurdles*

103. Other common hurdles include:

- Language barriers or shortcomings in the internal organisation of competition authorities that results in a lack of competences to co-operate effectively.

¹¹⁶ For a discussion of the definition of confidential information and its implications see ICN (2007), p.26-27.

¹¹⁷ Joshua, Camesasca, Jung (2008), p. 25.

¹¹⁸ Barnett (2006).

- Practical difficulties in the co-ordination of investigations, for example if investigations are at different stages between the different authorities involved or if difficulties arise due to the different time zones.
- Resource constraints for making or responding to requests, particularly where formal channels are required. Co-operation can be resource intensive, detracting scarce resource from other enforcement activities.¹¹⁹ Resource constraints can also hinder measures to try and address some of the challenges. For example, in the US “taint teams” are used to sift and filter information received before it is passed to the case team to reduce the risk of compromising the integrity of the investigation in the receiving authority, is an investment that may not be available to smaller authorities.

5.2 *Challenges of specific relevance to developing and emerging economies*

104. There is relatively little evidence of effective cartel enforcement co-operation between competition authorities in developing countries and between developed and developing country authorities. This, in part, reflects that a number of jurisdictions have only recently adopted competition laws and so have only been enforcing their laws for a relatively short period of time. Some may not have begun to target cartel activity as a priority in their enforcement programmes. It is also true, however, that many developing countries and new competition authorities have not yet developed ongoing bilateral or multilateral relationships with other jurisdictions that could promote co-operation.

5.2.1 *Institutional and investigatory impediments*

105. New and less experienced competition regimes need to establish credible competition institutions and develop the necessary instruments and policies to become effective cartel enforcers. Until they do so, they may not have the resources or experience to harness the benefits of greater co-operation in the same manner as more experienced jurisdictions.¹²⁰

106. Lack of investigatory powers, such as the ability to conduct unannounced dawn raids, impedes the ability of an authority to take part in co-ordinated dawn raids with foreign authorities. A number of countries have amended their laws to align themselves to the standard of more experienced jurisdictions to be considered, in theory, for joint evidence gathering exercises.¹²¹ The lack of fully functional corporate leniency programmes, as discussed above, is also challenge to effective co-operation in the investigation of international cartels.

¹¹⁹ In a 2012 report to Congress the US Department of Justice noted the difficulties international co-operation entails: “In our enforcement efforts we find parties, potential evidence, and impacts abroad, all of which add complexity, and ultimately cost, to the pursuit of matters. Whether that complexity and cost results from having to collect evidence overseas or from having to undertake extensive inter-governmental negotiations in order to depose a foreign national, it makes for a very different, and generally more difficult investigatory process than would be the case if our efforts were restricted to conduct and individuals in the U.S. . . . Consequently, the Division must spend more for translators and translation software, interpreters, and communications, and Division staff must travel greater distances to reach the people and information required to conduct an investigation effectively and expend more resources to co-ordinate our international enforcement efforts with other countries and international organizations”, US DoJ (2012).

¹²⁰ UNCTAD (2011), p.33.

¹²¹ For example, Chile and Mexico recently amended their competition laws (in 2009 and 2010 respectively), which improved their investigatory powers, including the ability to conduct surprise inspections.

107. As with any new authority, human resource capacity is a challenge. It takes time to develop the requisite skills and experience. Even where competition authorities are conferred with strong powers, for example to compel the production of documents and conduct surprise inspections, these may be hampered by inexperience and a lack of institutional capacity.

108. Competition authorities may make mistakes in their early enforcement efforts. South Africa's first use of its search and seizure powers led to the High Court setting aside the Commission's summons on procedural grounds and also because it had infringed on the rights of the respondents by informing the media about the search and seizure operation and facilitating their access to the premises of the respondents during the raid.¹²²

109. National courts may impede competition authority efforts if the judiciary has insufficient knowledge or experience of competition law. In Senegal, the National Competition Commission's only cartel decision to date was annulled by the Administrative Tribunal on the basis of a narrow interpretation of cartel conduct as price fixing under the law.¹²³

110. The priority for many new or young competition authorities will be the building of institutional capacity. Consequently, the focus of international co-operation extended to these authorities has centred, perhaps not unreasonably, on the provision of capacity building and technical assistance.

111. Proactive enforcement against cartels may not be a new competition authority's first priority. It may be premature, therefore, to expect newer authorities to prioritise international co-operation in competition law enforcement when some are still facing the challenges of establishing their competition authorities, and others are struggling to enforce their own domestic laws.

5.2.2 *Lack of trust and confidence in legal systems*

112. Trust is central to building co-operative relationships between authorities.¹²⁴ In cartel enforcement, trust is an essential ingredient for competition authorities seeking to co-ordinate searches, develop co-ordinated investigative strategies and exchange information.

113. A lack of trust can be caused by a weak legal framework in the country seeking co-operation, insufficient transparency of the competition authority's procedures and inadequate safeguards for due process. This heightens perceptions that information may be leaked, putting the investigations of foreign authorities at risk and undermining the effectiveness of their cartel enforcement programmes and associated tools. There may be a lack of confidence in the ability of the requested country to provide information of the quality and/or standard necessary for the requesting country to use it in its own investigation. This is a higher risk with newer authorities that have not yet established the necessary safeguards or acquired sufficient experience to handle such requests.

114. This is a Catch 22 situation. If newer competition authorities do not start to co-operate, they will not develop the expertise and implement the safeguards necessary to handle the responsibilities that co-operation requests entail. A degree of trial and error is arguably a cost inherent in building the experience

¹²² *Pretoria Portland Cement Company Ltd. and Another v Competition Commission and Others* (64/2001) [2002] ZASCA 63 (31 May 2002).

¹²³ See Senegal's written contribution to the 2012 OECD Global Forum on Competition, [DAF/COMP/GF/WD\(2012\)18](#).

¹²⁴ See for example the written contributions of India ([DAF/COMP/GF/WD\(2012\)52](#)) and South Africa ([DAF/COMP/GF/WD\(2012\)51](#)) to the 2012 OECD Global Forum on Competition.

and capacity required to establish trust and confidence between competition authorities. Otherwise it reinforces the perception that countries with more advanced competition regimes have little incentive to co-operate with countries whose enforcement of competition law was considered inadequate.¹²⁵

115. Building trust between competition authorities and the business community is also important. Firms need to have confidence that confidentiality waivers will not result in compromised corporate information. Prospective leniency applicants need to have confidence in the operation of authorities' leniency programmes, and to be able to predict with a high degree of certainty how they will be treated if they seek leniency; otherwise, they will not come forward to report cartel activity in the first place.¹²⁶

5.2.3 *Export cartels*

116. The existence of export cartels presents a particular challenge for improving international co-operation in cartel investigations. Export cartels are cartels based in one jurisdiction but which produce their effects exclusively in another jurisdiction.¹²⁷

117. Often, these are not prohibited by their "home" jurisdiction, if the competition law only prohibits cartels which have an effect within its own territory. Several countries, including developed and developing countries, maintain explicit exemptions for export cartels, some requiring notification of their activities and a few others requiring official authorisation. If the relevant documents are in the public domain, foreign competition authorities can obtain information about the cartels' existence and membership. However, implicit exclusion of export cartels from domestic antitrust laws effectively cloaks their cartels from foreign authorities.

118. The explicit or implicit targets of export cartels are often developing countries. Although more developing countries have adopted competition laws in recent years, and the application of the effects doctrine could in theory provide a basis to prosecute export cartels, in practice they are unlikely to do so successfully. The affected jurisdiction may have difficulty obtaining the evidence concerning the cartel if it is located in a different territory.¹²⁸ Export cartel exemptions prevent the competition authorities of the state in which a company is domiciled—and therefore holding the most information about the conduct and having the best access to the companies in question—from assisting those that are harmed by anti-competitive behaviour (the target states).¹²⁹ But even if there were no such exemptions, the application of the effects doctrine would make it difficult for competition authorities to prosecute their own firms for harm done to consumers elsewhere.

119. International co-operation is held back by challenges that require the attention of developed and developing jurisdictions in different ways. As the former Director General of DG Competition stated: "[o]nce we have overcome these difficulties, significant advantages are likely to arise from such advanced co-operation."¹³⁰

¹²⁵ WTO (2002), comments from Thailand at p. 4.

¹²⁶ Brandenburger (2010).

¹²⁷ OECD (1993).

¹²⁸ Positive comity would not necessarily be the solution. If the alleged practice is not an infringement in the jurisdiction where the firms are based, the competition authority there may lack the legal means to investigate.

¹²⁹ Becker (2007).

¹³⁰ Lowe (2006).

6. International Co-operation in Tax cases

120. The challenges associated with international co-operation are not unique to the area of competition. Enforcement bodies in other policy areas such as tax, anti-corruption and money laundering face similar challenges to competition authorities. Some of the tools which have been adopted in these policy areas to deal with co-operation challenges may provide fertile ground for future discussion on their potential application to cartel enforcement.

121. This section will analyse the experience in the area of tax. The challenges faced by tax authorities in dealing with international tax cases are analogous to a number of those encountered by competition authorities, in particular with regard to information sharing. The use of open multilateral instruments alongside bilateral agreements, work sharing arrangements and a legal framework for information sharing, are some of the ways in which tax authorities have sought to overcome these challenges.

6.1 Instruments to facilitate co-operation in cross-border tax cases

122. There are several different instruments available for international co-operation in the tax area. These include international treaties, both bilateral and multilateral, EU instruments (for its member countries), and domestic laws.¹³¹

6.1.1 Bilateral Tax Treaties

- *Double taxation agreements.* There are around 3000 double tax treaties in force around the world. These treaties are usually based on the OECD¹³² and/or the UN Model, which often constitute the basis for negotiation between countries.¹³³ A double tax treaty is an agreement between two States to co-ordinate the exercise of their taxing rights, with a view to eliminate or reduce double taxation. Bilateral tax treaties eliminate/reduce double taxation by either allocating exclusive taxing rights to one of the contracting States (residence or source state) or allocation taxing rights to one State and at the same time obliging the other State to grant double taxation relief. Double tax treaties also constitute the legal basis for co-operation between the competent authorities contracting States in order to prevent and be able to respond to tax avoidance and evasion in relation to any taxes whether or not they are within the scope of the treaty. Some double tax treaty also provide for assistance in the collection of taxes.
- *Bilateral information exchange agreements* are concluded where there is no tax system in place in one of the signatory countries. These arrangements often provide for structured exchange programmes specifying the type of information to be exchanged, the use of information in

¹³¹ Besides the bilateral and multilateral instruments which have been entered into specifically for co-operation on tax matters, information exchange can also take place through other international legal instruments which are not tax-specific, such as MLATs, which are applicable to criminal tax matters.

¹³² The OECD Model Tax Convention on Income and Capital (the Model Convention) aims to settle on a uniform basis the most common problems that arise in the field of international juridical double taxation. Member countries, when concluding or revising bilateral conventions should conform with this Model Convention. The worldwide network of tax treaties based upon the Model Convention helps to avoid the danger of double taxation by providing clear consensual rules for taxing income and capital. It also includes specific provisions on international co-operation, namely on information exchange and assistance in the collection of taxes.

¹³³ The two Model Tax Conventions are broadly similar in substance concerning the information exchange provision. There is some difference in language between Article 26 of the United Nations (UN) Model and the OECD Model. In the UN Model the restrictions on information disclosure are not as broad in scope and it contains more explicit language on the implementation procedures for information sharing.

criminal investigations, and the sharing of costs. A number of these are based on the OECD's Model Agreement on Exchange of Information in Tax Cases.

- *Tax information exchange agreements* (TIEAs) are bilateral agreements between two jurisdictions providing a legal basis for administrative co-operation in tax matters. They are often negotiated on the basis of a Model issued by the OECD in 2002¹³⁴ and their number is growing exponentially. They provide for exchange of information on request and, subject to certain conditions, allow for the presence of foreign officials relating to a specific criminal or civil tax investigation or civil tax matters under investigation.

6.1.2 *Multilateral Tax Treaties*

123. There are a number of multilateral tax treaties which provide for international co-operation in the area, the most relevant of which is the Convention on Mutual Administrative Assistance in Tax Matters as amended in 2010. The Convention expressly provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims. The number of Parties to the Convention is constantly increasing.

124. The Convention was originally developed jointly by the Council of Europe and the OECD and opened for signature by the member states of both organizations on 25 January 1988. The Convention facilitates international co-operation for an improved operation of national tax laws, while respecting the fundamental rights of taxpayers. It applies to a broad array of taxes, from direct taxes (including capital gains and net wealth taxes) and virtually every form of indirect taxes (but excluding customs duties) levied at both the national and local level. The Convention provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. This co-operation ranges from exchange of information, including automatic exchanges,¹³⁵ to the recovery of foreign tax claims. The Convention provides for tax examinations abroad and simultaneous examination of taxpayers. The latter involves two or more tax authorities co-ordinating their efforts to examine simultaneously and independently, each on its own territory, taxpayers that are closely affiliated (for example, a parent and subsidiary). At each stage of the examination, the information gathered is regularly exchanged.

125. In April 2009, the G20 called for action “to make it easier for developing countries to secure the benefits of the new co-operative tax environment, including a multilateral approach for the exchange of information.”¹³⁶ In response, the OECD and the Council of Europe developed a Protocol amending the

¹³⁴ The Model Agreement on Exchange of Information in Tax Cases (the Model Agreement) is intended to promote international co-operation in tax matters through the exchange of information. The Model Agreement grew out of the work undertaken by the OECD to address harmful tax practices. The lack of effective exchange of information is one of the key criteria in determining harmful tax practices. The Model Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices. The Model Agreement, which was released in April 2002, is not a binding instrument but contains two models for bilateral agreements. A number of bilateral agreements have consequently been based on the Model Agreement.

¹³⁵ Automatic exchange of information (also called routine exchange by some countries) involves the systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc).

¹³⁶ OECD Centre for Tax Policy and Administration website, Exchange of Information section, update January 2012.

multilateral Convention on Mutual Administrative Assistance in Tax Matters to open it up to all countries and bring it in line with the international standard on exchange of information for tax purposes.

6.1.3 *EU Directives and Regulations*

126. Within the European Union, there a number of Directives and Regulations which provide for international co-operation in the tax area. Council Directive 2011/16/EU of 15 February 2011 on administrative co-operation in the field of taxation (which repealed Directive 77/799/EEC) establishes rules and procedures for the co-operation between EU countries with a view to exchanging information relevant to the administration and enforcement of national laws in the field of taxation. It applies to all taxes except value added tax (VAT), customs duties and excise duties covered by other EU legislation on administrative co-operation between EU countries. Specifically, Council Regulation (EC) No 2073/2004 of 16 November 2004 on administrative co-operation in the field of excise duties strengthens co-operation between tax authorities in the matter of excise duties. It lays down rules and procedures enabling the competent authorities of the Member States to co-operate and to exchange with each other, notably by electronic means, any information that may help them to assess excise duties correctly. Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative co-operation and combating fraud in the field of value added tax sets out rules and procedures for co-operation and exchanges of information between European Union (EU) countries' competent authorities responsible for applying value added tax (VAT).

127. The EU tax system allows representatives of one member country to be present and gather information during a tax inspection in the territory of another member state. It also includes provisions promoting timely and effective co-operation between national tax administrations.¹³⁷

6.1.4 *Domestic laws*

128. Some jurisdictions have enacted domestic legislation which allows their tax authorities to exchange information with certain countries on a unilateral basis. Such legislation must generally specify a number of details, for example the countries with which it wishes to be bound, the applicable procedures, conditions, limitations and safeguards. Domestic legislation may in specific circumstances constitute a viable means of filling the gaps in a jurisdiction's treaty network and therefore provide for measures that would otherwise not be available.

Operation Green Fees – A case example

Over the last two years, law enforcement and tax authorities around Europe have been fighting the criminal networks involved in an estimated 5 billion Euro worth of damages to European taxpayers, caused by VAT-fraud within the EU Emission Trading System (ETS). In operations during 2010, several hundred offices all over Europe were raided and more than 100 people arrested.

In the latest operation on 17 December 2010, the Italian Guardia di Finanza, as part of the so-called Operation Green Fees, carried out raids on about 150 companies in eight different regions of Italy. These operations occurred just a few weeks after the Italian Power Exchange (G.M.E) halted all trading in carbon credits due to a high volume of abnormal transactions. The potential VAT-loss is estimated to reach 1000 million Euro.

Earlier in 2010 authorities in France, Germany, Spain, United Kingdom and other countries conducted numerous operations against criminal networks involved in carbon credit fraud. The biggest swoop, initiated by Germany, saw more than 2500 officers involved across Europe and in non-EU countries.

¹³⁷

In particular, it requires maximum promptness in the response to a request by explicitly imposing time limits; and encourages countries to exchange audit experiences and reports.

Indications of suspicious trading activities were noted in late 2008, when several market platforms saw an unprecedented increase in the volume of trade in European Unit Allowances (EUAs). Market volume peaked in May 2009, with several hundred million EUAs traded in e.g. France and Denmark. At the time the market price of 1 EUA, which equals 1 tonne of carbon dioxide, was around 12.5 Euro. To prevent further losses, a number of EU member states, had to change their taxation rules on these transactions. As a result, the market volume dropped by up to 90%.

Missing trader intra-community fraud (MTIC) is the theft of Value Added Tax (VAT) from a government by organised crime groups who exploit the way VAT is treated within EU member states. Carbon credit fraud is a variation on VAT carousel fraud.

The success of Operation Green Fees was due to the extensive use of international co-operation tools between Italy, other EU members and several countries from Central America to Far East. This took advantage of the different legal bases used for civil and criminal procedures as well as co-operation on intelligence with Tax Administrations, Customs, Financial Intelligence Unit Authorities and police forces.

6.2 *Information sharing mechanisms and other forms of co-operation under the OECD instruments*

129. The Convention, the Model Convention and the Model Agreement deal specifically with information exchange in tax cases. Chapter III of the Convention deals with different forms of assistance and its Section I focuses in particular on different forms of information exchanges. Article 26 of the Model Convention provides a framework for information exchange on request, spontaneously and automatically.¹³⁸ Article 5 of the Model Agreement provides for exchange of information on request.¹³⁹ It is important to note that exchange of information under these various texts is mandatory due to the use of the word “shall”. In 2006, the OECD Committee on Fiscal Affairs (CFA) approved a new *Manual on Information Exchange* (the Manual).¹⁴⁰ The Manual provides practical assistance to officials dealing with exchange of information for tax purposes and may also be useful in designing or revising national manuals. It has been developed with the input of both OECD member and non-member countries. The Manual follows a modular approach: it first discusses general and legal aspects of exchange of information and then covers the specific ways of sharing information included in the various OECD instruments discussed above:

- *Exchange of Information on Request*: This situation occurs when one competent authority asks for particular information from another competent authority. Typically, the information requested relates to an examination, inquiry or investigation of a taxpayer’s tax liability for specified tax years.
- *Spontaneous Information Exchange*: Spontaneous exchange of information is the provision of information to another contracting party that is foreseeable relevant to that other party and that has not been previously requested. Because of its nature, spontaneous exchange of information relies on the active participation and co-operation of local tax officials (e.g. tax auditors, etc). Information provided spontaneously is usually effective since it concerns particulars detected and

¹³⁸ Article 26, Model Tax Convention on Income and on Capital (2008).

¹³⁹ Article 5, Model Agreement on Exchange of Information on Tax Matters (2002).

¹⁴⁰ Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, approved by OECD Committee of Fiscal Affairs on 23 January 2006.

selected by tax officials of the sending country during or after an audit or other type of tax investigation.

- *Automatic (or Routine) Exchange of Information:* Automatic exchange of information (also called routine exchange by some countries) involves the systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc). This information is obtained on a routine basis in the source country (generally through reporting of the payments by the payer (financial institution, employer etc). Benefits of automatic exchange related to the possibility to match the foreign source information received with the recipient tax data base (often using bridging programmes to capture the relevant information) and automatically matched against the income reported by a taxpayer.
- *Industry-wide Exchange of Information:* As international transactions have increased, so too has the need for tax treaty partners to seek assistance from each other by sharing knowledge and expertise on particular industries and special issues of mutual interest. Industry-wide exchanges of information can provide an answer as they entail the exchange of tax information specifically concerning a whole economic sector and not taxpayers in particular. The purpose of such an exchange is to secure comprehensive data on worldwide industry practices and operating patterns, enabling tax inspectors to conduct more knowledgeable and effective examinations of industry taxpayers.

130. The OECD has developed guidance on other forms of co-operation between tax authorities in different jurisdictions which inevitably include the need to exchange information. These other forms of co-operation include:

- *Simultaneous Tax Examinations:* Arrangement between two or more countries to examine simultaneously and independently, each on its territory, the tax affairs of tax payers in which they have a common or related interest with a view to exchanging any relevant information which they obtain. As a compliance and control tool used by tax administrations, simultaneous tax examinations are effective in cases where international tax avoidance and evasion is suspected. Several countries that have been carrying out simultaneous tax examinations for a number of years report that they are a useful and productive control tool. There is a growing interest in particular in multilateral simultaneous tax examinations given the increasing multilateral dimension of tax evasion schemes and the need for international co-operation between tax administrations. The guidance developed by the OECD includes suggestions to have a tax official from one of the participating countries present during a simultaneous tax examination.
- *Tax Examinations Abroad:* Enables tax administrations, when requested and to the extent allowable by domestic law, to permit authorised tax officials of another country to participate in the conduct of tax examinations carried out by the requested country. This helps dealing with the limitation of standard ways of exchanging information which has traditionally been carried out in writing. Written procedures can often be time-consuming and may not be as effective as other compliance methods when rapid action on the part of the tax administration is required. Participating to tax examinations abroad also enables a tax administration to obtain a clear and detailed understanding of business and other relations between a resident of a country who is the subject of a tax examination and his foreign associates.
- *Joint Audits:* Joint audits are an innovative form of co-operation between countries in the tax area. Bilateral or multilateral joint audits have great potential for transfer pricing audits etc. A joint audit is defined as an arrangement whereby participating countries agree to conduct a

co-ordinated audit of one or more related taxable persons (both legal entities and individuals) where the audit focus has a common or complementary interest and/or transaction. Joint audits proved extremely useful to face the unprecedented increase in the mobility of taxpayers and cross-border economic activity. Multinational corporations operate globally; their operations and financial affairs are complex and cross many tax jurisdictions. This environment makes it extremely difficult for any single tax jurisdiction to fully engage with taxpayers operating on a global level.

6.3 *Drivers, challenges and lessons for competition authorities*

131. The key driver for co-operation between tax enforcers is the principle of residence,¹⁴¹ under which companies and individuals are taxed on their income, wherever in the world it arises, at the rate specified by the jurisdiction in which they reside. Seen from a national perspective, countries seem unlikely to have an incentive to provide information to other jurisdictions because by providing information to foreign tax authorities a country makes itself less attractive to foreign investors. The national interest, therefore, would appear to lie precisely in not providing information, thereby becoming a relatively more attractive location for investors. Against this, however, must be weighed the potential benefits of reciprocity: providing information to others may be the quid pro quo for receiving information from them. The pattern of incentives to provide information is thus potentially complex, as countries will have to weigh diverging interests.¹⁴²

132. Tax enforcers face a number of obstacles/challenges to information sharing, some of which are identical to those faced by competition authorities and discussed in the first part of this paper. These include (i) double incrimination, (ii) interest test, (iii) bank secrecy restrictions, (iv) general legal restrictions, (v) anonymity, (vi) inability of receiving country to make full use of the information, and (vii) domestic demands given higher priority than overseas information requests.

- A first obstacle is related to the fact that some countries adhere to the principle of double incrimination, meaning they are unable to share information unless the potential offence would also be a tax crime if committed in their own jurisdiction. Where the definitions of tax crimes are similar, this principle will generally not be an impediment to information exchange. Matters are more complicated if countries have different notions of what constitutes a tax crime.
- A further set of difficulties arise when countries apply the interest test, meaning that they are not able to share information on matters in which they do not themselves have a tax interest. Very much like the discussion above on export cartels, if a certain conduct is not considered illegal in the country requested to disclose information, this country will not be able to co-operate with countries where that conduct is illegal.
- Bank secrecy rules may allow the tax authorities access to bank information only in relation to criminal tax matters, not civil tax matters. In addition to bank secrecy restrictions, there may be other kinds of legal restrictions that block access to bank information. For example, access to bank information may not be automatic but necessitates a request in the context of a specific tax audit.
- An obstacle to co-operation may be the fact that financial institutions (which are the source of the information) do not have enough information to associate the details of a particular account or

¹⁴¹ As opposed to the “source principle” according to which taxation occurs in the jurisdiction in which the income arises.

¹⁴² For a review of the literature on the self-interested incentives of countries to provide information to foreign authorities, see Keen and Ligthart (2006).

other asset with a particular individual or company, making it difficult for it to respond to a specific request from the tax authority. A further level of complexity is due to the difficulty (or sometimes impossibility) of linking the financial information to the ultimate beneficiary. In the case of legal trusts, for example, the information required for tax purposes may include the settlor, the beneficiary, and the trustee.

- Another set of potential obstacles may arise when the information is exchanged but cannot be used by the recipient, as matching information received to a country's own records is likely to fail if methods of storing and organising the information across countries do not align.
- More "practical" obstacles can arise from tax administrations being greatly stretched and requests from domestic tax administrators are given higher priority than information requests from abroad.

133. Despite these obstacles, the sharing of taxpayer-specific information between national tax authorities has emerged as the central issue on the international tax policy agenda. Countries and international organisations have devised tools to foster cross-border co-operation. Some of these initiatives may provide insights to other enforcement areas facing similar challenges, including competition policy.

134. First, the tax experience illustrates the importance of open multilateral instruments alongside bilateral instruments. The availability of multilateral co-operation frameworks ensures that jurisdictions which do not have the resources to engage in negotiating a network of bilateral agreements can still access multilateral co-operation, and it facilitates co-ordinated efforts in examining cross-border cases.

135. Second, the effectiveness of the enforcement action on cases with a cross-border impact can be strengthened by so-called "work sharing arrangements". The experiences with joint audits, tax examinations abroad and simultaneous examination of tax payers are highlighted as important aspects of multilateral co-operation.

136. Finally, the variety of types of information sharing mechanisms shows the value of developing a legal framework at the multilateral level to formalise and categorise information exchange, with ensuing duties and obligations between authorities.

7. Conclusion

137. This paper highlights the successes and shortcomings in international co-operation in cartel cases. Co-operation appears to have increased steadily over the years, and takes place in a variety of ways through a range of different formal and informal mechanisms at the bilateral and multilateral levels. The OECD's instruments have contributed to fostering a climate of co-operation.

138. Nevertheless, the challenges discussed highlight that important barriers remain at different levels (i) between experienced authorities; (ii) between the more experienced authorities and the newer authorities in developing and emerging economies; and (iii) among the newer authorities in developing countries. The current co-operation methods and instruments are all useful up to a point, but none adequately addresses the various limitations to competition authorities working together and exchanging confidential information. Given the limits that continue to beleaguer effective co-operation between cartel enforcers in OECD member countries, the additional challenge is to establish the conditions, incentives and tools that will also bring the newer authorities in developing countries into the international cartel enforcers' network.

139. Some of the recommendations for improving international co-operation that were made more than a decade ago by the U.S. International Competition Policy Advisory Committee (ICPAC)¹⁴³ may be worth revisiting. ICPAC recommended “work sharing” in relation to multi-jurisdictional investigations.¹⁴⁴ This could range from joint teams on investigations to *de facto* lead authorities if some jurisdictions were prepared to relinquish control of cases significantly to permit such advanced co-operation. This concept, a form of enhanced comity, has been raised on several occasions, notably by the business community, and the debate continues. It has already been successfully applied to international co-operation efforts between tax authorities.

140. Discussions have also covered the costs and benefits of moving from a patchwork of bilateral co-operation agreements to a multilateral platform, noting that regional multilateral platforms are already in place with varying degrees of success. Multilateral agreements in other policy areas have underpinned the significant progress made in international co-operation between enforcement bodies and facilitated the co-ordination of different legal systems.

141. More specific solutions have also been considered. These include:

- *Liberalising laws to enable information sharing.* Restrictions on information sharing by competition authorities are broader than those applicable to some other areas of law and broader than necessary to protect confidential information. Truly effective action against cartels will require additional countries to adopt laws that permit competition authorities to share confidential information in appropriate cases and subject to adequate protections.
- *A common definition of confidential information.* A common understanding of what confidential information is for the purposes of co-operation between competition authorities could be developed. Improvements could also be made in understanding what constitutes “agency information” as opposed to confidential information to facilitate exchange of the former. Competition authorities are normally permitted, but not required by law, to limit access to internal information such as the nature or status of their investigations, their investigation theories, or their preliminary conclusions
- *Removing inconsistencies across leniency policies.* More work could be done to eliminate conflicting requirements between leniency programmes to encourage leniency applicants to come forward. Greater consistency would improve the attractiveness of applying for leniency in a wider number of jurisdictions, thus enhancing the potential for more waivers of confidentiality to be granted enabling co-operation between the authorities.
- *Practical tools to improve capacity and understanding.* The ICN, for example, has projects underway to facilitate experience sharing on co-operation, develop tools to facilitate authority contacts, identify matters suitable for co-operation and produce charts summarising authority information sharing mechanisms.

142. The global impact of cartels makes international co-operation a necessity rather than a nice-to-have. The impediments to international co-operation must be addressed before its benefits can be realised by a wider number of competition authorities. The intensity and quality of co-operation needs to be improved before formal case co-operation becomes routine, and as successful as informal co-operation between enforcers in cartel investigations.

¹⁴³ ICPAC was an independent advisory committee of legal, economic and business experts established by the US Department of Justice in 1997 to consider international competition issues.

¹⁴⁴ ICPAC (2000).

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