

Unclassified

DAF/COMP/GF/WD(2012)24



Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

02-Jan-2012

English - Or. French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2012)24  
Unclassified

## Global Forum on Competition

### IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

#### Contribution from France

-- Session II --

*This contribution is submitted by France under Session II of the Global Forum on Competition to be held on 16 and 17 February 2012.*

JT03313881

Document complet disponible sur OLIS dans son format d'origine  
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## IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- France --

### Introduction

1. The fight against cartels has since its creation in 1986 been a priority for the *Conseil de la concurrence* – which in 2009 became the *Autorité de la concurrence*. The experience of the *Autorité de la concurrence* in detecting and sanctioning international cartels is, however, more recent, since this activity could only expand rapidly after the legal instruments at its disposal were reinforced (the law on new economic regulations of 15 May 2001, which among other things institutes leniency and settlements in France, and the ordinance of 4 November 2004 adapting certain provisions of the (French) Commercial Code to European competition law, which modernizes implementation of European competition law following the entry into force of Regulation (EC) 1/2003 ). Since 2005, when the latter came into force, the *Autorité* has imposed sanctions in nearly twenty international cartel cases, that is involving any cartel with at least one company having its registered office outside French territory and played a significant role in anticompetitive practices.

2. International cooperation in investigations is only formally implemented in a limited number of international cartels, that is those requiring the reciprocal coordination of competition authorities and/or assistance in gathering evidence outside national territory or, conversely, for the benefit of another authority not empowered to investigate on French soil.

3. In practice, the *Autorité's* experience in international cooperation is European-based. This situation can be explained by the high degree of interpenetration of the French economy with those of its European neighbours, and by the existence of a common heritage of substantive law, such as a common and harmonized definition of cartels at European level and above all the availability of effective instruments of cooperation. Articles 11 to 16 and 20 to 22 of Council Regulation (EC) no. 1/2003 dated 16 December 2002, the Commission's Notice on cooperation within the European Competition Network (ECN) and the ECN's model programme on leniency thus played a decisive role in structuring cooperation between the *Autorité* and its European counterparts.

4. Conversely, the lack of cooperative instruments may dissuade authorities from cooperating at a global level, and limits upstream exchanges of confidential information, unless there is a special cooperation agreement that must be framed from the standpoint of many factors, e.g. the costs and benefits, the strength of the economic ties between the states concerned, the similarity of their substantive laws, and the known or estimated frequency of cases liable to fall within the scope of such an agreement.

5. This contribution reviews the experience of the *Autorité de la concurrence* in international cooperation in cartel investigations in chronological order as the investigations proceed in practice: (i) detecting and gathering evidence and identifying parallel procedures, (ii) allocation of cases and (iii) practical cooperation in investigations if a case was not reallocated. In conclusion, the *Autorité* offers its thoughts on how to improve international cooperation in the light of its European experience.

## 1. Detecting and gathering evidence, and identifying parallel procedures as regards international cartels

6. Like many of its OECD counterparts, the *Autorité* has at its disposal a range of procedural instruments that enable it to detect and gather evidence on cartels, whether as a result of complaints or applications for leniency, but also through more proactive market intelligence mechanisms. The *Autorité* can thus carefully monitor market developments, which makes it easier for it to gather circumstantial economic evidence and thereby initiate a more active phase of gathering direct evidence through hearings or even through investigative measures, or by mobilizing the sector inquiry instrument, on its own initiative since the law on the modernization of the economy of 4 August 2008 came into force. These instruments are not specific to international cartels, but their application can reveal the international dimension of certain cartels.

7. Once this international dimension has been identified, formal or less formal cooperation can be considered, generally on the basis of binding instruments when an exchange of confidential information proves to be necessary. International cooperation can, however, be much more effective if reciprocal alert or information mechanisms are set up in advance, either on the basis of the comity of nations or on that of binding instruments.

8. Within the ECN, mutual information is provided for by article 11, paragraph 3 of Regulation (EC) no. 1/2003, which imposes on competition authorities an obligation to inform all network members of proceedings liable to result in a decision implementing European competition law, and thus of a case in which trade between Member States may well be significantly affected. This obligation arises as soon as the first formal investigative measure is adopted. This mutual information system is essential, inasmuch as it enables each competition authority to follow up the activities of its European counterparts, and offers an opportunity for informally sharing experiences, if the authorities are investigating in similar economic sectors, or more formally if joint investigative measures are necessary or if parallel procedures have been identified. A secure electronic system (ECN-ET) has been set up for the purpose. In the period since the regulation came into force (1 May 2004), France has passed on 207 case files to the ECN at 30 November 2011, making it one of the largest contributors, the average being 45 case files per Member State<sup>1</sup>.

9. These mutual information mechanisms have been broadened and refined as part of the implementation of leniency programmes to provide information at an even earlier stage of the investigation. Within the ECN, a common approach is adopted to processing applications for leniency thanks to the model programme co-drafted by the *Autorité* and the British *Office of Fair Trading* in 2006 following close consultation with all the other national authorities in the ECN and the European Commission<sup>2</sup>. It meets a threefold objective. Firstly, it ensures convergence of the applicants' eligibility and reward criteria, as well as of the national procedures for processing applications for leniency, including the introduction of a mechanism for marking the applicant's place in the queue and the principle of the admissibility of oral applications for leniency. The purpose here is to avoid applicants officially filing their form not with the best placed authority, because its programme may be less attractive than that of another authority involved in the case but less well placed to conduct the investigation. The model programme also ensures equal treatment for applicants. Finally, it streamlines the procedures for companies.

10. The model programme is a particularly fruitful example of international cooperation. All the competition authorities in the ECN, with one exception, have adopted a leniency programme, whereas only

<sup>1</sup> European Commission site, Competition DG, ECN statistics, <http://ec.europa.eu/competition/ecn/statistics.html>.

<sup>2</sup> ECN model programme on leniency, [http://ec.europa.eu/competition/ecn/model\\_leniency\\_fr.pdf](http://ec.europa.eu/competition/ecn/model_leniency_fr.pdf)

four (including France) had one in 2002. The latest report on the convergence of national programmes<sup>3</sup> took note of many other significant advances.

11. The model programme also introduces a mechanism that goes beyond the objective of mutual information and directly paves the way for coordinated case allocation. This refers to the summary application described in point 22: "*In cases where the Commission is 'particularly well placed' to deal with a case in accordance with paragraph 14 of the Network Notice, the applicant that has or is in the process of filing an application for immunity with the Commission may file summary applications with any NCAs which the applicant considers might be 'well placed' to act under the Network Notice*"<sup>4</sup>. This mechanism has to date been adopted by 23 NCAs in Europe<sup>5</sup>.

## 2. Allocating cases in parallel procedures concerning international cartels

12. Should parallel procedures be identified due to the international nature of a cartel, the competition authorities concerned must avoid two main risks.

13. Firstly, they must respect the *ne bis in idem* principle, which is recognized at European level by the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights, as well as in certain instruments of international criminal law. In competition-related cases, the jurisdictions of the Union have hitherto considered that application of the *ne bis in idem* principle was subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected<sup>6</sup>. Advocate-General Julianne Kokott, in her findings dated 8 September 2010<sup>7</sup>, deemed that this principle did not rule out the possibility of several competition authorities within the European Union bringing action against the same cartel for offences in different periods or territories. At international level, the Court of Justice of the European Union has ruled that the European Commission and the competition authority of a third State could rule against the international cartel, because each authority would be protecting its own legal interests<sup>8</sup>, and would be protecting consumers in its own geographical sphere of competence.

14. In a recent case heard in 2011, the *Autorité de la concurrence* thus had to ascertain with the European Commission that its action was conducted in accordance with the *ne bis in idem* principle. The *Autorité de la concurrence* thus ascertained in advance, in cooperation with the European Commission,

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<sup>3</sup> ECN Model Leniency Programme, Report on Assessment of the State of Convergence, 15 October 2009, [http://ec.europa.eu/competition/ecn/model\\_leniency\\_programme.pdf](http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf).

<sup>4</sup> Summary applications include a short description of the following: the name and address of the applicant; the other parties to the alleged cartel; the affected product(s); the affected territory(-ies); the duration; the nature of the alleged cartel conduct; the Member State(s) where the evidence is likely to be located; and information on its other past or possible future leniency applications in relation to the alleged cartel.

<sup>5</sup> Germany, Austria, Belgium, Bulgaria, Denmark, Spain, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia (Slovak Republic), Sweden, United Kingdom.

<sup>6</sup> Court of Justice of the European Union, 7 January 2004, Aalborg Portland e.a./Commission, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Rec. p. I-123.

<sup>7</sup> Court of Justice of the European Union, findings of Mme Kokott, 8 September 2010, Toshiba Corporation e.a., C-17/10.

<sup>8</sup> Court of Justice of the European Union, 29 June 2006, Showa Denko, C-289/04 P, Rec. p. I-5859; 29 June 2006, SGL Carbon/Commission, C-308/04 P, Rec. p. I-5977; 10 May 2007, SGL Carbon/Commission, C-328/05 P, Rec. p. I-3921; Court of First Instance of the European Communities, 9 July 2003, case T-224/00, Archer Daniels Midland, Rec., p. II-2597.

which had sanctioned companies for fixing the prices of washing powder<sup>9</sup>, that it had not been denied jurisdiction by proceedings brought at European level, because the European case and the French case were clearly separate. This was a *prima facie* assessment, without prejudging the final respective assessments of the two authorities. At the end of the two sets of proceedings, in its decision pronounced on 8 December 2011<sup>10</sup>, the *Autorité* concluded that the two offences were clearly separate. The French decision relates *inter alia* to a different period and area, to a broader range of products, and to different parties whose practices had different aims – in the case in point, a direct cartel on prices and promotions of all formats of standard washing powder on the French market, in the very specific context created on this market by the Galland Act<sup>11</sup>. The *Autorité* and the European Commission were thus able to legitimately sanction two distinct offences that nonetheless concerned the same business segment, without contravening either the *ne bis in idem* principle or applicable European law, thanks to the dialogue between them.

15. Conversely, it would work against the interests of European consumers for the competition authorities not to be in a position to sanction companies engaged in anticompetitive practices because the authority in possession of the evidence is not well placed to act. This risk is averted by the allocation mechanisms in the ECN, which can set an example for other forms of regional cooperation. In this respect, the European Commission Notice on cooperation within the European Competition Network<sup>12</sup> suggests using three sets of criteria to allocate cases within the ECN: the geographical dimension of the offence, the authority best placed to gather evidence and/or put an end to the cartel as efficiently as possible. This case allocation system, which requires close cooperation between European competition authorities, has yielded good results, as the following example illustrates.

16. In 2003, the European Commission referred to the French authorities a case that led to a fining decision<sup>13</sup>. The Commission referred a complaint it had received from a former manager of a subsidiary of a group based in Luxembourg, who had been asked to scale down his marketing campaign, which was deemed to be too aggressive on the French market.

17. On the other hand, national competition authorities can identify a common case that can be referred to the European Commission if the latter is better placed, for instance if the territory of more than three Member States is affected by the practices. In one particular case, the *Autorité* shared information with the German, Swedish and British competition authorities that identified a possible cartel on a European scale in the so-called "flat glass" case, which paved the way for *ex officio* proceedings brought by the European Commission<sup>14</sup>.

18. Where appropriate, allocating cases to the best placed competition authority paves the way for effective cooperation as regards exchanges of information and joint inspection.

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<sup>9</sup> Decision of the European Commission dated 13 April 2011 no. COMP/39.579 — Domestic detergents.

<sup>10</sup> Decision 11-D-17 of 8 December 2011 on practices in the detergents sector, points 334 to 348.

<sup>11</sup> Decision 11-D-17 of 8 December 2011 on practices in the detergents sector, points 334 to 348.

<sup>12</sup> Commission Communication 2004/C 101/03 of 27 April 2004 on cooperation within the European Competition Network (OJEU no. C 101 of 27 April 2004, p. 43).

<sup>13</sup> Decision dated 2 February on practices in the temporary job sector.

<sup>14</sup> Decision of the European Commission dated 28 April 2007 no. COMP/39/165 - Flat glass.

### **3. Concrete cooperation in investigations of international cartels: joint inspections and exchanges of information within the European Union**

19. The ECN is also a powerful instrument of cooperation between competition authorities at the investigative stage, once the best placed competition authority has been identified.

20. First of all it allows for informal cooperation that does not involve exchanges of confidential information, the aim being to achieve convergence in procedural practices and to exchange practical experience as regards substantive analysis, whether this concerns the definition of relevant markets, standards of proof or even arrangements for implementation of European Union law by the national competition authorities.

21. But above all the ECN stands out because of the wide-ranging cooperation it allows, both as regards exchanges of information and assistance for investigative measures.

22. With regard to exchanges of information, article 12 of Regulation (EC) no. 1/2003 permits national competition authorities applying articles 101 and 102 TFUE to exchange any factual circumstances or points of law gathered by one of them in accordance with its national law or within the framework of an inspection conducted under article 22 of Regulation (EC) no. 1/2003, even confidential information, and allows them to be used as evidence, within the limits set by the law. The *Autorité de la concurrence* implemented the provisions of article 12 of Regulation (EC) no. 1/2003 on six occasions in 2010, three of which with the Bundeskartellamt.

23. Article 22 of said Regulation (EC) no. 1/2003 confers the necessary powers on a competition authority in the ECN to carry out an investigative measure on its own national territory, in accordance with the procedures in force on the said territory, "on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement" of articles 101 and 102 of the TFEU. The *Autorité de la concurrence* has applied these provisions on several occasions. One such occasion was the case involving practices in the liquefied petroleum gas (LPG) container sector, for which the simultaneous assistance of the Czech and Austrian authorities was sought<sup>15</sup>, as well as that of the Italian (2007, 2006) and Belgian (2006) authorities. In 2008, in a case concerning the practices of oil companies supplying Air France with aviation fuel in Reunion Island, the *Autorité de la concurrence* collaborated closely with the British *Office of Fair Trading*. In that investigation, a large proportion of the physical evidence was held by subsidiaries of most of the oil companies tendering for Air France aviation fuel supply contracts at Reunion Island, based in the United Kingdom. Reciprocally, the *Autorité* provided assistance to its counterparts, the Bundeskartellamt, the Belgian competition council and the Hellenic Competition Commission.

### **4. Conclusion: Thoughts on improving international cooperation in the light of the *Autorité's* European experience**

24. The *Autorité's* European experience as regards cooperation on cases of international cartels can provide food for thought for other national authorities engaging in regional cooperation mechanisms from the standpoint of competition law.

25. This experience is also behind the *Autorité's* six key proposals for enhancing cooperation within the ECN.

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<sup>15</sup> Decision 10-D-36 of 17 December 2010 on practices in the liquefied petroleum gas (LPG) container sector.

26. The first two proposals aim to preserve and boost the capacity to detect evidence of anticompetitive practices *ex officio*, a necessary complement for proper implementation of leniency programmes.

27. Information could thus be exchanged at an even earlier stage than within the framework of the examination of summary applications or "11-3 information" submitted to the network by other competition authorities. A group of national authorities could, on a voluntary basis, undertake to coordinate sector-specific inquiries that may later lead to opening a case if the facts and evidence so warrant.

28. In the more specific context of cooperation with a view to commence infringement proceedings, one could also consider developing regional cooperation platforms based on the Nordic model to exchange hard and circumstantial evidence. Such exchanges could occur before the first investigative measure is implemented, to facilitate exchanges of evidence and the identification of cartels on a global scale. The regional platforms would be all the more effective as they could concentrate on sectors deemed a priority and/or in which trade is the most intense.

29. A third line of thought for the future could consist in further refining the cooperation mechanisms provided for by the model leniency programme and stimulating increased voluntary convergence. As the aforementioned report has shown, there is room for manoeuvre as regards substantive convergence, for instance in order to define companies having forced another company to participate in the infringement – the coercers – to better demarcate the boundaries of total or partial immunity, but also, regarding procedural matters (*inter alia* the management of markers), to upgrade the ranking of summary applications beyond 1A and use standardized forms.

30. Our last three proposals could be studied with a view to possibly revising Regulation (EC) no. 1/2003 in the medium or long term.

31. First and foremost, cooperation on cross-border cartels would require more convergence as regards decision-making, more particularly with regard to the level of sanctions. Deterrent and proportionate sanctions throughout the European Union are indeed a key condition for preventing the formation of cartels. The European competition authorities have already laid down common principles on the subject, on the initiative of the *Autorité* and its Italian counterpart<sup>16</sup>, the application of which could be assessed. At an even later stage, cooperation between judges in a network safeguarding their independence could complement the current system, thereby creating a veritable "European network of competition judges", which would be the counterpart of the ECN, in accordance with the wishes expressed by two high-ranking magistrates<sup>17</sup>.

32. Greater cooperation between ECN members and the authorities of third States could also be better pooled, according to a principle equivalent to the "clause of the most favoured nation", in order to broaden the potential scope of exchanges of confidential information within the ECN and to cut the cost of negotiating bilateral agreements.

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<sup>16</sup> ECA working party on "Financial penalties for companies in competition law, convergence principles", [http://www.autoritedelaconcurrence.fr/doc/eca\\_ppes\\_convergence.pdf](http://www.autoritedelaconcurrence.fr/doc/eca_ppes_convergence.pdf).

<sup>17</sup> The former President of the Paris Court of Appeal and President of the Final Court of Appeal, now a member of the Constitutional Council, Guy Canivet, organization of national jurisdictions for the application of Community competition law, *Concurrences* (2004), and Joachim Bornkamm, president of the first civil chamber of the German Federal Court of Justice, J. Bornkamm, A competition judge at the Bundesgerichtshof, *Concurrences* (2008).

33. Finally, the mechanisms of articles 12 and 22 of the regulation could profitably be extended by instituting a legal basis for the mutual admissibility of evidence before competent jurisdictions, in view of the existing differential treatment of certain types of evidence, such as telephone recordings.

34. In conclusion, a formal framework for cooperation relying on early mutual information, more particularly in the framework of implementing leniency programmes, and greater formal cooperation between competition authorities sharing a common substantive heritage and whose national economies are closely related, could lead to convincing results with respect to deterrence and the fight against international cartels. Within the European Union, a united front by the competition authorities in a system permitting the detection, allocation and sanctioning of cartels has gradually been put in place on the basis of binding instruments and voluntary convergence initiatives that could be pursued yet further.