Fighting Hard-Core Cartels

HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES



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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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Foreword

This publication comprises two reports by the OECD Competition Committee, which represent important milestones in the OECD anti cartel programme. That programme began with the publication in 1998 of the OECD Council Recommendation Concerning Effective Action against Hard Core Cartels, and was followed in 2000 by a report by the Competition Committee on implementation of the Council Recommendation.

In 2001 the Competition Committee issued a Report on Leniency Programs to Fight Hard Core Cartels, which addresses the main difficulty in detecting and punishing cartels – that they are conducted in secret. A new and potent enforcement tool against cartels is the promise of lenient treatment to cartel participants who confess and provide evidence against their co-conspirators. The Leniency Report reviews the main features of existing programmes. They include the importance of clarity and priority, to maximise the incentive for defection; the value of offering leniency even after an investigation has begun; the probative value of the evidence provided by the informant; the seriousness of the possible penalties, including the risk of personal liability; and assurances of confidentiality.

In 2002 the Competition Committee issued a Report on the Nature and Impact of Hard Core Cartels and the Sanctions Under National Competition Laws. The report examines the nature and impact of cartels, the sanctions that are available, and the optimal use of sanctions for achieving deterrence of cartel activity. The report concludes that cartels cause billions of dollars of harm to consumers each year, and it emphasises that heavier sanctions are needed to deter new cartels from being formed and to induce current participants to enter leniency programmes. The report concludes that sanctions currently imposed are often too light when set against the gains to the cartel.

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Part I

REPORT ON LENIENCY PROGRAMS TO FIGHT HARD-CORE CARTELS

Note by the Editor

The OECD Competition Committee adopted in 2001 the report on leniency programs to fight hard core cartels. This report contains descriptions and multiple references to leniency programs in Member countries and European Commission. Since the European Commission adopted in February 2002 a new leniency policy, some of the information in the 2001 report relating to the EC policy is no longer accurate. To that end, the EC new Notice, which came into force on 14 February 2002, is appended to the present report as well as the corresponding EC press release.

Executive Summary

A roundtable discussion about leniency programs was held at the OECD CLP in February 2000. In light of the written submissions, the background note, and the oral discussion, the following points emerge:

The challenge in attacking hard-core cartels is to penetrate their cloak of secrecy. To encourage a member of a cartel to confess and implicate its co-conspirators with first-hand, direct "insider" evidence about their clandestine meetings and communications, an enforcement agency may promise a smaller fine, shorter sentence, less restrictive order, or complete amnesty.

Leniency programs uncover conspiracies that would otherwise go undetected and also make the ensuing investigations more efficient and effective. Experience shows that these programs work. Since the US program was revised in 1993 to make the scope of amnesty clearer and somewhat broader, the number of applications has multiplied to more than 20 per year and led to dozens of convictions and to fines totalling well over USD 1 billion. In the US investigation of the vitamins cartel, the amnesty applicant's co-operation led

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directly to guilty pleas and fines of USD 500 million and USD 225 million against two other firms.

Several other jurisdictions also have leniency programs. The European Commission in 1996 announced conditions under which co-operation may lead to significant reductions or exemptions from fines, and about a dozen leniency cases have been developed so far. Canada and the UK have recently announced leniency programs, which are based in many respects on the US experience. Germany announced a program in May 2000, while France and Sweden are considering legislation that would authorise programs. Korea, which has had a leniency program since 1997, is considering legislation to improve it further.

Leniency could mean any reduction in the penalty compared to what would be sought in the absence of full, voluntary co-operation. The clearest, most complete form of leniency is amnesty. In the US program, where cartels are subject to criminal sanctions, "leniency" means immunity from prosecution. In the EU program, leniency is described in terms of reductions in fines. Other enforcement agency decisions that could be considered lenient treatment include agreeing not to refer a matter for criminal prosecution, or not to pursue penalties against individuals.

Clarity, certainty, and priority are critical, as firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximise the incentive for defection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the "best deal", but also that the terms of the deal be as clear as possible at the outset.

A general offer to reduce penalties in exchange for information may not be enough to encourage firms to come forward. The benefits of remaining with the cartel may appear larger and more certain than the unknown reward that would result from confessing. The original US leniency program, which made only a relatively general offer, produced only about one case per year. One of the critical 1993 changes that made the US program more effective was to make complete amnesty automatic to the first applicant if certain clearly specified conditions are met.

The EU leniency program sets out a schedule for potential reductions in fines, depending upon the stage of the proceedings and other factors. In the EU enforcement process, the Competition Directorate cannot make a firm commitment about the extent of leniency when a firm first offers to co-operate, because it cannot commit the Commissioners, who decide at the end of the process whether to grant amnesty, more lenient treatment, or nothing, depending on whether the party offered decisive evidence and continued to co-operate.

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The benefit of making the payoff for priority clear and substantial is already appearing. Firms have come in to apply for amnesty, too late, less than a day after their co-conspirator secured its position as first in line. The size of the incentive to be first is illustrated by the US investigation of the graphite electrodes cartel, where the amnesty applicant received no penalty, the next firm to come in was fined USD 32.5 million, the third company, USD 110 million, and the last one, USD 135 million.

An applicant for leniency may provide information that the agency does not already have, or disclose a cartel that the agency might not otherwise learn of at all. In addition, leniency might also be granted to a firm whose confession makes the agency's proof easier. Thus, leniency or even amnesty might still be granted to a firm that comes in after an investigation is underway.

Another critical change in the US program in 1993, and a feature of the EU and other programs, is to make amnesty or leniency possible even after an investigation has begun. Even after there is a suspicion of a violation, the investigation can be aided greatly by a confession accompanied by detailed, first-person evidence. But conditions may be more stringent for granting leniency after the agency already has gotten wind of the violation. In addition, some degree of leniency might be given to firms that co-operate with the investigation, even though they are not the first to come in. To maintain the strong incentive to be first, leniency to those who come in later should be clearly less generous.

The seriousness of the possible penalties, and thus the significance of the relief that leniency can promise, is an important factor. In addition, the risk of personal liability could be a powerful motivator.

If penalties are too weak or are applied too infrequently, then firms may disregard an offer to relax them. An enforcement agency may see few results from a leniency program before it has succeeded in imposing a significant penalty on a cartel; however, the example of penalties imposed in similar or neighbouring jurisdictions may give firms some incentive to come forward.

The opportunity to avoid individual liability or criminal penalty may be a significant factor in encouraging early co-operation. One of the important changes in the US program was to promise amnesty to officials and employees of the applicant who co-operate with the investigation. But the experience in the EU, where only firms are subject to the competition law, shows that the threat of individual liability may not be a necessary condition for a leniency program to achieve some results.

Administering a leniency program requires procedures to verify the credibility of information offered and to ensure continued co-operation from firms and their officers and employees. Considerations of fairness may require refusing to grant leniency to a firm that was the cartel

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ringleader or that coerced other firms to enter it. And similar considerations call for requiring the leniency applicant to make good faith efforts to terminate and correct the violation, including making restitution to victims.

Leniency decisions are implemented at the end of the process, to ensure compliance with the usual condition that the applicant co-operate throughout the investigation. Final implementation may require action by other institutions, such as prosecutors and courts.

One unresolved issue is the extent to which leniency should depend on the probative value of the evidence that the applicant proffers. The US and UK programs do not set an evidentiary burden requirement, such as the "decisive evidence" standard in the EC program. One reason given for the difference in approach is the nature of proof required in different legal systems. Where the case must be shown entirely with documents, it may be particularly important that the amnesty applicant supply usable proof, even the "smoking gun". On the other hand, the US notes that promising amnesty to a party who can provide a critical link in obtaining decisive documentary evidence has made it possible to crack some cartels.

An objection sometimes raised to leniency is that law enforcement agencies should always take vigorous action against violations. But some prioritising and balancing of costs and benefits in the enforcement process is inevitable. Overall enforcement effectiveness and compliance is likely to improve, as leniency for a few participants makes it possible to apply the law more thoroughly to others. Permitting a violator to avoid the consequences of its action by confessing and shifting the burden to others may appear unjust, but for violations like cartels, where there will be several parties, considerations of enforcement effectiveness may outweigh that concern.

Agencies with leniency programs promise strong protections against unauthorised disclosure. Co-operating with other enforcement agencies about cartel enforcement will require finding ways to communicate about the existence of situations calling for enforcement attention, without divulging the details of these confidential sources.

Confidentiality is important to leniency applicants, because informants can run serious risk of retaliation, as well as liability in other jurisdictions. Too great a risk that information would be conveyed to other jurisdictions might decrease firms' incentives to come forward. On the other hand, thanks to increasing co-operation, a firm trying to tell an agency something it did not already know could be disappointed to find that the agency had already learned about it from another source. Agencies may make it clear that they will act independently, which should have the effect of causing firms to confess early and often. Already, companies are coming forward simultaneously in all the major jurisdictions with leniency programs.

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Overview

Now that hard-core cartels have been recognised, in the 1998 Council recommendation, as "the most egregious violations" of competition law and hence a principal focus of competition policy and enforcement, Member countries face the challenge to design and implement effective enforcement procedures and adequate sanctions against them. Because cartel behaviour is illegal, and even criminal in many jurisdictions, the participants take pains to conceal it. That secrecy makes discovering and proving violations much more difficult for enforcement agencies.

Some jurisdictions have developed programs that offer leniency in order to encourage violators to tell these secrets, to confess and implicate their co-conspirators with first-hand, direct "insider" evidence that provides convincing proof of conduct parties want to conceal. The programs uncover conspiracies that would otherwise go undetected. They elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence is obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. To get this information, the parties who provide it are promised lower fines, shorter sentences, less restrictive orders, or even complete amnesty.

Member countries have expressed interest in learning more about how leniency programs work as investigative tools and about how they might be adapted to different legal and administrative settings. This interest in comparing experiences, and the exposure of international cartels that demand action in many jurisdictions, makes the issue timely. A round table discussion on the subject was held at the WP3 meetings in February 2000. Based on that roundtable discussion and notes submitted by Member countries, this paper describes the major features of the existing and publicly proposed programs and sets out some of the practical and legal issues that these programs may raise. Because many jurisdictions are actively considering these issues and making changes in their procedures, the descriptions below should not be considered complete or authoritative. For details about a particular jurisdiction's current program, it would be advisable to contact the competition agency there directly.

Clear definitions may help in understanding the different programs. The term "leniency" will be used here to describe all programs that provide for any reduction in sanction in exchange for information and co-operation. The more precise term "amnesty" will be used to describe a program that promises no penalty to the first party to come forward to the enforcement agency and comply with the agency's requirements. Logically, amnesty is included within the more general concept of leniency. This distinction is adopted here for clarity. Public announce-

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ments of these programs do not always make this distinction clearly, and some use the terms "leniency" and "amnesty" almost interchangeably.

Leniency programs in Member countries

The current "amnesty" program at the US Department of Justice, Antitrust Division dates from 1993. The program has been a critical tool for successful enforcement action against major cartels. A corporation can avoid criminal prosecution for antitrust violations by being the first to confess its role in the illegal activities, co-operating fully with the Antitrust Division in its investigation, and meeting other specified conditions. A similar program for individuals who approach the Antitrust Division on their own behalf to report antitrust violations was announced in 1994. The US has had a leniency-type program since 1978, but the earlier one had been relatively ineffective, leading to only about one application per year. Changes in the program in 1993 make amnesty automatic if no investigation is underway before the applicant comes forward, make amnesty possible even after an investigation has begun, and grant amnesty to individual officers, directors, and employees of the applicant who co-operate with the investigation. After these changes, the number of applications multiplied, to more than 20 per year. The US program has led to the conviction of over 30 defendants and collection of well over USD 1 billion in fines in the last two years.

The European Commission announced conditions in 1996 under which enterprises in a cartel agreement that decide to co-operate with the Commission may be exempted from fines or may be granted significant reductions in fines. In the EC system, leniency is not automatic. The decision is made at the end of the process, whether to grant amnesty, more lenient treatment, or nothing, depending on whether the party offered decisive evidence and continued to co-operate. The considerations are much like those applied in plea bargaining in other jurisdictions. The EC program specifies percentages by which fines might be reduced, in exchange for co-operation at different stages of an investigation. About a dozen leniency cases were at different stages of readiness as of February 2000, some of which were expected to appear soon.

Canada, which treats cartels as criminal offences, has had a "Cooperating Parties" immunity program for ten years. In September 2000, it adopted revisions to the program, which had been published in draft form for comment first in 1999 and again in February 2000. The revisions were developed after consultation with the US about its experiences. The purpose of the revisions is to make the policy more transparent, so parties know whether they are likely to qualify before they approach the enforcement authority. While favourable treatment is available for parties who do not qualify for complete immunity, the new immunity policy deals solely with grants of immunity, and, as such, a successful applicant who is first in,

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and meets certain conditions will receive complete immunity, that is, amnesty. In addition, the Attorney General and the general immunity policy of Canada is referred to in the policy, because that office is ultimately responsible for the granting of immunity. The Bureau undertakes to recommend that the Attorney General grant immunity to a party who comes in before it knows of the offence, or before it knows enough to refer the party for prosecution. Although it is difficult to quantify the program's effectiveness, the Bureau is certain that the program is key to enforcement against international cartels, and indeed that criminal enforcement would not as effective without it. Although the Bureau may have to make a decision on less than full information, leniency leads to decisions that are made earlier rather than later and may thus terminate the cartel activity more quickly.

The UK Office of Fair Trading included a leniency program in the guidance about appropriate penalties under the new Competition Act, which was published for public comment in August 1999. The OFT program builds on the experiences of the US and EC leniency programs, and its terms take account of the US DOJ corporate amnesty policy. A revised version of this proposed guidance was approved 29 January 2000, to become effective with the new Act on 1 March 2000. The Director General of OFT will offer total immunity from financial penalties, that is, amnesty, to the first participant in a prohibited cartel to come forward before an investigation has begun. Immunity is automatic if conditions, similar to those for the US DOJ policy, are satisfied. And immunity may be offered to the first participant who comes forward after an investigation is underway, but before the Director General has given written notice of a proposed decision that the prohibition has been violated.

In Korea, the KFTC has undertaken a leniency program, which is explicitly authorised in the competition law, since 1997. Formal requirements are set out in the enforcement regulation. Although the regulations do not specify how valuable or complete the information must be, it would be expected that information which is not valuable or complete would not qualify the party for immunity. The party must not be the instigator of the violation. The degree of punishment is determined by relative responsibilities. In the only application so far, a member of a cartel who reported it to the KFTC received only a cease and desist warning, rather than an order and financial surcharge. In addition to offering lighter penalties to parties who inform on their partners in unlawful restrictive agreements, the KFTC might also agree not to refer their violations for criminal prosecution. Korea is considering legislation to improve this program further.

Other jurisdictions have made use of the incentives that underlie leniency programs, without adopting such policies explicitly. For example, in a 1997 action against a nine-firm cartel in the explosives industry, the Italian Competition Authority imposed fines totalling 1 406 million lire, but did not impose any fine on the complainant company, because it played a decisive role in the discovery of

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the agreement and it had voluntarily ceased breaking the law before the Authority had taken action. (OECD CLP 1998) Germany's Bundeskartellamt has announced a leniency program,[1] and France and Sweden are considering legislation that would make a program possible.

As jurisdictions apply stronger sanctions to hard-core cartels, the benefits that a firm could gain by coming in first and thus obtaining leniency are becoming irresistible. Recent US cases illustrate how much a firm can save itself by confessing and implicating its co-conspirators. In the vitamins investigation, the applicant's co-operation led directly to guilty pleas and fines of USD 500 million and USD 225 million against two other firms. In the graphite electrodes investigation, the next company in the door after the amnesty applicant was fined USD 32.5 million, the third company, USD 110 million, and the last company, USD 135 million. In the marine construction investigation, a corporate co-conspirator agreed to plead guilty and co-operate shortly after the investigation was opened based on information provided by the amnesty applicant. Although the company provided very valuable co-operation and received a significant reduction in its fine for that co-operation, it was not the first one in, and it still paid a fine of USD 49 million.

Aspects of information demanded

To encourage cartels to break down, amnesty is typically offered only to the first firm to come in. In the US, if the conspirators "conspire" to confess together, all will be rejected. Sometimes parties have come in together, to plead guilty and bargain for more lenient treatment under the sentencing guidelines, but that is not "amnesty". Complete "amnesty" is limited to the first, individual company. Some degree of leniency or consideration might be given to firms that co-operate with the investigation, even though they are not the first to come in. To preserve the incentive for firms to defect, it is important that the first firm in clearly receive the "best deal".

An important consideration of existing leniency programs is that the company or individual seeking leniency provide information that the agency does not already have. One value of the programs is in ferreting out cartels that the agencies might not otherwise learn of at all. Leniency might also be granted to a firm whose confession makes the agency's proof easier. In the US and UK programs, the first listed condition for granting full amnesty (that is, total immunity from penalties) is that the Division or the OFT has not yet received information about the illegal activity from any other source. In the EC program, the greatest degree of leniency would be given to the first firm to adduce decisive evidence of the cartel's existence, informing the Commission before it has undertaken an investigation. In Canada, the first crite-

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rion for a recommendation of immunity is that the Bureau is unaware of an offence, and the party is the first to disclose it.

Leniency might still be granted to a firm that comes in after the agency has already begun an investigation; in some jurisdictions, such as the US, Canada, and the UK, such a firm might receive amnesty. Even if the agency already has some idea that there might have been a violation, the investigation can be aided greatly by a confession accompanied by detailed, first-person evidence. And violations may end more quickly, if confession leads to the cartel's breakdown. But conditions may be more stringent for granting leniency after the agency already has gotten wind of the violation. In the US program, qualifying for amnesty after an investigation is underway requires that the company come in before the agency has enough evidence to lead to a conviction. Still, expanding the program to permit amnesty after an investigation is underway, even subject to that caveat, was a critical step toward making the program more effective. About half of the applications in the US come in after some investigation is underway. In the vitamins case, which had already been under investigation for two and half years by the US and others, it was the co-operation of Rhone-Poulenc that cracked it. In the absence of a policy permitting amnesty after the investigation was underway, the outcome would have been uncertain.

Not only should the company or individual come in early, but its information should be valuable and reliable. The later in the process, the more detailed and incriminating the information should be, to justify granting leniency in exchange for it. By then the agency may not want simply a "tip" that a cartel exists, but evidence to prove the case against it. In the EC program, leniency depends on being "the first to adduce decisive evidence of the cartel's existence". After an investigation has begun, some degree of leniency might be granted to a firm that provides enough information to support initiating the EC's decision process. Even at a later point, some reduction in fine is possible if a firm gives the Commission evidence that materially contributes to making the case against it before a statement of objections is sent.[2]

Consensus may not yet exist about how much leniency should depend on the probative value of the evidence that the applicant proffers. Agencies take different approaches about whether the information supplied must be "decisive" or otherwise of particular significance. The US and UK programs do not set an evidentiary burden requirement, such as the "decisive evidence" standard in the EC program. One reason given for the difference in approach is the nature of proof required in different legal systems. In the EC program, "decisive evidence" means, in a sense, the "smoking gun" that demonstrates the violation. In the EC process, where proof relies on documents, and it is not possible to test or confirm them through hearings and testimony under oath, it may be particularly important that the amnesty applicant supply information that will constitute usable proof.

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The US believes that being able to promise amnesty to a party whose evidence was not "decisive" made it possible to crack some cartels, by rewarding a cartel member who provided a critical link in obtaining decisive evidence. For example, one applicant was a peripheral player in a conspiracy who did not attend many meetings. It supplied enough evidence to support search warrants, but not enough to support a conviction. The investigation that the information made possible led eventually to another, more culpable, member of the cartel pleading guilty.

Other considerations

The information and its source must be credible. To ensure against misrepresentations, material facts will need to be confirmed by further investigation. And the party seeking leniency must remain credible as long as its evidence may be needed in an enforcement action or appeal. Embarrassments to be avoided include the belated discovery of other, previously undisclosed offences that could undermine the party's evidence or testimony in a contested proceeding.

Agencies typically demand complete and continuing co-operation from firms seeking leniency. Further investigation will be needed to track down all the participants and assemble the necessary formal proofs, and the informants will be particularly well placed to assist in that process. In addition, the agencies want to avoid the risk that the party will change its mind and repudiate its original confession. Canada's program notes some of the practical implications of full co-operation, in requiring that the firm pay its own expenses, maintain co-operation throughout the ensuing prosecution and other legal proceedings, no doubt including appeals, and promote continuing co-operation of its officers and employees for that entire period.

The informant's role and responsibility in the design and implementation of the activity reported is important. Agencies may refuse to grant leniency to firms that were the prime instigators or beneficiaries of the illegal conduct, or that coerced other firms to join it. The EC's requirement is that the party not be an "instigator" or have coerced someone else to participate. It is judgement and a matter of fact, aimed at disqualifying the most blatant violators. In Canada, the applicant must not have been the instigator or the leader of the illegal activity. In the US program, the applicant for amnesty must not have "coerced another party to participate in the illegal activity" and must not "clearly [have been] the leader in, or originator of, the activity". The sentences are in the singular, not the plural, referring to "the" leader and "the" originator of the activity, rather than "a" leader or "an" originator. The Division has interpreted this language to mean that, if the corporate conspirators are co-equals or two or more corporations are viewed as leaders or originators, then there is no single leader or originator so any of the cor-

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porate participants, including these co-equals or co-leaders, would be eligible for amnesty. The UK too takes this approach.

Good faith efforts to terminate and correct violations upon discovery are usually a condition of leniency. In the EC program, for maximum leniency a firm must have terminated its involvement by the time it comes to the Commission to "confess". The US program requires that a corporation have taken prompt and effective action to terminate its part in the illegal activity when it was discovered. The UK program requires that a party cease participating in the cartel from the time that it comes to the OFT. In Canada, the applicant must take effective steps to terminate the illegal activity. Korea notes, however, that requiring termination before a company applies for amnesty could delay prompt reporting, so it does not demand that a firm have ceased its violation before reporting it.

Determining what constitutes "discovery" and "termination" by a corporation can require making judgements about corporate formalities. The US has issued some guidance about this situation, which could be particularly significant for small or closely-held firms. Where the top executives, board members, or owners participated in the conspiracy, the corporation's "discovery" of the activity arguably occurred when those participants joined the conspiracy, so it could be difficult to say that the corporation promptly terminated its part in the activity. Nonetheless, the Antitrust Division will consider the corporation to have discovered the illegal activity at the earliest date on which either the board of directors or the corporation's counsel (either inside or outside) were first informed of the conduct at issue. Thus, the fact that top executives, board members, or owners participated in the conspiracy will not necessarily bar the corporation from eligibility for amnesty. The purpose of this interpretation is to ensure that as soon as the authoritative representatives of the company for legal matters – the board or counsel representing the corporation – are advised of the illegal activity, they take action to cease that activity. In the case of a closely held corporation in which the board of directors is never formally advised of the activity, because all members of the board are conspirators, the corporation still may qualify if the activity is terminated promptly after legal counsel is first informed.

Termination need not mean a public announcement, because that action could impair further investigation against other participants. The US has issued guidance about what constitutes termination. Termination does not require announcement of withdrawal in the illegal activity to other participants in the activity (although that would constitute one means of termination). Termination can also be effectuated by reporting the illegal activity to the Antitrust Division and refraining from further participation unless continued participation is with Antitrust Division approval. An earlier draft of the UK program would have permitted the OFT to allow the applicant to continue in order to gather evidence, but that provision was deleted. The concern had been that a party might come in to

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request amnesty the day before a cartel meeting, and the failure of the company to appear would be a signal, causing the other conspirators to shred their evidence. In the UK, where the sanctions are not criminal so the quantum of proof needed is lower, this concern about evidence preservation was not considered significant enough to justify taking a position that appeared to order parties to continue violating the law. In addition, controversies could arise about entrapment. The risk that termination could impair further investigation against other parties can still be dealt with, though, on a case-by-case basis.

Another measure of a party's good faith is its effort to remedy the damage it has inflicted on others. One condition of leniency in the US is that, where possible, the firm make restitution to injured parties. Restitution will be excused only where, as a practical matter, it is not possible. The restitution requirement might be excused if the applicant is in bankruptcy and is prohibited by court order from undertaking additional obligations, or if there was only one victim of the conspiracy and it is now defunct. And payment of full restitution may not be required if it would substantially jeopardise the organisation's continued viability. In the US program, the issue of restitution is addressed in paragraph 2(g) of the model letter, which requires the applicant to make "all reasonable efforts, to the satisfaction of the Antitrust Division", to pay restitution. This contemplates that, at some point before conditional amnesty becomes final, the Antitrust Division will make a determination that the applicant has satisfied any obligation to pay restitution and will so inform the applicant. Canada calls for restitution "where possible".

There may be other considerations of fairness, too. In Canada, immunity will not be granted to a firm that was the sole beneficiary of the activity in Canada. This requirement is evidently intended to ensure against the possibility that there would be no party against which Canada could take enforcement action concerning a cartel that had caused harm there. Although a party's intentions may not be determinative as long as it complies with a program's requirements, agencies may want to discourage manipulation and avoid being required to arbitrate disputes about "honour among thieves" – although of course amnesty programs work because they invite one of the "thieves" to cheat on the others. In some circumstances the US program will consider the fairness to other parties of granting leniency to a particular informant, "considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward". A firm that originated or led the conspiracy or that coerced others to join would face a heavier burden – indeed, would probably be disqualified for leniency – as would a firm that does not come forward until the Division is on the verge of having enough evidence to sustain a conviction.

Other elements that an agency might consider are whether a firm is a recidivist and whether the firm has a compliance program. Existence of a compliance program could be a mitigating factor, but only if it was followed; if management

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ignored its own compliance program, that could instead be an aggravating factor. The EC has encountered some recidivists, and recidivism is considered an aggravating factor in calculating fines. Other jurisdictions have not yet had to deal with a recidivist applying for amnesty. If certainty is considered very important to making the program effective, then if a recidivist qualified, amnesty would be granted, but grudgingly.

Elements of leniency

In general, leniency could mean any penalty or obligation that is less severe than one which would be sought in the absence of full, voluntary co-operation. Where cartels are subject to criminal sanctions, leniency often takes the basic form of a grant of immunity from prosecution. Under the US "leniency" program, the principal benefit that is offered is not to charge a firm or individual criminally for the activity being reported, that is, "amnesty". (The announcement describing the program uses the terms "leniency", "amnesty", and "immunity" without making precise distinctions among them). In Canada the greatest degree of leniency that would be offered is a grant of immunity from prosecution.

Reduction in penalties might also be considered leniency, although some programs treat amnesty (total immunity) and leniency as somewhat different. In Canada, if a firm does not qualify for immunity, the Commissioner might still recommend that the Attorney General treat it more leniently. In the US, in addition to the amnesty offered by the Antitrust Division's "leniency" program, general principles of criminal justice administration permit financial or other penalties to be adjusted depending on the extent of the party's co-operation in investigation. These guidelines for sentencing, for calculating fines and penalties (which apply in all kinds of cases, not just antitrust) provide that a company that comes forward early and provides substantial assistance can qualify for a reduction in otherwise applicable fines. In Korea, leniency means reduction in otherwise applicable sanctions, and not necessarily complete amnesty from any order or finding of wrongdoing. Korea has not set concrete criteria in advance to relate the degree of leniency to the degree of culpability and co-operation. Although Korea recognises that there may be value in certainty, it also notes that specific criteria may undermine flexibility and equity in fact-specific antitrust cases.

The extent of potential reduction in fines or penalties in the EC program is quantified, with degrees of leniency correlated to percentage reductions. The greatest degree of co-operation, by a company that comes in before the investigation begins, can lead to "non-imposition" of any fine at all, or at least to "very substantial" reduction, meaning a reduction of from 75 per cent or more from the otherwise applicable fine. A lesser degree of co-operation can lead to a "substantial" reduction, of from 50 to 75 per cent; this might be available to the party who

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provides the "smoking gun". And a "significant" reduction, of from 10 to 50 per cent, might still be granted to firms that provide critical information against themselves and do not contest their liability.

Narrowing the scope of sanctions may also amount to leniency. This is particularly significant where individuals may be subject to personal liability, and thus the incentive of granting immunity to individuals could be very great. The US believes that its program would not be as successful without the risk of individual criminal prosecution under US law. The risk is real: in the ADM case, three executives have been sentenced to prison terms of two years or longer, and in the vitamins case, a half dozen foreign executives have submitted to US criminal jurisdiction. There have been applications from foreign companies, whose executives might have evaded prosecution by staying out of the US. In Canada, there is a risk of individual liability, although there has been no tradition of actually imposing jail terms. The threat is still valuable, though. Some enforcers believe that the threat of enforcement action tying up executives for several years of litigation, or constraining their ability to travel, could be a significant incentive to co-operation. In the US program, once a corporation qualifies for leniency, its officers and employees may also receive similar treatment, if they, too, co-operate fully and assist in the investigation. Individuals who come forward with the corporation to seek leniency may qualify for individual immunity even if the corporation does not. In Canada, a firm may initiate an application on behalf of its employees, although it is not required to do so. If a corporation qualifies for immunity, though, then its present directors, officers and employees who admit their involvement as part of the corporate admission, and who provide complete and timely co-operation, will qualify for the same recommendation. Employees may approach the Bureau on their own behalf, and each offer of co-operation will be evaluated for the benefit of the requesting party. Individual liability is not provided for under the EC system but individual consequences could be important, such as disqualification for serving in managerial positions. In the UK, there is a program of qualifying directors, althhough participation in a cartel is not, as yet, a disqualification.

But reduction in exposure to civil damages or other relief is not typically part of leniency. Agencies usually lack the power to grant this relief, at least directly.[3] The EC program specifically rejects the possibility that co-operation could protect a firm from the civil law consequences of its conduct. If the Commission takes enforcement action, its decision will identify a firm benefiting from leniency as a violator and will describe in full the part it played. The firm's co-operation with the Commission will also be described, to explain why the fine was reduced. The Commission is required to disclose details and explain the motivation for lenient treatment. So, a follow-up civil case could use that decision as evidence of wrongdoing. In the US program, firms and individuals who qualify for immunity from criminal liability could still face civil suit. The prospect, indeed the certainty, of a

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treble damage suit is probably the greatest disincentive to apply for amnesty in the US. The requirement to make restitution means paying single damages, and it does not eliminate the threat of civil suit. Civil suits are the usual means for satisfying the restitution requirement. Amnesty applicants often contact potential private plaintiffs just as they contact the enforcement agencies, seeking to work out restitution or settlements, offering co-operation in exchange for cheaper terms. In the UK, parties may face the risk of damages actions at the end of the enforcement process. (There have been no awards to date, but there have been settlements). This highlights the need for significant penalties in the law. If the civil liability looks bigger than the fine, then the net incentive might be not to co-operate. As fines, which are based on the duration of the violation, increase over time since March 2000 when the UK's new law became effective, the balance may shift.

An interesting feature of the US and UK programs is a provision for further reductions in penalties to a firm that reveals an additional second cartel, in a different market, after already co-operating in an investigation. That is, in addition to the amnesty that might be given for bringing this second cartel to light, the firm could benefit from additional reductions in the penalties otherwise applicable with respect to the first one. The EC too would offer a bonus for learning of a second infringement. In the US, this offer of "amnesty plus" has proven to be a fruitful source of tips and leads about other violations. The typical "amnesty plus" situation involves a company that does not qualify for amnesty in the first cartel but is seeking a reduction in fine. (But if an applicant is not candid about its participation in the second cartel, which the Division finds out about separately, that failure could disqualify it from leniency for the first one). Of the 30 ongoing international cartel investigations in the US, about half came to light through co-operation in other investigations.

Practical considerations

Because the enforcement agency may not know about the violation at issue, the process of granting leniency usually begins with an outside approach to the agency, perhaps by telephone, to discuss the possibility of immunity. The usual process is set out clearly in Canada's announcement. Initial, very general contacts may lead to a meeting among counsel for the firm or individual and the agency. Negotiations may be delicate. The agency needs to know how good the information really is, and so it will probe for more detail. The firm or individual, though, is concerned about being protected against the use of the information against it if immunity is not ultimately granted, and thus it may resist being too specific, too soon. Meetings may thus be held on a "without prejudice" basis, after agreement among counsel about the ground rules. The immunity request may appear as a hypothetical proffer of the information that could be provided if the agency recommended or granted leniency.

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The proffer will be assessed in terms of how it meets such conditions as timeliness, completeness, and good faith. If some but not all conditions are met, the agency and counsel may negotiate further, perhaps about the possible terms of leniency short of complete immunity. The agency will want to confirm the content and reliability of the proffer, both by interviewing individual witnesses and examining documentary evidence from the party seeking leniency and by investigating through other sources.

The agency may encounter several firms or individuals trying to come in at about the same time, each trying to be the one that confesses first. The US reports that firms have come in to apply for amnesty, too late, less than a day after their co-conspirator secured its position as first in line. Recognising this phenomenon, firms are advised not to dawdle. Agencies may need to assure firms that the time order will be respected strictly, and that *bona fide* requests for leniency will not be held up while the agency negotiates with or awaits a better offer from someone else.

Certainty and clarity are considered important in many jurisdictions. Firms may be more likely to come forward if the conditions and likely outcomes are certain. This has been the experience of the US program, which makes an unconditional promise of complete amnesty to those that meet the specified conditions–principally, being the first one in. Of course, the process is designed to make sure that parties keep their side of the bargain, for the amnesty does not become fully effective until the investigation is over and the possibility of prosecution is past. Although the US tries to make the process certain at the beginning, that does not mean that the Antitrust Division does not retain leverage. The letter a party gets at the outset grants conditional amnesty, subject to specified conditions including continued co-operation. In Canada, in consulting about the first draft of the proposed revisions, it became clear that the business community wanted certainty and transparency, which were necessary to provide enough incentive for a member to blow the whistle. The UK too follows the US approach, emphasising certainty and issuing a letter granting conditional amnesty. In the EC, there is no formal mechanism by which a company can get an idea early on about the likely outcome if it continues to co-operate with the Competition Directorate's investigation. It would be difficult to implement such a mechanism, because the final decision depends on the full Commission. It is hoped that as there are more cases, common practices will appear and lead to acceptably stable expectations. But the Competition Directorate cannot offer much of a commitment at the outset.

Considerations of speed and completeness may sometimes conflict. Companies may apply for amnesty before completing their own internal investigations, in order to ensure their place at the front of the line. Further investigation may uncover anti-competitive activity that is more extensive than the conduct originally reported, which falls outside of the non-prosecution protection of the (conditional) grant of amnesty. In the US program, if the company is providing full,

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continuing, and complete co-operation, and the company can meet the criteria for amnesty on the newly discovered conduct, the amnesty coverage will be expanded to include such conduct, by issuing an addendum to the original amnesty letter.

Leniency decisions are typically finally implemented at the end of the enforcement process. Any agreement between the agency and the firm or individual is likely to be conditioned on continued co-operation through the investigation. Of course, the agency cannot be arbitrary. Announced leniency programs and proceedings pursuant to them lead firms to take actions based on legitimate expectations about benefits to be obtained. But agencies reserve the power to keep firms and individuals to their side of the bargain, too. For example, in the EC program, if a firm does not contest the facts at the Commission and hence benefits from a reduction in a fine, but then objects before the Court of First Instance, the Commission will ask the Court to increase the fine. In Canada, parties may contact the Bureau to obtain a provisional guarantee of immunity. After receiving the provisional guarantee, the party makes its disclosure and enters a final agreement, which can be revoked later if it is determined that the party did not fulfil its obligations.

Leniency to a corporation depends on corporate action. In the US program, a firm's admission of its participation in a cartel must be a corporate act, not merely the isolated confessions of individual officials. The EC too makes it clear that the approach to the Commission must come from the corporation as an official act, not just from an individual. The value of the corporation's act can be undermined if critical individuals do not also co-operate. If individual corporate executives represented by independent counsel refuse to co-operate, the corporation's claim for amnesty might be in jeopardy because the confession is no longer a corporate act or the corporation is not providing full and complete co-operation. In the US program, in order for the confession of wrongdoing to be a corporate act and in order for the co-operation to be considered "full, continuing and complete", the corporation must, in the Antitrust Division's judgement, be taking all legal, reasonable steps to co-operate with the Antitrust Division's investigation. If the corporation is unable to secure the co-operation of one or more individuals, that will not necessarily prevent granting the amnesty application. But the number and significance of the individuals who fail to co-operate, and the steps taken by the company to secure their co-operation, are relevant in determining whether the corporation's co-operation is truly "full, continuing and complete".

The situations and incentives of individuals may differ significantly from those of the corporations for whom they work. Where the individuals may also be liable or responsible for the violations, their interests and those of the corporation may conflict. In the US program, leniency for individuals may follow from, but does not depend on, leniency for the corporation. Canada's program is even more explicit in recognising the need to treat individuals separately from the corporations for which they work, emphasising that an offer of co-operation may be made

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by anyone who has been implicated in a possible violation and that employees are free to approach the agency on their own behalf. Individuals would be well advised to retain independent counsel, rather than rely on the corporation to represent their interests. In the EC, there is no individual liability, so there is less incentive for individuals to come forward against the judgement of their firms. Despite the lack of individual liability, firms still have an incentive to come forward because high company fines are possible and are being levied.

Firms or individuals informing on their fellow conspirators can run serious risk of commercial or even personal retaliation. They may also be exposed to liability in several jurisdictions. To encourage co-operation in the face of these risks, programs typically assure parties that their information will be granted strong protections against unauthorised disclosure. In the US program, the identity of the informant and the information provided are kept confidential and cannot be disclosed to other enforcement agencies, including foreign agencies that have co-operation agreements with the US, without the informant's consent. In Canada, the Bureau generally treats as confidential the identity of the party requesting immunity and any information obtained from that party. Of course, agencies may find ways to communicate with each other about the existence of situations calling for enforcement attention, without divulging the details of these confidential sources. Information obtained from other sources in a continuing investigation, such as other members of the cartel, would not be covered by a promise of confidentiality about the information supplied by the applicant for leniency. And the fact that a firm has informed on its competitors in exchange for lenient treatment may become public knowledge in other ways. That the firm is not named or fined along with the rest of the industry when enforcement action is taken would be revealing. Securities laws may require some kind of public disclosure related to the potential for civil liability. The firms themselves sometimes make public announcements about their co-operation. The fact that a firm has co-operated with the EC will eventually be revealed if the Commission takes enforcement action, as the Commission is required to explain its decision, including the reasons why the fine of some violator was reduced.

It is important for the agency to publicise the availability of leniency, to encourage nervous conspirators to inform on their cohorts. Long before the UK's revised competition law was set to become effective, the OFT began publicising its intention to offer immunity from the new, harsher penalties to firms that came in first to provide evidence against themselves and their co-conspirators. After a program is underway, publicity may take advantage of early successes, to demonstrate the real benefits of coming in, and the real risks of failing to be the first to do so. Until those successes are in hand, vivid examples of other jurisdictions may be compelling.

Implementing a leniency agreement may depend on action by another body, such as a court or a prosecutor. The competition agency's decision may not be the

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last word. If sanctions must take the form of a court order, a judge may have to agree to impose reduced fines or other penalties. In Canada, decisions to prosecute, and hence decisions to grant immunity, are ultimately up to the Attorney General. Thus, the Bureau's own program is implemented by recommendations to the Attorney General, and the Department of Justice has its own published program about immunity. In developing and implementing a leniency program, co-ordinating policies and procedures with such other decision-makers will be important.

Potential problems or issues

The seriousness of the possible penalties, and thus the significance of relief that leniency can promise, is an important factor. If penalties are too weak or are applied too infrequently, then firms may disregard an offer to relax them. Firms or individuals with little concern about the risk of liability will have little incentive to annoy their co-conspirators by defecting from the cartel and informing on them. The firm may calculate that the benefits it receives from continuing to violate the law, discounted by the expected costs of getting caught, outweigh the benefits of avoiding that penalty – and it must consider not only the loss of its profits from the cartel, but also additional costs incurred as the others retaliate against its defection. It is difficult to generalise, however. Incentives to remain in the cartel or to defect will depend on the actual level of penalties and the perceived risk that they will actually be imposed, among other things. Differences within the cartel could be important. It may be an equilibrium strategy for all firms to remain in the cartel, if they are all in about the same position. But if their situations are not symmetrical, one firm may have an incentive to defect, and if the effects of that defection would be severe enough, others might then be persuaded to try to defect, too. Asymmetry within the cartel might lead to defection even if penalties are slight. A firm that is doing less well than its co-conspirators, and thus has less to lose from its collapse, might have an incentive to defect and end the cartel, even if the only sanction is a cease and desist order against all the members, including the defector. It may believe it could be more profitable in a competitive environment, or it may just want revenge against the others for cheating it out of its "fair share" of the cartel's profits. But if penalties are so low that parties do not care whether any enforcement action is taken at all, regardless of the source – that is, they would not change behaviour or defect even if detection and enforcement were a certainty – then that weakness must be addressed before a leniency program will be effective.

The risk of personal liability could be a powerful motivator. The opportunity to avoid individual liability or criminal penalty may be a significant factor in encouraging early co-operation. An executive may feel compelled to come forward, to avoid personal exposure, when the corporation has not yet made that

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decision or indeed has decided against it. (The prospect of personal liability may also secure the co-operation of former employees, particularly if they are now working for a competitor). Thus, some agencies have been concerned that leniency programs will not be effective in systems that do not impose personal liability. But the threat of penalties or sanctions against individuals may not be a prerequisite to a leniency program. The promise of reduced fines puts the issue in a form that firms should be able to respond to. Corporate managers presumably can make the necessary calculations, to determine whether the firm gains financially more by defecting early than by holding out while hoping that others do too. They may pay even more careful attention to the trade-off, to the extent corporate governance structures enable directors or stakeholders to discipline managers for poor decisions. Here too, though, effectiveness will depend on penalties being large enough to materially affect corporate financial performance.

An objection to leniency, similar to an objection sometimes raised against "plea bargaining", is that law enforcement agencies that take less than vigorous action against violations are improperly shirking their duties. In such a conception of jurisprudence, the enforcer has no discretion to moderate the law's application. But few if any agencies could function effectively subject to such expectations. Some prioritising and balancing of costs and benefits in the enforcement process is inevitable. The European Commission addresses this objection directly, finding that "the interests of consumers and citizens in ensuring that [cartel] practices are detected and prohibited outweigh the interest in fining those enterprises which co-operate with the Commission, thereby enabling or helping it to detect and prohibit a cartel". A similar statement appears in the UK program. It is likely that overall enforcement effectiveness and compliance will improve, as leniency for a few participants makes it possible to apply the law more thoroughly to others.

There could be concern about the injustice of permitting a violator to avoid the consequences of its action by confessing and shifting the burden to others. But for violations like cartels, where there will be several parties, considerations of enforcement effectiveness may outweigh that concern. That is, even though one party "gets off", there will be others to prosecute, and their prosecutions will be more certain and successful as a result of the evidence obtained through the amnesty offer. That depends on their being other parties to prosecute; in Canada, amnesty is not granted if the applicant is the only member of the conspiracy that has benefited from it in Canada.

Some jurisdictions have little discretion in setting the level of financial sanctions. A "surcharge" may be set by law or rule as a fixed percentage of sales, profits, or impact. Collecting such a charge may be conceived as an administrative function rather than as law enforcement, and thus it can avoid delays and uncertainties that may result from going through the courts. The lack of flexibility in setting the amount could be a handicap to offering leniency, if reducing or eliminating financial expo-

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sure could not be part of the offer. But enforcers may have some discretion about whether to exact surcharges at all, even if they have little discretion in calculating them. In addition, if other enforcement tools are available, such as criminal sanctions, part of leniency could be a commitment not to refer a matter for criminal prosecution against the parties that come in first. Whether that offer would encourage sufficient co-operation would depend on the credibility of the criminal or other enforcement threat.

Because the immediate effect of leniency is to reduce penalties to at least some participants, it has been argued that programs might actually encourage collusion, because they decrease the expected cost of misbehaviour (Motta, 1999). But expected costs may be decreased only for the first firm in the door. For others, facing increased likelihood of detection and convincing proof of their participation, the expected costs of collusion may increase substantially after a leniency program is in place. At least, it is not clear that the net effect would be to make firms more, rather than less, willing to collude. A firm could not be too confident that it will be the first one in the door. Certainly, if it calculated that move too closely, it could trip itself, because good faith would be an element in the leniency decision.

International co-operation and co-ordination among jurisdictions

As actions against international cartels increase, it will become necessary to deal with concerns about international co-ordination and the appropriate means for taking into account the important interests of other jurisdictions in establishing and implementing a program. Formal enforcement co-operation agreements could affect the extent and nature of co-ordination among different jurisdictions' leniency treatment of participants in a cartel, at least to the extent of information sharing where that is authorised. Similarly, some degree of co-ordination is likely in the context of overlapping jurisdictional competence, such as between the EC and its member states or in some federal countries. The prospect of co-ordination between jurisdictions should not be over-emphasised, though, for too great a risk that information would be conveyed to other jurisdictions might decrease firms' incentives to come in to seek leniency.[4] But increasing co-operation means that agencies may learn about cartel problems from each other, rather than from confessions or complaints. Firms trying to come in first to tell the agency something it did not already know could be disappointed to find that the agency had already learned about it from another source.

Commitments to confidentiality in leniency programs should not hamper co-operation, on balance. Even though agencies undertake not to disclose applications to other enforcement bodies, as a practical matter other agencies are finding out about them quickly anyway. Agencies may share information learned from

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other aspects of an investigation that follows the leniency application, for example. The US promises applicants that it will not divulge their application to other agencies, but it does call the applicants' attention to their self-interest in approaching those other agencies themselves, and quickly, before some other evidence comes in that the agency can share with impunity. The UK program does not require parties to authorise sharing information with other jurisdictions, but they may do so, and the OFT brings up the issue with the companies. Some parties have reportedly tried to make enforcement co-operation arrangements some kind of escape from liability, or to demand commitments about what an agency will communicate to other agencies. But firms are evidently concluding that they cannot "game" the systems, trying to feed different information to different enforcers. Programs require the applicants to make complete, good faith disclosures. Discovery through other channels that a party has not been dealing honestly with an agency would lead to revocation of the leniency offered. And a party's refusal to authorise an agency to check with others to confirm the party's good faith, after the party had applied for leniency there, might be considered suspicious. Firms appear to be moving toward accepting that sharing information with all authorities will become inevitable.

Agencies may make it clear that they will act independently, so that a firm will not jump to the top of the queue just because it has already qualified for leniency by coming in early elsewhere. This independent approach would preserve options, and it should have the effect of causing firms to confess early and often. Making it clear that treatment elsewhere is not relevant would deter a strategy of "confessing" in a jurisdiction where no penalty was likely anyway, then claiming that treatment as a binding or instructive precedent in jurisdictions where the risk was greater, but without having actually applied for leniency there–or even without terminating participation in the cartel there. If jurisdictions refuse to link their treatment to what others are doing, firms are likely to come in as quickly as possible to each jurisdiction where they face significant exposure, once they have decided to act. Although duplication of the process, by agencies as well as firms, may imply some inefficiency, that cost would probably be outweighed by the enforcement advantage of encouraging firms to engage in a "race to the courthouse". Already, the incentive for rapid action is obvious. Companies are now coming forward simultaneously in all the major jurisdictions with leniency programs.

The leniency process is useful as a tool for getting information. Leniency-induced confessions produce information that an agency could not get otherwise, at least not without great cost. And the process may have other advantages, beyond simply eliciting confessions. The US program requires that the applicant make available documents and other evidence, wherever located. In effect, the amnesty applicant enters an agreement that overcomes some of the technical difficulties of obtaining evidence outside the US.

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Notes

1. Notice No. 68/2000, 17 April 2000; *www.bundeskartellamt.de*/19.04.2000_*englisch.html*, visited 16 May 2000.
2. Even if no investigation is underway, an amnesty applicant who offers a tip or lead that is not decisive enough may be rejected. And as investigation proceeds, firms may uncover more information and thus they may be able to make a more complete proffer at a later stage. By that time, the Commission may have learned more, too, so the criterion of "decisiveness" will likely have been raised.
3. In the US, resolving a criminal case with a plea of "no contest" could establish liability and support the imposition of criminal penalties, but it does not amount to an admission or otherwise support a *prima facie* case in a private lawsuit for damages or an injunction. Of course, if leniency takes the form of immunity from prosecution, there will not even be a "no contest" admission. For many years, the Antitrust Division has refused to accept pleas of "no contest" to resolve criminal antitrust cases.
4. It might also impair the use of leniency offers to obtain information by lending support to a party's refusal to co-operate. A recent US case left open the question whether a party might refuse to supply information, despite a grant of immunity, where the US and other countries have substantially similar laws, aimed at offences of an international character, and the US was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries. U*nited* S*tates v.* B*alsys*, 524 US 777 (1998) (*dictum*).

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Annex A

US Program

US ANTITRUST DIVISION CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source.
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity.
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation.
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
5. Where possible, the corporation makes restitution to injured parties.
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Alternative Requirements for Leniency

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported.
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction.

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3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity.
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation.
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
6. Where possible, the corporation makes restitution to injured parties.
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. Leniency for Corporate Directors, Officers, and Employees

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. Leniency Procedure

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1993.

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US ANTITRUST DIVISION LENIENCY POLICY FOR INDIVIDUALS

On August 10, 1993, the Division announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also sets out the conditions under which the directors, officers and employees who come forward with the company, confess, and cooperate will be considered for individual leniency. The Division today announces a new Leniency Policy for Individuals that is effective immediately and applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware. Under this Policy, "leniency" means not charging such an individual criminally for the activity being reported.

A. Requirements for Leniency for Individuals

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source.

2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation.

3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Applicability of the Policy

Any individual who does not qualify for leniency under Part A of this Policy will be considered for statutory or informal immunity from criminal prosecution. Such immunity decisions will be made by the Division on a case-by-case basis in the exercise of its prosecutorial discretion.

If a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any directors, officers or employees who come forward and confess with the corporation will be considered for leniency solely under the provisions of the Corporate Leniency Policy.

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C. Leniency Procedure

If the staff that receives the request for leniency believes the individual qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Deputy Assistant Attorney General for Litigation, setting forth the reasons why leniency should be granted. The staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Deputy Assistant Attorney General for Litigation will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, the individual and his or her counsel may wish to seek an appointment with the Deputy Assistant Attorney General for Litigation to make their views known. Individuals and their counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1994.

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MODEL AMNESTY LETTER, CORPORATIONS

US Department of Justice
Antitrust Division
Office of the Deputy Assistant Attorney General
Washington, D.C. 20530

[insert]

Dear [insert]:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and ABC, Inc., in connection with possible [insert description of conduct: *e.g.*, price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the [insert generic description of industry: *e.g.*, widget] industry [insert geographic scope – *e.g.*, worldwide, in the United States]. This agreement is conditional and depends upon ABC, Inc., satisfying the conditions set forth below. After all of these conditions are met, the Division will notify ABC, Inc. in writing that the application has been granted. It is further agreed that disclosures made by counsel for ABC, Inc. in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.

AGREEMENT

1. Representations: ABC desires to report to the Antitrust Division possible [*e.g.*, price fixing] activity or other conduct violative of the Sherman Act in the [insert] industry [*e.g.*, worldwide]. ABC represents to the Antitrust Division that, in connection with the anticompetitive activity being reported, it:

a) took prompt and effective action to terminate its part in the activity upon discovery of the activity; and

b) did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the activity.

2. Cooperation: ABC agrees to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

a) providing a full exposition of all facts known to ABC relating to the reported activity;

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b) providing promptly, and without requirement of subpoena, all documents or other items in its possession, custody or control, wherever located, requested by the Antitrust Division, to the extent not already produced;

c) using its best efforts to secure the complete, candid and truthful cooperation of its current [and former] directors, officers and employees, and encouraging such persons voluntarily to provide the Antitrust Division with any information relevant to possible [*e.g.*, price-fixing] agreements or other conduct violative of 15 U.S.C. § 1 in the [insert] industry [*e.g.*, worldwide];

d) facilitating the ability of current [and former] directors, officers and employees to appear for such interviews or testimony as the Antitrust Division may require at the times and places designated by the Antitrust Division;

e) using its best efforts to ensure that current [and former] directors, officers and employees who provide information to the Antitrust Division respond completely, candidly and truthfully to all questions asked in interviews, and grand jury appearances and at trial;

f) using its best efforts to ensure that current [and former] directors, officers and employees who provide information to the Antitrust Division make no attempt either falsely to protect or falsely to implicate any person or entity; and

g) making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of any [*e.g.*, price-fixing] agreements or other conduct violative of 15 U.S.C. § 1 in the [insert] industry [*e.g.*, worldwide], in which ABC was a participant.

3. Corporate Leniency: Subject to verification of ABC's representations in paragraph 1 above, and subject to its full, continuing and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept ABC into [Part A/Part B] of the Corporate Leniency Program, as explained in an Antitrust Division policy statement dated August 10, 1993 (attached). Pursuant to that policy, the Antitrust Division agrees not to bring any criminal prosecution against ABC for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported in the [insert] industry [*e.g.*, worldwide]. The commitments in this paragraph are binding only upon the Antitrust Division, although, upon request of ABC, the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. If the Antitrust Division at any time determines that ABC has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of ABC into the Corporate Leniency Program. Should the Antitrust Division revoke the conditional acceptance of ABC into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against ABC, without limitation. Should such a prosecution be initiated, any documentary or other information provided by ABC, as well as any statements or other information provided by any current [or former] director, officer or employee of ABC to the Antitrust Division pursuant to this Agreement, may be used against ABC in any such prosecution.

4. Non-Prosecution Protection For Corporate Directors, Officers And Employees: Subject to ABC's full, continuing and complete cooperation, the Antitrust Division agrees that current [and former] directors, officers and employees of ABC who admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive activity being reported, shall not be prosecuted criminally by the Antitrust Division for any act or offense committed [during their period of employment at ABC] prior to the date of this letter in connection with the anticompetitive activity being

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reported in the [insert] industry [*e.g.*, worldwide]. Such full and truthful cooperation shall include, but not be limited to:

a) making his relevant personal documents and records available in the United States to attorneys and agents of the United States;

b) making himself available in the United States to attorneys and agents of the United States for interviews;

c) responding fully and truthfully to all inquiries of the United States in connection with [describe offense being reported], without falsely implicating any person or intentionally withholding any information;

d) otherwise giving the United States access to knowledge or information he may have relevant to [describe offense being reported]; and

e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621) and making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), in connection with [describe offense being reported].

The commitments in this paragraph are binding only upon the Antitrust Division, although, upon the request of ABC, the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. In the event a current [or former] director, officer or employee of ABC fails to comply fully with his/her obligations hereunder, this Agreement as it pertains to such individual shall be void, and any leniency, immunity or non-prosecution granted to such individual under this Agreement may be revoked by the Antitrust Division. Should any leniency, immunity or non-prosecution granted be revoked, the Antitrust Division may thereafter prosecute such person criminally, and any statements or other information provided by such person to the Antitrust Division pursuant to this Agreement may be used against him/her in such prosecution.

5. Entire Agreement: This letter constitutes the entire agreement between the Antitrust Division and ABC, and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein.

6. Authority And Capacity: The Antitrust Division and ABC represent and warrant each to the other that the signatories to this Agreement on behalf of each party hereto have all the authority and capacity necessary to execute this Agreement and to bind the respective parties hereto.

The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely yours,

Date: _____

Gary R. Spratling
Deputy Assistant Attorney General
Antitrust Division

_____

Date: _____

[Name]
ABC, Inc.

_____

Date: _____

[Counsel for ABC, Inc.]

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MODEL AMNESTY LETTER, INDIVIDUALS

US Department of Justice
Antitrust Division
Office of the Deputy Assistant Attorney General
Washington, D.C. 20530

[insert]

Dear [insert]:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and [you/your client], [Name] ("Applicant"), in connection with possible [insert description of conduct: *e.g.*, price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the [insert generic description of industry: *e.g.*, widget] industry [insert geographic scope–*e.g.*, worldwide, in the United States]. This agreement is conditional and depends upon Applicant satisfying the conditions set forth below. After all of these conditions are met, the Division will notify Applicant in writing that the application has been granted. [It is further agreed that disclosures made by counsel for Applicant in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.]

AGREEMENT

1. Representations: Applicant desires to report to the Antitrust Division possible [*e.g.*, price fixing] activity or other conduct violative of the Sherman Act in the [insert] industry [*e.g.*, worldwide]. Applicant represents to the Antitrust Division that, in connection with the anticompetitive activity being reported, he did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the activity.

2. Cooperation: Applicant agrees to provide full, continuing, and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

a) making his relevant personal documents and records available [in the United States] to attorneys and agents of the United States;

b) making himself available [in the United States] to attorneys and agents of the United States for interviews at the request of the United States;

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c) responding fully and truthfully to all inquiries of the United States in connection with [describe offense being reported], without falsely implicating any person or intentionally withholding any information;

d) otherwise giving the United States access to knowledge or information he may have relevant to [describe offense being reported]; and

e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings [in the United States], fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621) and making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), in connection with [describe offense being reported].

3. Individual Leniency: Subject to verification of Applicant's representations in paragraph 1 above, and subject to Applicant's full, continuing, and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept Applicant into the Individual Leniency Program, as explained in an Antitrust Division policy statement dated August 10, 1994 (attached). Pursuant to that policy, the Antitrust Division agrees not to bring any criminal prosecution against Applicant for any act or offense he may have committed prior to the date of this letter in connection with the anticompetitive activity being reported in the [insert] industry [*e.g.*, worldwide]. If the Antitrust Division at any time determines that Applicant has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of Applicant into the Individual Leniency Program. Should the Antitrust Division revoke the conditional acceptance of Applicant into the Individual Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against Applicant, without limitation. Should such a prosecution be initiated, any documentary information, statements, or other information provided by Applicant to the Antitrust Division pursuant to this Agreement may be used against Applicant in any such prosecution.

4. Entire Agreement: This letter constitutes the entire agreement between the Antitrust Division and Applicant, and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein. The commitments in this letter are binding only upon the Antitrust Division.

The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely,

Date: _____

Gary R. Spratling
Deputy Assistant Attorney General
Antitrust Division

_____

[Applicant Name]

Date: _____

_____

[Counsel for Applicant]

Date: _____

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Annex B

UK Program

OFFICE OF FAIR TRADING, GUIDANCE ON THE APPROPRIATE AMOUNT OF A PENALTY

EXTRACT

Part II: Lenient treatment for undertakings coming forward with information

Immunity from or reduction in financial penalty for undertakings coming forward with information in cartel cases

Undertakings participating in cartel activities[1] might wish to terminate their involvement and inform the Director of the existence of the cartel, but be deterred from doing so by the risk of incurring large financial penalties. To encourage such undertakings to come forward the Director will offer total immunity from financial penalties for an infringement of the Chapter I prohibition to a member of a cartel who is the first to come forward and who satisfies the requirements set out in paragraph 9.3.2. Alternatively, the Director may offer total immunity from financial penalties to a member of a cartel who is the first to come forward and who satisfies the requirements set out in paragraph 9.3.4. An undertaking which is not the first to come forward, or does not satisfy these requirements may benefit from a reduction in the amount of the penalty imposed if it satisfies the requirements set out in paragraph 9.4.1 below.

The Director considers that it is in the interest of the economy of the United Kingdom to grant favourable treatment to undertakings which inform him of cartels and which then cooperate with him in the circumstances set out below. It is the secret nature of cartels which justifies such a policy. The interests of customers and consumers in ensuring that such practices are detected and prohibited outweigh the policy objectives of imposing financial penalties on those undertakings which are members of the cartel and which cooperate with the Director.

Total immunity from financial penalties in cartel cases

Where an undertaking participating in a cartel is the **first to come forward** to provide evidence of the existence and activities of the cartel, and it fulfills all the requirements in paragraph 9.3.2, it will benefit from **total immunity** from financial penalties in respect of that infringement; if it is the first to come forward to provide such evidence and it fulfills all the requirements of paragraph 9.3.4 below, it may benefit from **total immunity** from financial penalties in respect of that infringement.

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Total immunity for the first to come forward *before* an investigation has commenced: In order to benefit from total immunity under this paragraph, the undertaking must be the **first** to provide the Director with evidence of the existence and activities of a cartel **before** he has commenced an investigation[2] of the undertakings involved; provided that the Director does not already have sufficient information to establish the existence of the alleged cartel, and the following conditions are satisfied:

the undertaking must:

- provide the Director with all the information, documents and evidence available to it regarding the existence and activities of the cartel;
- maintain continuous and complete cooperation throughout the investigation;
- not have compelled another undertaking to take part in the cartel and not have acted as the instigator or played the leading role in the cartel; and
- refrain from further participation in the cartel from the time it discloses the cartel.

If an undertaking does **not** fulfill all the requirements in paragraph 9.3.2 above, it may still benefit from total immunity from financial penalties if it fulfills all the requirements in paragraph 9.3.4 below.

Total immunity for the first to come forward *after* an investigation[3] has commenced: In order to benefit from the possibility of total immunity under this paragraph:

- the undertaking seeking immunity under this paragraph must be the **first**[4] to provide the Director with evidence of the existence and activities of a cartel **before** the Director has given written notice of his proposal to make a decision that the Chapter I prohibition has been infringed,[5] and
- conditions *a*) to *d*) in paragraph 9.3.2 above must be satisfied.

the grant of immunity by the Director in these circumstances is, however, **discretionary**. In order for the Director to exercise his discretion to grant immunity to the undertaking he must be satisfied that the undertaking should benefit from immunity, taking into account the stage at which the undertaking comes forward and whether or not at that stage the Director has sufficient evidence to make a decision that the Chapter I prohibition has been infringed.

Reduction in the level of financial penalties in cartel cases

Undertakings which provide evidence of the existence and activities of a cartel **before written notice of a proposed infringement decision is given**, but are not the first to come forward, or do not meet all the requirements under paragraphs 9.3.2 or 9.3.4 above, will be granted a **reduction** in the amount of a financial penalty which would otherwise be imposed of up to 50%, if the following conditions are met:

the undertakings must:

- provide the Director with all the information, documents and evidence available to them regarding the existence and activities of the cartel;
- maintain continuous and complete cooperation throughout the investigation; and
- refrain from further participation in the cartel from the time they disclose the cartel.

Procedure for requesting immunity or a reduction in the level of penalties

An undertaking which wishes to take advantage of the favourable treatment set out in this Part must contact the office of the Director of Cartel Investigations at the Office of Fair

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Trading, or his equivalent at the appropriate regulator. This step has to be taken by a person who has the power to represent the undertaking for that purpose.

Additional reduction in financial penalties

An undertaking cooperating with an investigation by the Director under the Act in relation to cartel activities in one market (the "first market") may also be involved in a separate cartel in another market (the "second market") which also infringes the Chapter I prohibition.

If the undertaking obtains total immunity from financial penalties under either paragraph 9.3.2 or 9.3.4 in relation to its activities in the second market, it will also receive a reduction in the financial penalties imposed on it which is additional to the reduction which it would have received for its cooperation in the first market alone.

Confidentiality

An undertaking coming forward with evidence of a cartel may be concerned about the disclosure of its identity as an undertaking which has volunteered information. The Director will therefore endeavour, where possible, to keep the identity of such undertakings confidential throughout the course of the investigation.

Notes

1. See meaning of cartel activities as set out in footnote 5 [omitted] above.
2. By the exercise of powers under sections 26-28 of the Act.
3. See footnote [2] above.
4. *i.e.* there must not be any undertaking which is benefitting from total immunity under paragraph 9.3.2 in relation to the same cartel.
5. Under Rule 14 in the Competition Act 1998 (Director's rules) Order 2000 SI 2000 No. 293.

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DRAFT LETTER FOR FULL LENIENCY

Dear [ ]

Competition Act 1998 ("the Act"): [ ] Industry

1. This letter is between [ ] and the Director General of Fair Trading ("DGFT")

2. This letter sets out the basis on which DGFT will grant [ ] immunity from any financial penalties which could be imposed under section 36 of the Act in accordance with paragraph [3.4] [3.6] of the Guidance on the Appropriate Amount of a Penalty issued under section 38 of the Act ("the DGFT's Guidance") a copy of which is attached to this letter. This immunity will be granted in connection with any cartel activities in the [ ] industry in the United Kingdom, in respect of which [ ] has currently come forward to seek immunity and which may infringe the prohibition contained in section 2 of the Act ("the reported possible infringement").

3. For clarification, it is agreed that the term "cartel activities", as used in the DGFT's Guidance can include vertical as well as horizontal agreements or concerted practices and that agreements, decisions by associations or concerted practices which "involve" price fixing include those which, directly or indirectly, in isolation or in combination with other factors under the control of the parties have the object or effect of restricting the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that these do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

4. This grant of leniency is made and remains conditional on [ ] satisfying each of the conditions set out below. Once these conditions have been satisfied, and the investigation has been completed, the DGFT will inform [ ] in writing of this fact.

Conditions

a) [ ] will provide the DGFT with all the information, documents and evidence currently available to it regarding the existence and activities of the cartel to which the reported possible infringement relates.

b) [ ] will maintain continuous and complete cooperation throughout the investigation. This will include but is not limited to:

i) providing the DGFT with all the facts known to [ ] and all the information, documents and evidence available to it relating to the reported possible infringement in addition to any such information already provided;

ii) providing promptly, and without the DGFT using his powers under any of sections 26 to 28 of the Act, all the information, documents, evidence or other items in its

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possession, custody or control, wherever located within the United Kingdom, requested by the DGFT, to the extent that they have not already been produced;

iii) using its best efforts to secure the complete and truthful cooperation of its current and former directors, officers and employees and encouraging such persons voluntarily to provide the DGFT with any information relevant to the reported possible infringement of section 2 of the Act in [ ] industry in the United Kingdom;

iv) facilitating the ability of current and former directors, officers and employees to appear for such interviews as the DGFT may reasonably require at the times and places reasonably designated by the DGFT;

v) using its best efforts to ensure that current and former directors, officers and employees who provide information to the DGFT respond completely and truthfully to all questions asked in interviews;

vi) using its best efforts to ensure that current and former directors, officers and employees who provide information to the DGFT make no attempt either falsely to protect or falsely to implicate any undertaking in any infringement of the Act.

c) [ ] confirms that it has not compelled another undertaking to take part in the cartel to which the reported possible infringement relates and has not acted as the instigator or played the leading role in that cartel; and

d) [ ] agrees to refrain from further participation in the possible cartel activities to which the reported possible infringement relates from the time it discloses the possible cartel.

e) Subject to [ ] satisfying each of the conditions set out in this letter, the DGFT will grant [ ] immunity from financial penalties in accordance with the policy on leniency set out in the DGFT's Guidance at paragraph [3.4] [3.6]. This means that no penalty will be imposed on [ ] in relation to any finding that the reported possible infringement or any part of it constitutes an actual infringement of section 2 of the Act.

5. At the request of [ ], the DGFT may bring to the attention of the regulators (as defined in section 54 of the Act) or any other competition authorities the fact that immunity will be granted on the terms and conditions which are set out in this letter. The DGFT shall not bring the facts revealed to the DGFT as a result of the provision of immunity under this letter to the attention of any other competition authority, save as permitted by section 55 of the Act.

6. If in the view of the DGFT at any time before the conclusion of the investigation into the reported possible infringement, the conditions which are set out in this letter have not been complied with in full by [ ], the DGFT shall give immediate written notice to [ ] of the nature of the alleged non-compliance and that the DGFT is considering revoking the grant of immunity from financial penalties. [ ] will be given a reasonable opportunity to explain the alleged non-compliance and, if the DGFT considers it appropriate, to remedy the breach within a reasonable period of time from the giving of such explanation.

7. If the DGFT then determines that the conditions which are set out in this letter are not complied with, the DGFT may revoke the grant of immunity from financial penalties and impose any penalty in accordance with section 36 of the Act.

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8. This letter sets out all of the conditions on which the DGFT will grant immunity to [ ]. It supersedes all prior understandings, if any, whether oral or written, relating to the reported possible infringement.

9. The DGFT and [ ] represent and warrant each to the other that the signatories to this letter on behalf of each party have all the authority and capacity necessary to sign this letter and to bind the respective parties hereto.

10.The signatories below acknowledge acceptance of the terms and conditions set out above.

Signed: _____Date: _____

For and on behalf of the Director General of Fair Trading

_____Date: _____

[Name]

For and Behalf of [ ]

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DRAFT LETTER FOR PARTIAL LENIENCY

Dear [ ]

Competition Act 1998 ("the Act"): [Industry]

1. This letter is between [ ] and the Director General of Fair Trading ("DGFT") .

2. This letter sets out the basis on which DGFT will grant [ ] immunity from [ ] % of any financial penalties which could be imposed under section 36 of the Act in accordance with paragraph 3.8 of the Guidance on the Appropriate Amount of a Penalty issued under section 38 of the Act ("the DGFT's Guidance") a copy of which is attached to this letter. This partial immunity will be granted in connection with any cartel activities in the [ ] industry, in the United Kingdom, in respect of which [ ] has currently come forward to seek partial immunity and which may infringe the prohibition contained in section 2 of the Act ("the reported possible infringement").

3. For clarification, it is agreed that the term "cartel activities", as used in the DGFT's Guidance, can include vertical as well as horizontal agreements or concerted practices and that agreements, decisions by associations or concerted practices which "involve" price fixing include those which, directly or indirectly, in isolation or in combination with other factors under the control of the parties have the object or effect of restricting the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that these do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

4. This grant of leniency is made and remains conditional on [ ] satisfying each of the conditions set out below. Once these conditions have been satisfied, and the investigation has been completed, the DGFT will inform [ ] in writing of this fact.

Conditions

a) [ ] will provide the DGFT with all the information, documents and evidence currently available to it regarding the existence and activities of the cartel to which the reported possible infringement relates.

b) [ ] will maintain continuous and complete cooperation throughout the investigation. This will include but is not limited to:

i) providing the DGFT with all the facts known to [ ] and all the information, documents and evidence available to it relating to the reported possible infringement in addition to any such information already provided;

ii) providing promptly, and without the DGFT using his powers under any of sections 26 to 28 of the Act, all the information, documents, evidence or other items in its

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possession, custody or control, wherever located within the United Kingdom, requested by the DGFT, to the extent that they have not already been produced;

iii) using its best efforts to secure the complete and truthful cooperation of its current and former directors, officers and employees and encouraging such persons voluntarily to provide the DGFT with any information relevant to the reported possible infringement of section 2 of the Act in the [ ] industry in the United Kingdom;

iv) facilitating the ability of current and former directors, officers and employees to appear for such interviews as the DGFT may reasonably require at the times and places reasonably designated by the DGFT;

v) using its best efforts to ensure that current and former directors, officers and employees who provide information to the DGFT respond completely and truthfully to all questions asked in interviews; vi. using its best efforts to ensure that current and former directors, officers and employees who provide information to the DGFT make no attempt either falsely to protect or falsely to implicate any undertaking in any infringement of the Act.

c) [ ] agrees to refrain from further participation in the possible cartel activities to which the reported possible infringement relates from the time it discloses the possible cartel.

d) Subject to [ ] satisfying each of the conditions set out in this letter, the DGFT will grant [ ] partial immunity from financial penalties in accordance with the policy on leniency set out in the DGFT's Guidance at paragraph 3.8. This means that only [ ]% of any financial penalty will be imposed on [ ] in relation to any finding that the reported possible infringement or any part of it constitutes an actual infringement of section 2 of the Act.

5. At the request of [ ], the DGFT may bring to the attention of the regulators (as defined in section 54 of the Act) or any other competition authorities the fact that partial immunity will be granted on the terms and conditions which are set out in this letter. The DGFT shall not bring the facts revealed to the DGFT as a result of the provision of partial immunity under this letter to the attention of any other competition authority, save as permitted by section 55 of the Act.

6. If in the view of the DGFT at any time before the conclusion of the investigation into the reported possible infringement, the conditions which are set out in this letter have not been complied with in full by [ ], the DGFT shall give immediate written notice to [ ] of the nature of the alleged non-compliance and that the DGFT is considering revoking the grant of partial immunity from financial penalties. [ ] will be given a reasonable opportunity to explain the alleged non-compliance and, if the DGFT considers it appropriate, to remedy the breach within a reasonable period of time from the giving of such explanation.

7. If the DGFT then determines that the conditions which are set out in this letter are not complied with, the DGFT may revoke the grant of partial immunity from financial penalties and impose in full any penalty in accordance with section 36 of the Act.

8. This letter sets out all of the conditions on which the DGFT will grant partial immunity to [ ]. It supersedes all prior understandings, if any, whether oral or written, relating to the reported possible infringement.

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9. The DGFT and [ ] represent and warrant each to the other that the signatories to this letter on behalf of each party have all the authority and capacity necessary to sign this letter and to bind the respective parties hereto.

10. The signatories below acknowledge acceptance of the terms and conditions set out above.

Signed: _____ Date: _____

For and on behalf of the Director General of Fair Trading

_____ Date: _____

[Name]

For and Behalf of [ ]

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Annex C

Canada Immunity Program

COMPETITION BUREAU INFORMATION BULLETIN IMMUNITY PROGRAM UNDER THE COMPETITION ACT

A. Introduction

The Competition Act (the Act)[1] is a law of general application that establishes basic principles for the conduct of business in Canada. The Act maintains and encourages competition:

- to promote the efficiency and adaptability of the Canadian economy;
- to expand opportunities for Canadian participation in world markets while recognizing the role of foreign competition in Canada;
- to ensure small and medium-sized enterprises have equal opportunity to participate in the Canadian economy; and
- to provide consumers with competitive prices and product choices.

The Act gives the Commissioner of Competition (the Commissioner) independent authority to administer and enforce the Competition Act. The Commissioner is the head of the Competition Bureau (the Bureau), the organisation that carries out investigations under the Act.

The Competition Act contains criminal provisions[2] that prohibit anti-competitive business activities such as conspiracies that prevent or lessen competition unduly (*e.g.*, price fixing or market allocation), bid rigging, price maintenance and deceptive marketing practices. There are also civil provisions relating to mergers, abuse of dominant position and misleading advertising. The criminal provisions carry serious penalties. For example, the conspiracy provision carries a maximum fine of $10 million and five years in prison per count.

When there has been a violation of the Act, the Bureau's objective is to halt the anti-competitive acts and punish the firms and individuals responsible. By attaching penalties to such behaviour, the Bureau hopes to deter similar crimes. The Bureau also encourages firms to set up corporate compliance programs to ensure they adopt policies and practices that conform with the law. The *Corporate Compliance Programs Bulletin* provides advice to company management to promote appropriate corporate conduct.

The Bureau, as with other law enforcement agencies, recognizes the importance of programs that contribute to the detection, investigation and prosecution of serious crimes. This information bulletin details the Bureau's approach to recommending immunity for violations

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of the *Competition Act*, and expands upon and supercedes earlier public statements by senior Bureau officials.

This bulletin describes the roles and responsibilities of the Commissioner and the Attorney General of Canada (the Attorney General), outlines the requirements for granting immunity requests, discusses the issues of timing and corporate *versus* individual immunity, and sets out the steps in the immunity process. Particular mention is made of transnational criminal activity, as well as issues such as confidentiality and failure to comply with the requirements of an immunity agreement.

This bulletin does not give legal advice. Readers should refer to the Act when questions of law arise and obtain private legal advice if a particular situation causes concern.

For the purposes of this bulletin, the term *party* means a business enterprise or individual, as the case may be. The terms *firm*, *company* and *corporation* are used interchangeably to denote a business enterprise.

Anyone implicated in activity that might have violated the *Competition Act* may offer to co-operate with the Bureau and request immunity. A firm may but, does not have to, initiate an application on behalf of its employees. Employees may approach the Bureau on their own behalf. Each offer of co-operation will be evaluated for the benefit of the requesting party.

In this bulletin, the term *immunity* refers to a grant of full immunity from prosecution under the *Competition Act*. When a party does not qualify for immunity, the Commissioner may recommend that the Attorney General grant another form of leniency. When a party believes it does not meet the requirements for immunity, it may still offer to co-operate with the Bureau and request another form of leniency.

B. Roles of the commissioner and the Attorney General

Criminal prosecutions under the *Competition Act* are the responsibility of the Attorney General, and the Commissioner may refer a matter to the Attorney General for consideration when there is evidence of an offence, for whatever action the Attorney General may wish to take. The Attorney General has the sole authority to grant immunity to a party implicated in an offence under the *Competition Act*. The Bureau investigates the matter and makes a recommendation to the Attorney General. The Attorney General then independently considers if the interests of the public are best served by granting immunity. The Attorney General's policy on immunity is articulated in a document published by the Department of Justice Canada.[3]

C. Obtaining immunity

The Bureau encourages parties to come forward as soon as they believe they are implicated in an offence. It is not necessary for the party to have assembled a complete record of the information required at the first contact with the Bureau. Requests for immunity are subject to close scrutiny by the Attorney General and the Commissioner.

Subject to the following requirements, and consistent with fair and impartial administration of the law, the Commissioner will recommend to the Attorney General that it grant immunity to a party in the following situations:

- the Bureau is unaware of an offence, and the party is the first to disclose it; or
- the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney General.

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Requirements

The party must take effective steps to terminate its participation in the illegal activity.

The party must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada.

Throughout the course of the Bureau's investigation and subsequent prosecutions, the party must provide complete and timely co-operation:

- the party must reveal any and all offences in which it may have been involved;
- the party must provide full, frank and truthful disclosure of all the evidence and information[4] known or available to it or under its control, wherever located, relating to the offences under investigation. There must be no misrepresentation of any material facts; and
- the party must co-operate fully, on a continuous basis, expeditiously and, where the party is a business enterprise, at its own expense throughout the investigation and with any ensuing prosecutions. Companies must take all lawful measures to promote the continuing co-operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions.

Where possible, the party will make restitution for the illegal activity.

If the first party fails to meet the requirements, a subsequent party that does meet the requirements may be recommended for immunity.

D. Impact of corporate immunity on directors, officers and employees

If a company qualifies for immunity, all present directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete and timely co-operation, will qualify for the same recommendation for immunity. Past directors, officers and employees who offer to co-operate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis.

If a corporation does not qualify for a recommendation for immunity, the past or present directors, officers and employees who come forward with the corporation to co-operate may nonetheless be considered for immunity as if they had approached the Bureau individually.

E. The immunity process

Step 1: Initial Contact

Anyone may initiate a request for immunity by communicating with the Deputy Commissioner of Competition, Criminal Matters, or the Deputy Commissioner of Competition, Fair Business Practices, to discuss the possibility of receiving immunity from prosecution in connection with an offence under the Act. Certain inculpatory information will need to be disclosed at this stage in order to determine whether the party might qualify under Part C, above. Usually the request is made in terms of a hypothetical disclosure.

Step 2: Provisional Guarantee of Immunity

If the party decides to proceed with the immunity application, there will need to be a description of the illegal activity, usually still in hypothetical terms. The Bureau will then

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present all the relevant information to the Attorney General, who has independent discretion in these matters, in order to obtain a written provisional guarantee of immunity.[5]

Step 3: Full Disclosure

After the party receives a written provisional guarantee of immunity from the Attorney General, the Bureau will need to know with sufficient detail and certainty what evidence or testimony a potential witness will be able to provide and how probative it is likely to be. Full disclosure is, therefore, essential. The full disclosure process will be conducted with the understanding that the Bureau will not use the information against the party, unless there is a failure to comply, as described in section F.

Step 4: Immunity Agreement

Upon recommendation by the Bureau, and if, after an independent review, the Attorney General accepts the recommendation, the Attorney General will execute an immunity agreement that will include all continuing obligations as described in paragraph 16, above.

F. Failure to comply with the requirements of the agreement

Failure to comply with any of the requirements of the immunity agreement may result in the Attorney General revoking immunity.

The Bureau will resume investigating the party who has agreed to co-operate but who does not fulfill its obligations under the agreement and consider referral of the matter to the Attorney General. The Bureau will recommend that the Attorney General revoke any grant of immunity and take appropriate action against the party concerned.

Paragraph 26 extends to a company that does not fully promote the complete and timely co-operation of its employees, and to a party that fails to disclose any and all offences or that does not provide full, frank and truthful disclosure of all evidence and information known or available to it or under its control.

G. Transnational criminal anti-competitive activity

As a matter of law and practicality, international anti-competitive activity, including price-fixing cartels and deceptive marketing practices, may fall under the jurisdiction of more than one competition authority. Parties should expect, then, that all jurisdictions affected will look into the matter. This may be the case when, for example, agreements to fix prices or allocate markets apply across national borders or when deceptive telemarketers take advantage of differing legal treatments to locate in one country and do business in another. In these circumstances, the authorities may decide to pursue independent, joint or parallel investigations.

Because the timing of an approach to the Bureau usually dictates the resolution options available, a party and its counsel should appreciate that when the matter involves other countries, a foreign investigation can potentially lead to the Bureau's becoming aware of the matter prior to an approach by an involved party.

In situations involving multiple jurisdictions, a party may wish to approach each competition law authority individually. In particular, a party whose business activities have a substantial connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.

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The Bureau will not afford any special consideration to a party solely because it has been granted immunity or another form of favourable treatment in another jurisdiction.

When approached by a party seeking immunity, the Bureau will inform the party of the existence of similar immunity programs in other jurisdictions.

H. Confidentiality

The Bureau treats as confidential the identity of a party requesting immunity and any information obtained from that party. The only exceptions to this policy would be the following:

- when there has been prior disclosure by the party
- when the party has agreed and when disclosure is for the purpose of the administration and enforcement of the Act;
- when disclosure is required by law; and
- when disclosure is necessary to prevent the commission of a serious criminal offence.

It is the Bureau's policy with respect to private actions under section 36 of the Act to provide confidential documents and evidence only in response to a court order. In connection with information obtained under the Immunity Program, the Bureau will take all reasonable steps to protect the information.

I. Conclusion

The Bureau encourages the public to take advantage of its policies and programs, which facilitate conformity with the provisions of the *Competition Act*.

Anyone wishing to apply under the Commissioner's Immunity Program may contact:

- Deputy Commissioner, Criminal Matters
  (819) 997-1208,
- Johanne D'Auray Deputy Commissioner, Fair Business Practices
  (819) 997-1231.

For further information, visit the Bureau Web site (*http://competition.ic.gc.ca*) or contact the Bureau toll free at 1-800-348-5358.

Notes

1. Competition Act, R.S.C. 1985, c. C-34.
2. See Appendix I for relevant provisions [omitted]
3. Refer to the *Federal Prosecution Services Deskbook*, Department of Justice Canada, particularly Part 7, Chapter 1, Immunity Agreements.
4. Subsequent references to evidence and information relate to this requirement to provide complete and continuing co-operation to the Bureau.
5. Having regard to the immunity agreement policy set out in the *Federal Prosecution Service Deskbook*, Department of Justice, Part 7, Chapter 1.

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Annex D

EC Program*

COMMISSION NOTICE ON THE NON-IMPOSITION OR REDUCTION OF FINES IN CARTEL CASES

A. Introduction

Secret cartels between enterprises aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports are among the most serious restrictions of competition encountered by the Commission.

Such practices ultimately result in increased prices and reduced choice for the consumer. Furthermore, they not only prejudice the interests of Community consumers, but they also harm European industry. By artificially limiting the competition that would normally prevail between them, Community enterprises avoid exactly those pressures that lead them to innovate, both in terms of product development and with regard to the introduction of more efficient production processes. Such practices also lead to more expensive raw materials and components for the Community enterprises that buy from such producers. In the long term, they lead to a loss of competitiveness and, in an increasingly global market-place, reduced employment opportunities.

For all those reasons, the Commission considers that combating cartels is an important aspect of its endeavours to achieve the objectives set out in its 1993 White Paper on Growth, Competitiveness and Employment. This explains why it has increased its efforts to detect cartels in recent years.

The Commission is aware that certain enterprises participating in such agreements might wish to terminate their involvement and inform the Commission of the existence of the cartel, but are deterred from doing so by the risk of incurring large fines.

In order to take account of this fact, the Commission has decided to adopt the present notice, which sets out the conditions under which enterprises cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them. The Commission will examine whether it is necessary to modify this notice as soon as it has acquired sufficient experience in applying it.

* As stressed in the Note by the Editor, this 1996 Notice is superseded by the 2002 Notice (see Appendix 2).

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The Commission considers that it is in the Community interest in granting favourable treatment to enterprises which cooperate with it in the circumstances set out below. The interests of consumers and citizens in ensuring that such practices are detected and prohibited outweigh the interest in fining those enterprises which cooperate with the Commission, thereby enabling or helping it to detect and prohibit a cartel.

Cooperation by an enterprise is only one of several factors which the Commission takes into account when fixing the amount of a fine. This notice does not prejudice the Commission's right to reduce a fine for other reasons.

B. Non-imposition of a fine or a very substantial reduction in its amount

An enterprise which:

- informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;
- is the first to adduce decisive evidence of the cartel's existence;
- puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;
- provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;
- has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity,

will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if they had not cooperated.

C. Substantial reduction in a fine

Enterprises which both satisfy the conditions set out in Section B, points (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50% to 75% of the fine.

D. Significant reduction in a fine

Where an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

Such cases may include the following:

- before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;
- after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

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E. Procedure

Where an enterprise wishes to take advantage of the favourable treatment set out in this notice, it should contact the Commission's Directorate-General for Competition. Only persons empowered to represent the enterprise for that purpose may take such a step. This notice does not therefore cover requests from individual employees of enterprises.

Only on its adoption of a decision will the Commission determine whether or not the conditions set out in Sections B, C and D are met, and thus whether or not to grant any reduction in the fine, or even waive its imposition altogether. It would not be appropriate to grant such a reduction or waiver before the end of the administrative procedure, as those conditions apply throughout such period.

Nonetheless, provided that all the conditions are met, non-imposition or reductions will be granted. The Commission is aware that this notice will create legitimate expectations on which enterprises may rely when disclosing the existence of a cartel to the Commission. Failure to meet any of the conditions set out in Sections B or C at any stage of the administrative procedure will, however, result in the loss of the favourable treatment set out therein. In such circumstances an enterprise may, however, still enjoy a reduction in the fine, as set out in Section D above.

The fact that leniency in respect of fines is granted cannot, however, protect an enterprise from the civil law consequences of its participation in an illegal agreement. In this respect, if the information provided by the enterprise leads the Commission to take a decision pursuant to Article 85(1) of the EC Treaty, the enterprise benefiting from the leniency in respect of the fine will also be named in that decision as having infringed the Treaty and will have the part it played described in full therein. The fact that the enterprise cooperated with the Commission will also be indicated in the decision, so as to explain the reason for the non-imposition or reduction of the fine.

Should an enterprise which has benefited from a reduction in a fine for not substantially contesting the facts then contest them for the first time in proceedings for annulment before the Court of First Instance, the Commission will normally ask that court to increase the fine imposed on that enterprise.

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Appendix I

The 2002 European Commission Notice on Leniency

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19.2.2002 EN Official Journal of the European Communities C 45/3

Commission notice on immunity from fines and reduction of fines in cartel cases

(2002/C 45/03)

(Text with EEA relevance)

INTRODUCTION

1. This notice concerns secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports. Such practices are among the most serious restrictions of competition encountered by the Commission and ultimately result in increased prices and reduced choice for the consumer. They also harm European industry.

2. By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.

3. The Commission is aware that certain undertakings involved in this type of illegal agreements are willing to put an end to their participation and inform it of the existence of such agreements, but are dissuaded from doing so by the high fines to which they are potentially exposed. In order to clarify its position in this type of situation, the Commission adopted a notice on the non-imposition or reduction of fines in cartel cases [1], hereafter 'the 1996 notice'.

4. The Commission considered that it is in the Community interest to grant favourable treatment to undertakings which cooperate with it. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.

5. In the 1996 notice, the Commission announced that it would examine whether it was necessary to modify the notice once it had acquired sufficient experience in applying it. After five years of implementation, the Commission has the experience necessary to modify its policy in this matter. Whilst the validity of the principles governing the notice has been confirmed, experience has shown that its effectiveness would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted. A closer alignment between the level of reduction of fines and the value of a company's contribution to establishing the infringement could also increase this effectiveness. This notice addresses these issues.

6. The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.

7. Moreover, cooperation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.

A. IMMUNITY FROM FINES

8. The Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if:

   (a) the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 [2] in connection with an alleged cartel affecting the Community; or

   (b) the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC [3] in connection with an alleged cartel affecting the Community.

9. Immunity pursuant to point 8(a) will only be granted on the condition that the Commission did not have, at the time of the submission, sufficient evidence to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with the alleged cartel.

10. Immunity pursuant to point 8(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point 8(a) in connection with the alleged cartel.

[1] OJ C 207, 18.7.1996, p. 4.

[2] OJ 13, 21.2.1962, p. 204/62. (Or the equivalent procedural regulations: Article 21(3) of Regulation (EEC) No 1017/68 of the Council; Article 18(3) of Council Regulation (EEC) No 4056/86 and Article 11(3) of Council Regulation (EEC) No 3975/87).

[3] Reference in this text to Article 81 EC also covers Article 53 EEA when applied by the Commission according to the rules laid down in Article 56 of the EEA Agreement.

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11. In addition to the conditions set out in points 8(a) and 9 or in points 8(b) and 10, as appropriate, the following cumulative conditions must be met in any case to qualify for any immunity from a fine:

(a) the undertaking cooperates fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it remains at the Commission's disposal to answer swiftly any request that may contribute to the establishment of the facts concerned;

(b) the undertaking ends its involvement in the suspected infringement no later than the time at which it submits evidence under points 8(a) or 8(b), as appropriate;

(c) the undertaking did not take steps to coerce other undertakings to participate in the infringement.

PROCEDURE

12. An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate-General for Competition. Should it become apparent that the requirements set out in points 8 to 10, as appropriate, are not met, the undertaking will immediately be informed that immunity from fines is not available for the suspected infringement.

13. If immunity from fines is available for a suspected infringement, the undertaking may, in order to meet conditions 8(a) or 8(b), as appropriate:

(a) immediately provide the Commission with all the evidence relating to the suspected infringement available to it at the time of the submission; or

(b) initially present this evidence in hypothetical terms, in which case the undertaking must present a descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Expurgated copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence.

14. The Directorate-General for Competition will provide a written acknowledgement of the undertaking's application for immunity from fines, confirming the date on which the undertaking either submitted evidence under 13(a) or presented to the Commission the descriptive list referred to in 13(b).

15. Once the Commission has received the evidence submitted by the undertaking under point 13(a) and has verified that it meets the conditions set out in points 8(a) or 8(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.

16. Alternatively, the Commission will verify that the nature and content of the evidence described in the list referred to in point 13(b) will meet the conditions set out in points 8(a) or 8(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.

17. An undertaking which fails to meet the conditions set out in points 8(a) or 8(b), as appropriate, may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section B of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

18. The Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same suspected infringement.

19. If at the end of the administrative procedure, the undertaking has met the conditions set out in point 11, the Commission will grant it immunity from fines in the relevant decision.

B. REDUCTION OF A FINE

20. Undertakings that do not meet the conditions under section A above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

21. In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

22. The concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.

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23. The Commission will determine in any final decision adopted at the end of the administrative procedure:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed, as follows. For the:

— first undertaking to meet point 21: a reduction of 30-50 %,

— second undertaking to meet point 21: a reduction of 20-30 %,

— subsequent undertakings that meet point 21: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.

PROCEDURE

24. An undertaking wishing to benefit from a reduction of a fine should provide the Commission with evidence of the cartel in question.

25. The undertaking will receive an acknowledgement of receipt from the Directorate-General for Competition recording the date on which the relevant evidence was submitted. The Commission will not consider any submissions of evidence by an applicant for a reduction of a fine before it has taken a position on any existing application for a conditional immunity from fines in relation to the same suspected infringement.

26. If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes added value within the meaning of point 22, it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point 23(b).

27. The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted.

GENERAL CONSIDERATIONS

28. From 14 February 2002, this notice replaces the 1996 notice for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. The Commission will examine whether it is necessary to modify this notice once it has acquired sufficient experience in applying it.

29. The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.

30. Failure to meet any of the requirements set out in sections A or B, as the case may be, at any stage of the administrative procedure may result in the loss of any favourable treatment set out therein.

31. In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.

32. The Commission considers that normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council.

33. Any written statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file. It may not be disclosed or used for any other purpose than the enforcement of Article 81 EC.

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Appendix II

The EU Commission Press Release on the 2002 Notice on Leniency

ip/02/247

Brussels, 13 February 2002

COMMISSION ADOPTS NEW LENIENCY POLICY FOR COMPANIES WHICH GIVE INFORMATION ON CARTELS

The European Commission on Wednesday took another important step to uncover and suppress price-fixing pacts and other hard-core cartels. The Commission unanimously adopted a new leniency policy that creates greater incentives for companies to blow the whistle on the most serious violations of antitrust rules. Under the new rules the Commission will grant total immunity from fines to the first company to submit evidence on a cartel unknown to, or unproved by the Commission. The leniency policy updates a previous 1996 document. "***Detection and prosecution of cartels is one of my top priorities***", ***European Competition Commissioner Mario Monti said, adding***: "***The 1996 leniency policy played an important role in uncovering and punishing secret cartels in the last five years. The new policy will create even greater incentives to denounce this scourge of the economy which has companies making illicit profits at consumers' expense***."

Secret cartels are the most serious violation of competition rules since they invariably result in higher prices. Whether they take the form of price-fixing or market-sharing agreements, the allocation of production quotas or the rigging of bids, they harm European industry and consumers. Such illicit behaviour makes raw materials and components more expensive and, in the long term, leads to a loss of competitiveness and reduced employment. That is why they are expressly prohibited in Article 81 of the European Union treaty.

The detection, prohibition and punishment of cartels is one of the highest priorities of the Commission in the field of competition policy.

The greatest challenge in the fight against hard-core cartels is to penetrate their cloak of secrecy and counter the increasingly sophisticated means at the companies' disposal to conceal collusive behaviour.

Following on the experience of the United States in this field, the Commission in 1996 adopted for the first time a Leniency Notice providing for immunity or reduction from fines for companies that help it in the detection and prosecution of these cartels.

This policy greatly contributed to the adoption in 2001 of 10 cartel decisions in which 56 companies were fined a total of €1 836 million, a record figure compared with any other previous year, larger even than the total amount of fines imposed in the whole preceding period, *i.e.* between the creation of the EC and the year 2000

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As decided in 1996, the Commission last year reviewed the experience acquired in the implementation of the Leniency Notice. After consultation with the competition authorities of the 15 EU states and with the business and legal communities, it concluded that the policy could be improved in terms of transparency and legal certainty in order to make it more attractive for companies to come forward.

Main aspects of the revision

- The Commission will grant complete immunity from fines:
  - to the *first* member of the cartel to inform the Commission of an *undetected* cartel by providing sufficient information to allow the Commission to launch an inspection on the premises of the suspected companies; or
  - to the *first* member of the cartel to provide evidence that enables the Commission to *establish an infringement*, when the Commission is already in possession of enough information to launch an inspection, but not to establish an infringement. This type of immunity is available only in cases where no other cartel member has qualified for immunity under the first scenario.

Consequently, immunity from fines will reward firms that provide important insider information and evidence to the Commission at two crucial stages of a cartel investigation: either with the disclosure of a cartel previously undetected or by supplying unknown crucial evidence that will lead to the successful prosecution of the cartel members.

To obtain full immunity, a company must also *cooperate fully and on a continuous basis* with the Commission, provide *all evidence* in its possession, put an *end immediately to* the infringement and may not have taken steps to *coerce* other undertakings to participate in the cartel.

The new policy contrasts with the old 1996 leniency notice in that the latter required a company to provide "decisive" evidence and excluded from full immunity companies that had acted as an instigator of or played a determining role in a cartel. Both left room for interpretation and, therefore, uncertainty as to what decisive information was and what it meant to be an instigator or play a determining role.

In the five years to the end of 2001, the Commission granted full immunity in three occasions: Rhône-Poulenc, in respect to its participation in two of the three vitamins cartels in which it was found to be involved, a subsidiary of Interbrew in the Luxembourg brewers cartel and South-African company Sappi for the valuable information and co-operation provided in the carbonless paper cartel (see respectively IP/01/1625 of November 21, 2001, 2001IP /01/1740 of December 5 2001and IP/01/1892 of December 20,).

- In another innovation, a company fulfilling the conditions for immunity will promptly receive a letter from the Commission confirming that immunity will be granted if the conditions set out in the Notice are observed.
- As in 1996, the new Notice provides also for *a reduction of fines* for companies that do not qualify for immunity but provide evidence that represents "significant added value" to that already in the Commission's possession and terminate their involvement in the cartel.

The first company fulfilling these conditions will receive a reduction of 30-50% of the fine which would otherwise have been imposed, the second successful applicant 20-30% and subsequent successful applicants will receive a reduction of up to 20%.

Within each of these bands, the final amount of any reduction will again depend on the *time* at which evidence was provided and the *quality* of this evidence. The extent of co-operation

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provided by the company throughout the Commission's procedure will also be taken into account.

Successful applicants for reduction of fines will also be given a letter indicating the band to which they will, in principle, be entitled. This letter will be sent no later than the day the statement of objections is notified.

The new policy will not only increase the legal certainty provided to companies but will also enhance its overall transparency and predictability.

Commissioner Monti added:

"This new Notice should not, in any way, be understood as reflecting a more lenient approach in the fight against price-fixing and other anti-competitive practices. On the contrary, the new policy will increase the likelihood that cartels will be detected which, together with the Commission's determination to impose fines at dissuasive levels, should deter companies from entering into collusive behaviour in the first place."

Entry into force and publication of the new Notice

The new Notice will come into force tomorrow, February 14, 2002 and will be applicable to companies which file for leniency in a cartel case, as long as no other firm is already co-operating with the Commission in an investigation into that same cartel.

The "Notice on immunity from fines and reduction of fines in cartel cases" will be published in the Official Journal of the European Communities in the coming days and is already available on the internet at the following address:

http://europa.eu.int/comm/competition/antitrust/leniency

Leniency applications

Companies wishing to approach the Commission in order to benefit from the new Notice may do so directly or through an intermediary, such as a legal adviser.

For the purpose of filing an application for leniency initial contact should be made through the dedicated fax number:

Dedicated Fax number: + 322 299 45 85

The use of this fax ensures that the precise time and date of the contact is duly recorded and that the information is treated with the utmost confidentiality within the Commission.

If necessary, initial contact can in exceptional cases also be made through the following dedicated telephone numbers:

Telephone numbers: + 322 298 41 90 and 298 41 91

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Part II

REPORT ON THE NATURE AND IMPACT OF HARD CORE CARTELS AND SANCTIONS AGAINST CARTELS UNDER NATIONAL COMPETITION LAWS

Executive Summary

This Report by the OECD Competition Committee continues the programme begun in 1998 with the Recommendation of the OECD Council on hard core cartels. That Recommendation and a subsequent progress report by the Committee note that hard core cartels impose significant harm upon consumers world-wide, and they call for enhanced sanctions against cartel participants to serve as a deterrent to that conduct. This Report examines in greater detail 1) the nature and impact of cartels, 2) the sanctions against cartels that are available under national competition laws and that are imposed by national competition agencies and 3) the optimal use of sanctions for achieving the deterrence of cartel activity. The following general points are made in the Report:

The worldwide economic harm from cartels is clearly very substantial, although it is difficult to quantify it accurately. Conservatively, it exceeds many billions of US *dollars per year.*

Cartels harm consumers and have pernicious effects on economic efficiency. A successful cartel raises price above the competitive level and reduces output. Consumers choose either not to pay the higher price for some or all of the cartelised product that they desire, thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further, a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these effects adversely affect efficiency in a market economy.

It is not easy to quantify these effects, however. It would require comparison of the actual market situation under the cartel to that which would exist in a hypothetical competitive market. Competition officials usually do not undertake to make such a calculation, both because it is difficult to do and because their laws usually do not require it. When an estimate of harm is necessary,

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however, most officials employ a proxy, which is the unlawful gain accruing to the cartel members from their activity. In its simplest form, this estimation is the product of the cartel "mark-up" above the competitive price and the commerce affected (in units) by the cartel agreement. Even this calculation can be difficult, as it requires an assessment both of the amount of "affected commerce" and of what the "competitive" price would have been absent the agreement.

The OECD's Competition Committee conducted a survey of cartel cases conducted by its Members between 1996 and 2000, in an attempt to learn more about the harm from cartels. The responding countries described a total of 119 cases, but in many of these it was not possible to estimate harm. Still, the amount of commerce affected by just 16 large cartel cases reported in the OECD survey exceeded USD 55 billion world-wide. The survey showed that the cartel mark-up can vary significantly across cases, but in some it can be very large, as much as 50% or more. Thus, it is clear that the magnitude of harm from cartels is many billions of dollars annually.

Cartel operators can go to great lengths to keep their agreements secret, showing that they fully realise that their conduct is harmful and unlawful. In some cases, they are explicit in their contempt for the competitive process.

The results of the OECD survey provided examples of the lengths to which cartel conspirators have gone to hide their actions. Conspirators in one case, faced with a document demand from the competition authority, loaded two automobiles with bid files and took them to the country, where it took a full day to burn them in "four huge bonfires". In another case, the conspirators carefully controlled the creation and retention of incriminating documents by, among other things, conducting internal audits to verify that such documents no longer existed. When it was felt necessary to keep certain spreadsheets showing allocations of business among the conspirators, the files were copied onto computer disks and hidden in the eaves of one employee's grandmother's house. In another case, internal documents from one of the defendants revealed an unofficial motto of the company: "Our competitors are our friends, our customers are the enemy."

The principal purpose of sanctions in cartel cases is deterrence. Ideally, sanctions should take away the prospect of gain from cartel activity. Because not all cartels are uncovered and punished, many experts contend that effective deterrence requires imposing a fine against organisations participating in a cartel that is a multiple of the estimated gain on those cartels that are uncovered. Further, sanctions against individuals can provide important, additional deterrence.

It is widely agreed that an effective sanction against a cartel should take into account not only the amount of gain realised by the cartel but also the probability that any given cartel will be detected and prosecuted. Because not all

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cartels are detected, the financial sanction against one that is detected should exceed the gain actually realised by the cartel. Some believe that as few as one in six or seven cartels are detected and prosecuted, implying a multiple of at least six. A multiple of three is more commonly cited, however. Determining the gain, as noted above, can be difficult. Some experts recommend employing a proxy when the gain cannot be calculated, such as a percentage of total turnover of the participants.

Whether or not it is possible to calculate accurately an optimal financial sanction against enterprises, in practice it is difficult to implement it. Sanctions against natural persons, placing them at risk individually for their conduct, provide an overall enhancement to deterrence. While, as noted below, relatively few countries currently impose any kind of sanction against individuals for cartel conduct, some are considering the enhancement of such sanctions.

Strong sanctions against enterprises and individuals increase the effectiveness of leniency programs in uncovering cartels and provide incentives to cartel participants to co-operate with a cartel investigation.

Cartel sanctions also provide an incentive for cartel participants to defect from the secret agreement and provide information to the investigators. The threat of very large fines against companies for cartel conduct provides incentives for firms to defect from the cartel and benefit from leniency. Similarly, the threat of strong sanctions against individuals provides added incentives for those individuals to "blow the whistle" on cartel conduct and to offer co-operation to government investigators in exchange for reduction or elimination of the punishment.

The competition laws of most countries provide for the imposition of large fines against organisations for cartel conduct. In some cases, however, the maximum fines found in these laws may not be sufficiently large to accommodate multiples of the gain to the cartel, as recommended by many experts. In some countries, natural persons can also be fined, and in fewer countries they can be sentenced to imprisonment. The recovery of money damages by victims of a cartel is another component of financial sanctions against cartels. A minority of OECD *countries permit the recovery of such damages.*

The maximum fines found in the competition laws of most countries are expressed either in absolute terms or as a percentage of the annual turnover of the respondent company. Without more experience in assessing the unlawful gain realised by cartels, it is difficult to know whether these maximums are sufficiently large to accommodate the desired multiples of that gain. One benchmark in this regard might be the new law in New Zealand, which recently completed an in-depth study of optimal sanctions in cartel cases. The maximum fine provided in that law is the greater of three times the unlawful gain, NZD 10 million (the equivalent of approximately EUR 4.8 million) or 10% of the

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total turnover of the enterprise. In most countries whose laws contain absolute maximum fines the maximum is below the equivalent of NZD 10 million. Several of these countries have as an alternative maximum, however, 10% of total turnover of the respondent, which is consistent with the New Zealand standard.

In several OECD countries, but less than half, natural persons can be fined for cartel conduct, often for very large sums. The laws of nine OECD countries provide for imprisonment of natural persons. Fourteen countries permit the recovery of money damages by cartel victims.

Some countries are now imposing very large fines on enterprises for cartel conduct, but more countries are still not doing so. Few countries are aggressively sanctioning natural persons. There is a noticeable and welcome trend toward stronger sanctions, however. Several countries are revising their laws and practices with a view toward increasing sanctions on cartels and their members.

The OECD survey showed that ten countries had imposed organisational fines in excess of the equivalent of USD 1 million within the survey period of 1996-2000. In three countries the largest fines were in excess of USD 100 million. In two the largest fines were between USD 10 million and 100 million and in the remainder the largest were between 1 and 10 million. Within the survey period these large fines increased in number and severity in the later years. In the remaining countries, however, no fines exceeded USD 1 million and in some the fines were small or nonexistent.

Only four countries had imposed fines on natural persons. In three of the four the largest fines exceeded the equivalent of USD 100 000. Only two countries, Canada and the United States, had imposed sentences of imprisonment on natural persons, and the US was by far the leader in this regard. It imposed 28 such sentences in 1999 and 18 in 2000. The average length of those sentences was approximately 8 months in 1999 and 10 months in 2000. While the possibility for the recovery of money damages by cartel victims exists in several countries, in only the United States is the practice common.

Several countries have just completed or are in the process of reviewing their laws and policies relating to cartels, with a view toward increasing their enforcement efforts in this area. Those countries include Brazil, Canada, Denmark, France, Israel, the Netherlands, New Zealand, Norway, Sweden, Switzerland and the United Kingdom.

Available data indicate that sanctions actually imposed have not reached the optimal level for deterrence.

The OECD survey permitted comparison of financial sanctions with the cartel gain in a relatively few cases. The fines, expressed as a percentage of the gain, varied widely, from 3% to 189%. In only four cases, two from the United States, one from Canada and one from Germany, were the fines more than

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100% of the estimated gain, and in no case was the fine as high as two or three times the gain, as recommended by some experts. Thus, it must be concluded that, while there is a distinct, if uneven trend toward more rigorous sanctions in cartel cases, available data indicate that larger sanctions are required to achieve effective deterrence.

I. Introduction

The 1998 Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels ("Cartel Recommendation") noted in its Preamble that "... hard core cartels are the most egregious violations of competition law and ... they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others". The Preamble notes further that hard core cartels "... create market power, waste, and inefficiency in countries whose markets would otherwise be competitive". The Recommendation calls on OECD Members to provide for "... effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels".

The 2000 Cartel Report noted that an important step in enhancing anti-cartel enforcement is "overcoming the knowledge gap concerning the harm done by hard core cartels".[1] Improving public knowledge about the nature of this conduct and the harm that it causes would bolster popular support for more effective action against it. The Report also called for further work on sanctions against cartels, recognising that the principal purpose of such sanctions is deterrence.[2]

This report is a follow-on to that earlier work. It discusses the types of harm that can result from cartel activity and notes issues relating to quantifying that harm. It describes some recent cartel cases in Member countries in which some approximation of the level of harm was estimated, and illustrates the nature of cartels with examples of evidence from such cases. It reviews the laws of Member countries providing for sanctions against cartels and lists some sanctions that were applied in recent cases. Finally it discusses the subject of optimal sanctions and again considers some recent cases relating to that question.

II. The nature and impact of cartels

Cartels are universally recognised as the most harmful of all types of anticompetitive conduct. Moreover, they offer no legitimate economic or social benefits that would justify the losses that they generate. Thus, they are condemned in all competition laws; in some countries they are classified as a crime. Sophisticated cartel operators know that their conduct is unlawful and so they conduct their business in secret, sometimes taking great pains to keep their agreements from the public and from law enforcement officials.

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That the harm from cartels is large is undisputed. Quantifying it precisely, however, is difficult. Data collected through a recent OECD survey provide some additional information on the magnitude of cartels' harm. The OECD's study permits the following general, non-scientific but important conclusion: The harm from cartels is even larger than has been previously thought, and conservatively exceeds the equivalent of billions of US dollars per year.

Issues of identification and calculation

It is helpful first to consider briefly the economic basis for the generally accepted conclusion that cartels cause great harm.

Cartels that successfully reduce output and raise price above the competitive level cause consumers, collectively, to purchase less of the cartelised product and to pay more for the quantity that they do purchase. There can be differing views about the real harm to society that results. Economists agree that there is a loss resulting from consumers' collective decision to purchase less of the product at the cartel price. A lower quantity of a product (or service) is produced and consumers are forced to substitute a less desirable product for that quantity that they can no longer afford to buy. There is another, usually larger loss to consumers resulting from their having to pay the higher cartel price for that quantity that they do purchase. Without more, however, economics could not conclude that society as a whole is worse off as a result of this "wealth transfer" from consumers to producers (the cartel operators).

Of course, economics is not the only means of determining cartel harm. There are social and equity issues that are relevant as well. It is difficult to be indifferent about the total effect of a cartel on consumers. They unwittingly pay a supra-competitive price that is the result of an agreement, usually secret, among producers who know, or should know, that their conduct is unlawful. Those circumstances plus the international consensus that an important purpose of competition laws is to protect consumers cause almost all competition experts to consider the wealth transfer effect as a cartel harm.

Cartels can have other harmful economic effects as well. In addition to the misallocation of resources described above, a cartel shelters its members from full exposure to market forces. The result could be reduced pressure to control costs and to innovate.[3] This harm to "productive" and "dynamic" efficiency is no less real than that to "allocative" efficiency described above, if even more difficult to measure.

Indeed, measuring any of the harms described above is difficult. The competition community tends to focus on the unlawful gain accruing to the cartel operators, because it is the easiest to calculate. There is another, equally important reason for concentrating on gain, however, which relates to sanctions. It is agreed

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that the purpose of sanctions in the cartel context is deterrence. As discussed further below, an optimal sanction should ensure that would-be cartel operators cannot expect to profit from such conduct, meaning that they would lose through sanctions whatever gains they might initially acquire. The optimal financial penalty, therefore, would take into account the gain from the unlawful conduct.

Calculating unlawful gain is also difficult, of course. In its simplest form it can be approximated by multiplying the increase in price resulting from the cartel agreement (the "overcharge") by the amount of turnover (in units) subject to the agreement.[4] Determining the hypothetical competitive price, or "reference price", that is used to determine the unlawful margin is itself difficult. One can either attempt to make a prediction of what the price would have been in the affected market, or use a "benchmark" price determined by examining one or more other markets comparable to the affected one where presumably there was no collusion.[5]

In sum, calculating the harm from cartels is difficult, and requires the use of various proxies and assumptions. There are several reasons why it should be done, however. The overarching one is the need to inform consumers and policymakers about the importance of implementing an aggressive program against this practice. It may also be necessary to calculate harm in order to provide redress to consumers who suffer from the effects of an unlawful agreement. An important additional reason, however, is that only by understanding the extent that cartels cause harm can governments apply appropriate sanctions against the practice, sanctions that provide an effective deterrent.

Estimates of actual harm

The Cartel Report noted recent prosecutions of international cartels in the United States, which disclosed that just ten such cartels had "affected over USD 10 billion in US commerce", and "cost individuals and businesses many hundreds of millions of US dollars annually in the US alone". Taking into account the fact that these data represented the effects of only a few cartels in one economy (albeit the world's largest), and that other cartels presumably are never discovered or prosecuted, the report extrapolated from that information the conclusion that the effects of hard core cartels world-wide are of great magnitude. The Report relied upon estimates that on average, cartels produce overcharges amounting to 10% of the affected commerce and cause overall harm amounting to 20% of affected commerce.

This report builds on the base provided in the Cartel Report, but progress in this area is difficult, for at least two reasons. First, most competition laws do not require proof of a specific harm as an element in the prosecution of a hard core cartel. While most countries have not embraced a "per se" rule like that in effect in the United States, proof of a specific level of harm is usually not required to establish

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liability, and so competition agencies usually do not undertake to do it. Second, as discussed above, it is difficult to calculate harm. Thus, even where proof of harm may be useful in arriving at an appropriate sanction it may not be done.

In early 2001 Working Party No. 3 of the Competition Committee collected data from 15 Member countries on cartel cases that they had processed between 1996 and 2000. The Members provided information about a total of 119 cases. These cases do not represent nearly all of the cartel cases prosecuted by the responding countries (nor indeed, by all OECD countries) in that period, however. Issues of reporting burdens or confidentiality of information kept some countries from reporting on all of their cases. Thus, these 119 cases represented substantially less than half of the total number of cartel cases prosecuted by OECD countries in the relevant period, although they do include many of the larger ones.

In October 2001 the Competition Committee held its first "Global Forum on Competition". Delegations from eighteen non-Member countries[6] participated with Committee delegates in a two-day meeting on competition policy issues of interest to all participants. The invitees were asked to submit information about cartel cases that had been prosecuted in their countries in recent years. Twelve countries responded. Those responses were also employed in the preparation of this report. A summary of the responses is contained in Annex C.

The surveys provided some interesting information about the general characteristics of cartels that have come to the attention of competition agencies. By number, domestic cartels, or cartels that affect markets that are no larger than national boundaries and sometimes smaller, were predominant in the survey results. The participants in these cartels were usually local or domestic firms, though on occasion they were domestic subsidiaries or affiliates of foreign enterprises. Domestic cartels occurred in all economic sectors, but they were relatively more common in some sectors, including construction and construction materials (cement, concrete, asphalt), sales to government institutions, bulk food products, electrical equipment, and the services sector, including in particular local transportation services, the professions and health care. A single "profile" of markets that were subject to cartelisation did not emerge, but some characteristics did come up repeatedly, including high concentration (but not necessarily in some service markets), homogeneous products and, a factor that occurred in many cases, the existence of an industry trade association that provided the opportunity for conspirators to meet and agree. Some of these cartels had existed for many years, even decades, especially in countries that had not long been prosecuting cartels actively.

More recently, however, competition agencies have begun to uncover and prosecute large international cartels, whose participants are multinational companies headquartered in different countries. The number of reported international

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cartels was relatively small, which makes generalisation difficult, but these markets also tended to be highly concentrated, to involve homogeneous products and to have at the centre of the conspiracy an industry trade association. Several of the international conspiracies had devised complex price fixing schemes, which were augmented and made more transparent for their members by market allocation agreements, either in the form of quotas or territorial agreements. In some cases involving both domestic and international cartels the cartel operators had designed elaborate mechanisms to enforce the agreement and punish cheating.

In several of the reported cases evidence was developed showing that the cartel operators fully realised that their conduct was harmful and unlawful, causing them sometimes to go to great lengths to keep their agreement secret. Following are a few examples:

- Fire protection devices, Australia: Officials from one of the largest corporate defendants provided detailed evidence of deliberate destruction of incriminating documents after ACCC document demands were received. Two men, with the approval of their superior, loaded two automobiles with bid files and took them to the country, where it took a full day to burn them in "four huge bonfires".

- Driving schools, Denmark: One person remarked: "... [I]f we compete on prices at that level, a bit of mental calculation will show that each of us would give away 75 000 DKK each year to our customers instead of earning the money ourselves. That would be a stupid thing to do".

- Ready-mix concrete, Germany: The cartel kept detailed records, specifying in some cases the allocations of sales to the second decimal point. The system even specified who was to provide food and drink for the cartel meetings.

- Hotel association, Spain: the chairman of the hotel association wrote to his members: "... [W]e should make an important effort in order to obtain a price increase between two to four points over the inflation rate..." At the same time the association was urging such an increase it represented to the Spanish government that it would not attempt to raise rates in order to help to control inflation.

- Lysine, US: The now widely-viewed videotapes of cartel meetings contain several examples of overt, knowing conspiratorial activity, including some members joking at one meeting about inviting their customers and antitrust officials to sit with them. They also show an ADM executive exhorting his co-conspirators at one meeting to support the agreement, in which he says, "I wanna be closer to you than I am to my customer ..." a sentiment that coincided with the oft-quoted unofficial motto at ADM, "Our competitors are our friends; our customers are the enemy".

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- Vitamins, US: The conspirators went to great lengths to keep track of and destroy incriminating documents, including conducting internal audits to verify that such documents no longer existed. When it was felt necessary to keep certain spreadsheets showing allocations of business among the conspirators, the files were copied onto computer disks and hidden in the eaves of one employee's grandmother's house.

The surveys also provided information about harm resulting from the reported cases. Annex A provides information about some of the larger cases in the surveys. The data relating to amount of affected commerce and harm are not complete, for the reasons outlined above, but they do support some general conclusions. It was possible to estimate the amount of affected commerce in 16 of these large cases. Many of them involved affected commerce in the hundreds of millions or billions of national currency. The total for the 16 cases exceeded USD 55 billion. In some of the other reported cases it was not possible to provide a specific estimate of affected commerce, but the reporting agency noted that it amounted to "many billions" of national currency. Taking into account the many cartel cases, both known and unknown, in which specific amounts of affected commerce cannot be calculated, it seems clear that the total of such commerce amounts to many billions of dollars each year.

Annex A also provides estimates of harm, expressed in terms of percentages of affected commerce, that could be derived in 14 of the cases. These estimates range from a low of 3% to a high of 65%. Specifically, there were two cases below 5%, five between 5% and 15%, four between 20% and 30%, and three at 50%-65%. Real-world data on actual harm is sparse, however. One relevant document, the United States Sentencing Guidelines, employs certain assumptions about gain and loss in the cartel context:

> It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss… [in calculating a base fine]. The purpose for specifying a per cent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the Guideline fine range.[7]

Empirical data supporting these percentages are sparse.[8] Interestingly, in the limited data (14 cases) from the survey, the median is between 15 and 20%. At the very least it seems clear that the gain from cartel agreements can vary

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significantly from case to case, and sometimes it can be very high. Moreover, since the actual loss to consumers includes more than just the gain transferred to the cartel, as discussed above, that loss – the total harm from cartels – is significant indeed.

In sum, it has been generally accepted for many years that cartels inflict substantial harm on consumers throughout the world. The experience of OECD countries in recent years, as they become more aggressive in finding and prosecuting cartels, has been to confirm that assumption. Indeed, recent cases against large, international cartels suggest that the dimensions of the problem are even larger than previously thought. It remains difficult to place a monetary value on the harm, but it is surely significant, amounting to billions of dollars annually.

III. Sanctions available and applied in cartel cases

Sanctions in Members' Competition Laws

Annex B contains thumbnail descriptions of the available sanctions for hard core cartels in the laws of Member countries.

Fines against enterprises

The laws of most Member countries provide for the possibility of large fines against enterprises found to have participated in a cartel. Maximum permissible fines may be expressed either as a specific monetary amount or as a percentage of some measure of turnover, or both. In the first category are Australia (AUD 10 million), Canada (CAD 10 million per count for conspiracies and discretionary for bid rigging) and Mexico (375 000 times the minimum general wage prevailing in the Federal District, currently the equivalent of about USD 1.5 million). In the second category, maximum fines expressed as a percentage of turnover, are France (10% of world-wide turnover), European Union (10% of previous year's global turnover), Hungary (10% of previous year's turnover), Italy (10% of previous year's turnover), Sweden (10% of annual revenue), and United Kingdom (10% of UK turnover for the duration of cartel, maximum three years).

Several countries have both types of maximums: Czech Republic (CSK 10 million or 10% of "net turnover" for previous year), Finland (EUR 672 752 or 10% of previous year's global turnover), Ireland (EUR 3 809 214 million or 10% of previous year's turnover), Japan (administrative surcharge of up to 6% of cumulative sales of products subject to the agreement, maximum three years, criminal fine of up to JPY 100 million), Korea (surcharge of 5% of turnover affected by cartel or KRW 1 billion, criminal fine of up to KRW 200 million), Netherlands (EUR 450 000 or 10% of turnover), Poland (the lesser of EUR 5 million or 10% of previous year's turnover) Slovak Republic (SKK 10 million or 10% of previous year's turnover), Spain

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(EUR 901 518 or 10% of previous year's turnover) and Turkey (TRL 200 million or 10% of previous years gross income). Two countries also provide alternatives, but instead of total turnover the maximum is stated in terms of unlawful gains: Germany (administrative fine of EUR 511 292 or three times additional profit from the cartel and United States (USD 10 million or twice the gain to the cartel or loss to the victims). A recent amendment to the New Zealand law provided for three alternatives: the greater of NZD 10 million, three times the illegal gain, or if the illegal gain is not known, 10% of the enterprise's annual turnover. Denmark and Norway provide for fines, but maximums are not stated. In Norway a court can also order confiscation of the cartel gains.

Fines against natural persons

Several countries, but less than half, provide for the imposition of fines on natural persons involved in cartel conduct: Australia (AUD 500 000), Canada (CAD 10 million per count for conspiracies and discretionary for bid rigging), France (EUR 1 524 490), Germany (administrative fine up to EUR 511 292 or three times the additional profit from the cartel realised by the natural person (and not the enterprise); criminal fines of up to EUR 1 840 651 for collusive tendering), Ireland (EUR 3 809 214), Japan (JPY 5 million), Korea (KRW 200 million), Mexico (7 500 times minimum general wage in Federal District), New Zealand (NZD 500 000), Norway (unspecified fines), Slovak Republic (unspecified fines), Spain (EUR 30 050), United States (USD 350 000 or twice the gain to the cartel or loss to the victims). In the majority of countries that impose fines on natural persons the violation is classified as a crime.

Imprisonment of natural persons

Fewer countries provide for the criminal sanction of imprisonment for natural persons: Canada (5 years per count), Germany (5 years for collusive tendering), Ireland (2 years), Japan (3 years), Korea (3 years), Mexico (sanction determined by the judicial authority), Norway (6 years), Slovak Republic (5 years), United States (3 years).

Recovery of damages by victims

In the following countries it is possible for victims of cartel activity to recover damages for their monetary loss, either in the course of the enforcement proceeding by the competition authority or separately in a civil action: Australia, Canada, Denmark, Finland, Germany, Ireland (including exemplary damages), Japan, New Zealand (including exemplary damages), Norway, Spain, Sweden, Switzerland, United Kingdom, United States (three times actual damages).

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Sanctions actually applied in cartel cases

Fines against enterprises

Annex A provides data on sanctions imposed in several of the larger cases reported in the OECD survey on cartel cases. The monetary sanctions are also expressed as percentages of affected commerce and estimated harm, where those two factors could be calculated. The data show that in some countries large fines for cartel conduct, often in tens or hundreds of millions of national currency, are common. Ten countries have imposed fines in excess of the equivalent of USD 1 million. In three countries the largest fines were in excess of USD 100 million: the European Commission, Germany, and the United States; in two the largest were between USD 10 and 100 million: Canada and Korea; and the remainder were between USD 1 and 10 million: Australia, Finland, Japan, Norway and Spain. Other countries, of course, have not been so aggressive, but in several countries there are efforts underway to bring about substantially larger fines in cartel cases in the future, discussed further below.

Increases in fines in the United States have been particularly noteworthy in recent years. In the ten years prior to 1997 an annual average of USD 29 million in fines was collected. In 1997 USD 205 million was assessed, and in the four-year period 1997-2000 the total fines collected were USD 1.7 billion. This effort coincided with a new emphasis in the US on prosecuting international cartels that harmed US consumers. More than 90% of the 1.7 billion in fines collected in 1997-2000 was obtained in international cartel cases. Other countries reported similarly dramatic increases in fines in recent years, including Australia, Canada, the European Commission, Germany and Korea.

Fines against natural persons

Only four countries, Australia, Canada, Germany and the United States, reported in the survey that they had imposed fines on natural persons. All four were aggressive in targeting individuals for punishment, however. Canada, Germany and the United States each reported several fines that exceeded the equivalent of USD 100 000. Again, the US has imposed some very large fines on natural persons in recent cases. In the graphite electrodes case, three individuals were fined in excess of USD 1 million, the largest of the three being 10 million. In a recent case involving bid rigging in sales of food to the New York City schools, one individual was fined 1 million and he and his company were required to pay 4.2 million in restitution.

Imprisonment of natural persons

Two countries, Canada and the US, reported sentencing individuals to terms of imprisonment. Canada reported three such sentences, the longest being for

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one year. Other individual defendants were required to perform community service for a specified period. The US has been the most active in imposing imprisonment for cartel conduct. In fiscal year 1999, 28 individuals received such sentences; in 2000, 18. The average length of those terms of imprisonment was approximately 8 months in 1999 and 10 months in 2000. Again, in recent cases some longer terms have been imposed. In the lysine case three individuals were sentenced to terms of 36, 34 and 30 months, respectively. In the New York food bid rigging case noted above, the individual who was required to pay restitution of USD 4.2 million and fined 1 million was also sentenced to imprisonment for four years, the longest such penalty yet imposed in a cartel case.[9]

Reviews of sanctions in other countries

It is clear from the discussion above that countries are at different places in their treatment of cartels. There is substantial variation across countries in the number of prosecutions and in the sanctions applied to them. Several countries have just completed or are in the process of reviewing their laws and policies relating to cartels, however, with a view toward increasing their enforcement efforts in this area. These include Denmark (a new competition law in 1998), France (an amended competition law in 2001), Ireland (a new emphasis on cartels as the top enforcement priority), the Netherlands (a new competition law in 1998, new guidelines for the setting of fines in 2002 and ongoing work on a leniency programme), New Zealand (a recently completed study of optimal sanctions, discussed below, and amendments to the competition law in 2001), Norway (a recently completed study of optimal sanctions, discussed below), Sweden (a proposal to criminalise cartel conduct), Switzerland (a proposal for fines for substantive violations of the competition law) and the United Kingdom (a new competition law that took effect in 2000 and an aggressive anti-cartel programme). Among non-Member observer countries to the Competition Committee, Brazil and Israel have implemented new anti-cartel programmes recently.

Conclusion

The competition laws of OECD countries provide for a wide range of sanctions against cartel participants, and by their terms they permit the imposition of heavy penalties. There is a clear trend in several countries toward stronger sanctions in cartel cases, and other countries are reviewing their laws and policies to provide for enhanced sanctions against cartels. Whether even the recent, more severe penalties are sufficient to deter future cartels is an open question, however, which is discussed further below.

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IV. Optimal sanctions

The principal purpose of sanctions in cartel cases is deterrence. The decision to form or join a cartel is primarily a financial one – cartels can rapidly and substantially improve their participants' profitability.[10] An effective deterrent, therefore, is one that promises, on average, to take away the financial gains that otherwise would accrue to the cartel members. Sanctions have another, related purpose in the cartel context – that of providing an incentive for cartel participants to defect from the secret agreement and provide information to the investigators.[11] The "carrot and stick" approach to cartel investigation requires that the "stick" – the possible sanction – be sufficiently severe to give effect to the "carrot" – the opportunity to avoid the sanction by co-operating. Thus, for both deterrence and co-operation purposes the potential sanction must be substantial if it is to be effective.[12] The following discussion will focus on the deterrent value of sanctions, as sanctions that are severe enough to be an effective deterrent will also provide the necessary stimulus to co-operate.

Fines against enterprises

In theory

As noted above, both New Zealand and Norway have studied this subject recently, and both came to similar conclusions.[13] These studies agree with the generally accepted wisdom that an effective sanction takes into account both the expected gains from the cartel and the probability that the cartel will be detected and punished.

> Firms will tend to discount the expected costs of penalties or remedies by some factor that represents their view on the likelihood of detection and punishment.... As detection and punishment are not perfect, effective deterrence requires penalties (or remedies) to be greater than the expected benefit from the illegal activity to compensate for imperfect detection and prosecution.[14]

> The most important principle for levying fines is that expected loss from violating the law should exceed the gain.[15]

To what extent the financial punishment should exceed the gain is much less clear. If, for example, only one in three cartels is detected and punished, then the monetary penalties for those that are prosecuted should be at least three times the expected gains if there is to be effective deterrence. It would be quite difficult to estimate the probability of detection of cartels, however, which in any event probably varies from country to country. One study based on a sample of cases from the United States during the period 1961 to 1988 estimated the probability of detection and punishment as between 13% and 17%, or between one in six and one in seven.[16] The US authorities have developed more effective investigation

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methods since 1988, of course, notably an enhanced leniency programme, which presumably have improved the detection rate in that country. The detection rate in some other countries, however, is probably lower than in the US

In any case, determining the multiplier to be applied to the gain is not the only problem in applying this equation. Quantifying the gain is itself difficult, as discussed above. Both Norway and New Zealand confronted this issue in their studies of optimal sanctions. Norway focused on simplifying the methodology for calculating gain from the cartel conduct. In its simplest form the calculation can be: cartel price minus the competitive price, or "reference price", multiplied by the turnover (in units) affected by the cartel agreement. Norway proposes that the reference price be determined by "benchmarking", using data from related, presumably competitive, markets.

New Zealand would focus equally on measuring the illegal gain and exceeding it by some amount to take into account a probability of detection of less than one, but it recognises the difficulties with calculating the gain, and proposes that a "proxy" for gain be available where necessary. The New Zealand study examined some alternative forms of sentences employed in other countries, as described above, including those that: 1) have a specific maximum stated in national currency, 2) are stated in terms of percentage of annual turnover, 3) are stated in terms of multiples of illegal gain, or 4) employ a combination of these measures. The study proposed

> … that penalties be allowed to be imposed of up to three times the illegal gain, or 10% of annual turnover (*i.e.* the Swiss model).[17] The Swiss model is preferred as it has the advantage that it sends a signal to the courts that penalties should be punitive by using a multiple of the illegal gain. The model then acknowledges the difficulty of calculating illegal gain by providing a proxy – the percentage of turnover.[18]

In 2001 the law was amended according to this recommendation, combining three measures: the greater of NZD 10 million, three times the illegal gain or, if the gain is not known, 10% of the turnover of the body corporate.

In recent years some large, high-profile international cartels that affected many countries have been discovered and prosecuted. Designing effective sanctions against these agreements presents special issues. Theoretically, unless a multinational cartel participant is prosecuted and fined in most or all of the countries in which the cartel had effects, the cartel still might have been profitable after paying fines in only some of the countries affected. This problem can be addressed, of course, through enhanced international co-operation in investigating and prosecuting these agreements. Further, the laws of several countries permit, sometimes explicitly, fines to be assessed on the basis of world-wide turnover. Thus, the cumulative effect of fines in these countries could account for

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non-prosecution in other countries. Of course, there is also a possibility of double counting if foreign turnover is taken into account in more than one country. That concern may be more theoretical than real, however, especially since some national laws permit basing fines on only one year's turnover.[19]

In practice

There are two issues affecting the adequacy of fines as a deterrent: whether a country's competition law permits fines that are sufficiently large to achieve the desired effect; and whether, if the laws are adequate, the fines actually imposed by the competition agency (and courts, where applicable) are large enough.

Assuming that an optimal sentence is best expressed as a multiple of the unlawful gain, the laws of only three countries, Germany, New Zealand and the United States, are written in that fashion – three times the gain in Germany and New Zealand and in the United States two times the gain realised by the entire cartel (not just the defendant). Other countries employ either a specified maximum amount or a percentage of annual turnover, or a combination of the two. Whether these measures are sufficiently large in any given country is difficult to determine in the abstract. Presumably the harm from a cartel – and therefore the optimal sentence – will vary according to the size of an economy.

One benchmark might be the new law in New Zealand. That country's economy is relatively small, on the global scale, and it has recently completed an in-depth review of optimal sanctions against cartels. As noted above, its new law provides for organisational fines of the larger of three times the unlawful gain, NZD 10 000 000 or 10% of the total turnover of the enterprise. Ten million NZD is equivalent to approximately EUR 4.8 million. Fifteen countries listed in Appendix B other than New Zealand express maximum fines at least in part in absolute terms. In 11 of the 15, the maximum amount is less than New Zealand's. Most of these countries, however, provide alternative maximums in terms of percentages of the annual turnover of the offending organisation. Maximum fines under this standard are potentially much larger. For example, the European Commission has imposed some very large fines (see Appendix A) under its maximum of 10% of the offender's annual global turnover. In a few countries, however, the relevant turnover is defined more narrowly, such as turnover affected by the cartel, or turnover within the prosecuting country. These limits would result in much smaller maximum fines.[20]

In sum, if it is concluded that an optimal organisational fine is one that is at least three times the unlawful gain to the respondent, it is difficult to determine in the abstract if the maximum fines in the laws of most countries are sufficiently large, as most of the maximums are not expressed in terms of unlawful gain. It is

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likely that in some cases, however, existing laws would not permit the imposition of optimally large fines against organisations.

In any case, the limited data that are available indicate that countries are not yet assessing fines that approach optimal levels. Annex A summarises 38 of the 119 cases reported in the OECD survey. On balance these are the larger ones, in terms of affected commerce and size of sanctions. It was possible to express pecuniary sanctions as a percentage of affected commerce in only 10 of these cases because, as discussed above, available data did not permit making even rough estimates of this relationship in most cases. In these 10 cases there was substantial variation in sanctions as a percentage of harm, ranging from 3% to 189%. Interestingly, four were above 100%, two from the US, one from Canada and one from Germany, though none was as large as twice the gain, when the prevailing wisdom seems to be that the multiple should be at least two or three.

The US has had the most experience with fines nominally expressed as a multiple of the unlawful gain. US law, it will be recalled, provides that the maximum corporate fine for cartel conduct is the larger of USD 10 million or twice the gain to the entire cartel or loss to the victims from the conduct. As of September 2001 US courts had imposed more than 30 fines larger than USD 10 million in cartel cases.[21] They had also imposed at least five fines upon individuals in excess of the statutory maximum of USD 350 000. These fines in excess of 10 million and 350 000 were assessed, at least implicitly, under the "twice the gain or loss" formula. In fact, however, none of them was based on a finding by a court of gain or loss; all were resolved by a plea agreement. There are strong incentives in the US system for both the government and the defendant to avoid litigation on the gain or loss issue.[22] US officials state that they do make estimates of gain or loss in the process of applying the statutory formula internally,[23] but their calculations usually are not publicly disclosed and have not been tested in court.

Compensatory damages for victims

As noted above, the laws of several OECD countries, but fewer than half, provide for recovery of compensatory damages by cartel victims. Such damages are properly considered as a component of pecuniary sanctions to which cartel participants are exposed. While the possibility for recovery of damages exists in several countries, it is seldom invoked, however. Civil damage cases are not common in most countries, save again the US, which has its well-known treble damage liability in antitrust cases. A detailed analysis of the US treble damage policy is beyond the scope of this report, and in any event there is disagreement both within and without that country about the utility of various aspects of it. It is without doubt an important component of the financial deterrent to cartel conduct under US law, however.[24]

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New Zealand studied the issue of strengthening incentives for private damage actions as a part of its review of sanctions.[25] The report stated:

> Private enforcement of the Commerce Act 1986 is a necessary corollary to public enforcement in achieving an optimal deterrence to would be offenders. However, the Act currently provides insufficient incentives for market participants to engage in private litigation under the Act.[26]

It concluded that merely providing for the recovery of compensatory damages would not provide sufficient incentives for private enforcement in the New Zealand system. The report considered both treble damages and exemplary (punitive) damages as additional incentives, and settled on the latter, concluding that they are likely to provide more accurate signals and to offer greater fairness.[27]

Sanctions against natural persons

In Theory

In theory it is possible to fashion a sufficient deterrent simply through financial sanctions against the enterprise, but there are practical difficulties with such a regime. As discussed above, sufficient information on which to calculate the penalty (including the amount of the cartel gain and the multiple to be applied to it to account for the probability of detection and punishment) is usually lacking. But further, the optimal fine may be too large for the enterprise to bear; if imposed it could cause it to exit the market, one adverse result of which, of course, would be to diminish competition. The result in most cases of this kind would be the imposition of a less than optimal fine. Thus, a case can be made for providing for additional sanctions against individuals who engage in cartel conduct.[28]

This was the conclusion in a recent report to Parliament by the United Kingdom Department of Trade and Industry.[29] The report concluded that it would not be feasible to impose optimal fines on organisations if one assumes that the proper multiple to be applied to the cartel gain to arrive at the optimal fine is as high as six. To address the problem the report recommended creating a new criminal offence for individuals who participate in hard core cartels. The crime would be punishable only by imprisonment ("custodial sentence"). The report recommended against individual fines as punishment, given the risk, apparently unavoidable, of the employer paying the fines for its employees.

New Zealand studied this issue in its review of appropriate sanctions. Current New Zealand law provides for civil fines of individuals of up to NZD 500 000 (approximately EUR 236 000) for cartel conduct. The report concluded that this level of fine was sufficiently large, but noted that the sanction had been little used. The report recommended certain options for increasing the imposition of fines against individuals, including signalling to the courts that there is a greater

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need to impose such penalties and forbidding an employer from indemnifying the individual for any such fines imposed.[30]

Sanctions against individuals have another beneficial effect. They provide an incentive for individuals to offer co-operation in cartel investigations, against the interest of their employer. Thus, individual sanctions can enhance the effectiveness of leniency and "whistleblower" programmes. There is an offsetting consideration relating to individual sanctions, however. In many countries, sanctioning individuals requires criminalisation of the conduct. In that context individuals have rights against self-incrimination, which makes it more difficult to obtain evidence from them unless they willingly co-operate. In this sense, criminalisation of cartel conduct for individuals makes voluntary co-operation more possible, because of the threat of personal sanctions, but also makes it more necessary, because a right against self-incrimination attaches.

In practice

As noted above, while the laws of as many as thirteen OECD countries provide for the imposition of fines against individuals and seven provide for imprisonment for cartel conduct, only four have actually fined individuals in recent years and in only two have sentences of imprisonment been imposed. Thus, few countries are currently employing this potentially important, additional sanction.

Conclusions

Accurate quantification of the harm from hard core cartels is not currently possible, for several reasons, but there is no doubt that it very large, amounting to the equivalent of many billions of US dollars annually. OECD countries are increasingly aware of the magnitude of the problem, and of the need to impose severe sanctions on cartel participants so as to deter such conduct. Sanctions in recent cases in some countries reflect this growing awareness. Fines against enterprises above the equivalent of USD 1 million are no longer uncommon in some countries. Sanctions against individuals have also dramatically increased in a few countries, where such sanctions are legally possible. Still other countries have recently undertaken a review of their sanctions policy, with a view toward increasing penalties for cartel conduct. The trend toward more rigorous sanctions in cartel cases is uneven – in some countries sanctions continue to be minimal – but it is unmistakable.

A related question has to do with what level of sanctions is sufficient to provide the necessary deterrent to would-be cartel operators. This question also is difficult to answer accurately. Without doubt the sanctions should be severe. Many experts hold the view that the gross amount of financial sanctions should be greater than the gain to the cartel, to account for the fact that not all cartels are discovered and punished. Multiples of two or three times the cartel gain are most

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often advanced for this purpose, but studies supporting larger multiples exist. Sanctions can be imposed in any of three ways: as fines or forfeitures upon the offending enterprises; as fines, and in a few countries, imprisonment, imposed on natural persons who participate in the cartel; and as compensatory and, possibly, punitive damages awarded to the victims of the cartel. Sanctions against natural persons and civil damages are currently employed in only a few countries, but these alternative methods can provide an important supplement to organisational fines.

In any case, while there is a noticeable trend toward more rigorous sanctions in cartel cases, available data indicate that sanctions against enterprises and natural persons have not yet reached the optimal level for deterrence.

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Notes

1. I*d*. at 13.
2. I*d*. at 19-20.
3. Cartel operators desire to maximise profits, of course, which means that each firm has incentives to control costs even in the cartel environment, but the agreement lessens external pressures to do so.
4. This methodology does not take into account other relevant factors, such as changes in unit costs resulting from the cartel and possible lost "profits" resulting from a reduction in unit sales caused by the higher cartel price.
5. New Zealand and Norway have recently undertaken ambitious studies of sanctions under their competition laws. Both deal in greater detail than this paper with these issues of identifying and quantifying harm to consumers and gain to producers resulting from cartels. Both also contain excellent analyses of the topic of optimal sanctions, which is discussed below. "Review of the Penalties, Remedies and Court Processes under the Commerce Act", Office of the Minister for Enterprise and Commerce, New Zealand, 1998; "Sanctioning Pursuant to the Norwegian Competition Act", Norwegian Competition Authority, 2001.
6. Argentina, Bulgaria, Chile, China, Chinese Taipei, Egypt, Estonia, India, Indonesia, Kenya, Latvia, Romania, Slovenia, South Africa, Thailand, Ukraine, Venezuela and Zambia.
7. United States Sentencing Guidelines, §2R1.1 cmt. n. 3.
8. S*ee*, Klawiter, "After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment and Other Penalties in the Age of International Cartels", Remarks before the George Washington Law Review Symposium, 2001, at 17.
9. The maximum sentence for a single violation is three years, but this person was also convicted of other crimes that were related to and arose out of his cartel conduct.
10. There are ancillary benefits to the cartel participants as well. Cartels offer the "quiet life", or perhaps more accurately a "less stressful life", to their members – a respite from the full rigours and uncertainties of a competitive marketplace.
11. See generally, Report on Leniency Programmes to Fight Hard Core Cartels, OECD Competition Committee, 2001.
12. Sanctions are not the only deterrent to cartel conduct, of course. The probability of detection is a related and important element. Detection can be enhanced in a variety of ways, including the provision of adequate investigation tools, an effective amnesty programme and, in the context of international cartels, effective international co-operation among national competition agencies.

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13. See note 4 above.
14. New Zealand, "Overview Paper" at paras. 28-29.
15. Norway, Summary of the Committee's Report.
16. P.G. Bryant and E.W. Eckhard (1991): Price Fixing: The Probability of Getting Caught", *Review of Economics and Statistics* 531.
17. In fact, as noted above, Switzerland has no direct sanctions for cartel conduct at present. Those fines can be imposed for failure to adhere to a decision of the Competition Commission or a voluntary settlement. An amendment providing for direct sanctions has been proposed.
18. New Zealand, "Paper 2 – Reforming Penalties and Offences" para. 16.
19. The European Commission, for example, can impose a fine of up to 10% of an enterprise's world-wide turnover in the preceding business year. Regulation 17/62, Article 15(2). The United States Sentencing Guidelines require calculation of fines in antitrust cases on the basis of "affected commerce," the definition of which is not limited to turnover in the US United States Sentencing Guidelines, §2R1.1(d)(1). The US Department of Justice takes the position that it can consider foreign turnover in its fine calculations. *See*, Spratling, "Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?", remarks before the Twelfth Annual National Institute on White Collar Crime (1998), available at *www.usdoj.gov/atr/public/speeches/*1583.*htm*.
20. One writer has concluded that even a maximum of 10% of total turnover is likely not to be large enough in many cases. Assuming a gain to the cartel of 5% of the selling price (low, by most estimates), a duration of the cartel of five years and a 16% probability of detection, the optimal fine would be approximately 150% of the annual selling price of the cartelised product. In this hypothetical, only in the case in which the turnover of the cartelised product amounts to less than one fifteenth of the enterprise's total turnover would 10% of total turnover be sufficiently large. Wouter P.J. Wils, "Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment?", at 11-14, presented to Sixth EC Competition Law and Policy Workshop at the European University Institute (Florence, 1-2 June 2001), available at *www.iue.it*/RSC/*competition*2001(*papers*).*html* and forthcoming in C.D. Ehlermann (ed.), European Competition Law Annual 2001 : Effective Private Enforcement of EC Antitrust Law (Hart Publishing 2002) and in W.P.J. Wils, The Optimal Enforcement of EC Antitrust Law : Essays in Law and Economics (Kluwer Law International 2002).
21. For data on these fines through March 2001, see, Griffin, "Status Report: Criminal Fines, International Cartel Enforcement, Corporate Leniency Program", remarks before the American Bar Association Section of Antitrust Law, 49th Annual Spring Meeting, March 28, 2001, available at *www.usdoj.gov/atr/public/speeches/*8063.*htm*.
22. See, Klawiter, note 7.
23. See, Spratling, "The Trend Towards Higher Corporate Fines: It's a Whole New Ball Game," remarks before the Eleventh Annual National Institute on White Collar Crime, New Orleans, Louisiana, March 7,1997.
24. Damage recoveries in private litigation resulting from the vitamins cartel, for example, have amounted to approximately USD 1 billion, and some aspects of the litigation are continuing. Private recoveries in the lysine litigation amounted to USD 45 million. There continues to be debate, however, about whether such recoveries are, on the one hand,

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still too small to provide an adequate deterrent, or on the other, excessively punitive. C*ompare*, Adams, Colón and Busman, "License to Steal – The Benefits of Cartel Activity Still Outweigh the Costs", presented at the American Bar Association Section of Antitrust Law 49th Annual Spring Meeting, March 29, 2001, *with* Denger and Arp, "Does our Multifaceted Enforcement System Promote Sound Competition Policy?" Antitrust Magazine, summer 2001, 41-46.

25. New Zealand, "Paper 3- Reforming Remedies".
26. I*d*. at para. 1.
27. The 2001 amendments to the competition law added the remedy of exemplary damages in private cases.
28. See Wils, *supra*.
29. Department of Trade and Industry, "A World Class Competition Regime", July 2001, 37-45.
30. The 2001 amendments to the competition law left the maximum fine for individuals unchanged but provided that a court must impose a fine on an individual adjudged to have engaged in a cartel unless there are good reasons not to.

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Annex A

Selected Cartel Cases

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Affected commerce, estimated harm and sanctions applied

Monetary amounts stated in local currency – euros in eurozone countries

	Case	Affected commerce	Estimated harm	Sanctions (including damages to private parties, where applicable)	Fines as % of affected commerce	Fines as % of estimated harm
Australia	Distribution Transformers	320 505 000	n.a.	1.5 million (case continuing)	n.a.	n.a.
Australia	Power transformers	40 million	n.a.	5.5 million (case continuing)	n.a.	n.a.
Australia	Vitamins	n.a.	n.a.	26 million	n.a.	n.a.
Australia	Frozen foods, Tasmania	n.a.	10-12% price increase	1.245 million	n.a.	n.a.
Australia	Installation of fire protection devices	More than 500 million	5-15% price increase	15.386 million	3%	31%
Canada	Snow removal	16 million	Up to 20%	4.048 million	25%	127%
Canada	Lysine	n.a.	n.a.	3.573 million	n.a.	n.a.
Canada	Citric acid	n.a.	n.a.	11.5 million	n.a.	n.a.
Canada	Sorbates	n.a.	n.a.	25.3 million	n.a.	n.a.
Canada	Vitamins	706.35 million	n.a.	91.395million (case continuing)	13%	n.a.
Denmark	Electric wiring services	n.a. (many billions over "several decades")	20-30%	(Case continuing)	n.a.	n.a.
European Commission	Graphite electrodes	More than 2 billion	Up to 50%	218.8 million	11%	22%
European Commission	Lysine	n.a.	n.a.	110 million	n.a.	n.a.
European Commission	British sugar	n.a.	n.a.	50.2 million	n.a.	n.a.
European Commission	Pre-insulated pipe	More than 2 billion	n.a.	92.210 million	5%	
European Commission	Vitamins	n.a.	n.a.	855.22 million	n.a.	n.a.
Finland	Purchases of raw wood	n.a.	n.a.	30 million	n.a.	n.a.
Germany	Ready-mix concrete	1 406 million (OECD estimate)	112 million (8% of affected commerce)	153 million	12%	136%
Germany	Road markings	More than 358 million (OECD estimate)	"Hundreds of millions" (more than 14% of affected commerce – OECD estimate)	13.1 million	3%	n.a.

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Affected commerce, estimated harm and sanctions applied (*cont.*)

Monetary amounts stated in local currency – euros in eurozone countries

	Case	Affected commerce	Estimated harm	Sanctions (including damages to private parties, where applicable)	Fines as % of affected commerce	Fines as % of estimated harm
Germany	Power cables	Many billions	Up to 50%	127.6 million	n.a.	n.a.
Japan	Ductile iron pipe	n.a.	n.a.	11.1 billion surcharges, 230 million criminal fines	6%	n.a.
Korea	Military fuel	USD548.3 million	n.a.	USD14.6 million	3%	n.a.
Mexico	Lysine	n.a.	n.a.	1.699 million	n.a.	n.a.
Norway	Hydro-electric power equipment	1.6 billion	140 million (9% of affected commerce)	75 million	5%	54%
Slovak Republic	Flour	n.a.	200-300/ton	2.24 million	n.a.	n.a.
Slovak Republic	Beer	4 billion	n.a.	1 million	Less than 1%	n.a.
Spain	Hotel association	6 billion	180 million (3% of affected commerce)	6 600	Less than 1%	Less than 1%
Spain	Sugar	1.1 billion	25.2 million (2% of affected commerce)	8.7 million	Less than 1%	35%
Switzerland	German language books	Many billions	n.a.	Fines not currently possible; amendment proposed	n.a.	n.a.
Switzerland	Drug distribution, industry-wide	n.a.	n.a.	Id.	n.a.	n.a.
United States	Lysine	1.4 billion world-wide	78 million in US	147.48 million; imprisonment for three executives	n.a.	189%
United States	Citric acid	4.8 billion world-wide, 320 million US	100 million in US (31% of affected commerce)	141.89 million	44%	142%
United States	Graphite electrodes	6 billion world-wide, 1.7 billion US	As much as 65%	410 million; imprisonment for two executives	24%	n.a.
United States	Cairo wastewater construction	300 million US	100 million (33% of affected commerce)	87.7 million;	29%	88%

Affected commerce, estimated harm and sanctions applied (*cont.*)

Monetary amounts stated in local currency – euros in eurozone countries

	Case	Affected commerce	Estimated harm	Sanctions (including damages to private parties, where applicable)	Fines as % of affected commerce	Fines as % of estimated harm
United States	Marine construction	1 billion world-wide, 107 million US	n.a.	49.3 million; confinement for one executive	46%	n.a.
United States	Sodium Gluconate	n.a.	n.a.	32.95 million	n.a.	n.a.
United States	Sorbates	2.2 billion world-wide, 1 billion US	n.a.	123.2 million	12%	n.a.
United States	Vitamins	Up to 33 billion world-wide	n.a.	1 billion in fines, 1 billion in damages; imprisonment for eight executives	n.a.	n.a.

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Annex B

Available Sanctions for Hard Core Cartels

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	Sanctions
Australia	• Pecuniary penalty (non-criminal) of AUD 10 million for corporations (AUD 750 000 for a secondary boycott offence) and AUD 500 000 for individuals, per offence. • Injunctions. • Damages (may only be sought through private action in a Court by a person who has suffered loss as a result of a contravention). • Ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct (including specific performance and rescission and variation of contracts).
Canada	• Fine up to CAD 10 million per count, imprisonment for up to five years per count, or both. For "foreign directed conspiracies", fines in the discretion of a court. For bid rigging, fines in the discretion of a court, imprisonment of up to five years, or both. • Damages.
Czech Republic	• Fine up to CSK10 million or up to 10 per cent of the net turnover recorded over the last complete calendar year.
Denmark	• Fine, must be imposed by a Court, but the law does not provide for a maximum. • Administrative order of annulment. • Civil damages.
European Union	• Administrative fine imposed on enterprises only of up to 10 per cent of previous year's global turnover.
Finland	• Penalty payment (competition infringement fine) of EUR 841 to EUR 672 752; the fine may be higher, but no more than 10 per cent of the previous year's turnover. • Agreements violating the law are void. • Civil damages.
France	• Pecuniary sanctions up to 10 per cent of world-wide turnover. • Criminal sanctions (individuals only): fines up to EUR 1 524 490.
Germany	• Wilful or negligent violations: administrative fine up to EUR 511 292 or up to three times the additional profit obtained as a result of the violation. • Collusive tendering: a crime, punishable by fines of up to EUR 1 840 651 or up to five years imprisonment, or both. • Agreements violating the law are void. • Civil damages.
Hungary	• Fine of up to 10 per cent of undertaking's net turnover in previous year. • Termination order; injunction.
Ireland	• Criminal conviction: fine of up to EUR 3 809 214 or 10 per cent of previous year's turnover, whichever is greater (undertaking); same level of fine plus imprisonment for up to 2 years (individual). • Civil declaratory and injunctive relief. • Civil damages, including exemplary damages.
Italy	• Fine, up to 10 per cent of the turnover of each undertaking or entity during the prior financial year.

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	Sanctions
Japan	• Administrative surcharge upon entrepreneurs, up to 6 per cent of the cumulative sales of the goods and services subject to the cartel for the duration of the agreement, except if the duration exceeds three years, the period for three years retroactive from the date on which the conduct ceased. • Criminal fine up to JPY 100 million (entrepreneur);imprisonment up to three years or fine up to JPY 5 million (persons). • Damages may be sought through private action in a court by a person, a firm, or government agency that has suffered loss as a result of a contravention either under civil law or the Antimonopoly Act; under the AMA, a private suit may follow a decision by the JFTC finding a defendant to have violated the Act, and its decision becomes *prima facie* evidence of a violation in the private suit.
Korea	• Surcharge up to 5 per cent of the turnover set forth in the Presidential Decree; where there is no revenue, up to KRW1billion. • Criminal violation: imprisonment up to three years or fine up to KRW 200 million. • Order to cease and desist, a public announcement of the violation by the enterprise, or any other necessary corrective measure. Failure to comply with the corrective measure is punishable by imprisonment up to two years or a fine up to KRW 150 million.
Mexico	• Fine for enterprises up to 375 000 times the minimum general wage prevailing in the Federal District; for individuals, fine up to 7 500 times the minimum general wage prevailing in the Federal District. • Criminal prosecution for conduct that violates the Criminal Code. • Order the suspension, rectification or elimination of the practice.
Netherlands	• Administrative fine on enterprises not to exceed the higher of EUR 450 000 or 10% of the turnover of the undertaking or, if the infringement is committed by an association of undertakings, of the combined turnover of the undertakings that are members of the association, in the financial year preceding that in which the fine is imposed.
New Zealand	• Pecuniary penalties for bodies corporate of up to the greater of: NZD 10 00 000, three times the illegal gain or if the gain is not known, 10% of annual turnover; for individuals, up to NZD 500 000. • Injunctions and remedial orders. • Civil damages, including exemplary (punitive) damages.
Norway	• Criminal sanctions (for individuals): fines and imprisonment up to six years. • Writ to relinquish cartel gains. Under the Criminal Code (Section 34) a Court can also order confiscation of the cartel gains. • Injunctions.
Poland	• Order to relinquish practices violating the law. • Impose a fine equivalent to the amount of EUR 1 000 to 5 000 000 but not exceeding 10 % of the annual revenue of the undertaking in question in the year preceding the year of imposition of the fine; where there is no revenue (such as for trade associations), fine up to 50 times the average salary.
Slovak Republic	• Fine up to SKK 10 million or 10% of total turnover in previous year. • Criminal fines and imprisonment up to five years.

	Sanctions
Spain	• Fine up to EUR 901 518 (economic agents, companies, associations, unions or groups); can be increased up to 10 per cent of total sales for the fiscal year preceding the Tribunal's decision. • Coercive fines of between EUR 60 and 3 006 per day to require cessation of unlawful conduct or adherence to remedial orders. • If the offending party is a legal entity, then an additional fine up to ESP 5 million imposed on the legal representative or the persons constituting the administrative bodies that participated in the agreement. • Injunctions and remedial orders. • Compensation of damages in a civil action.
Sweden	• Intentional or negligent infringement by an undertaking, fine up to 10 per cent of the annual turnover of the undertaking. • Injunctions and remedial orders. • Remedies in civil law, including damages to private parties.
Switzerland	• Injunctions. Currently there are no fines directly for violating the competition law. Amendment providing such sanctions is under consideration. • Administrative fines (for legal entities) of up to three times the illegal gain or up to 10 per cent of the previous year's turnover realised in Switzerland for failure to comply with a decision of the Competition Commission or a voluntary agreement. • Remedies in civil law: *a*) removal or cessation of the restriction; *b*) damages and reparations; *c*) remittance of illicitly earned profits.
Turkey	• Fines at least TRL 200 million (undertakings and associations of undertakings) and up to 10 per cent of the gross income in the prior fiscal year, as calculated by the Board (individuals or legal entities with the status of an enterprise and associations of undertakings and/or the members of those associations) • In cases where the above fines are imposed on a legal entity (undertakings and associations of undertakings), a fine up to 10 per cent of that fine is imposed on the individuals personally who are in the management organs of these legal entities.
United Kingdom	• Fines up to 10 per cent of UK turnover (undertakings) for the duration of the infringement, up to a maximum of three years. • Civil liability for damages.
United States	• Criminal violations: fines up to the larger of *a*) USD 10 million (corporations) and USD 350 000 (others), or *b*) twice the amount gained by the cartel from the violation or lost by the victims, and imprisonment up to three years. • Private parties can make claims in court for injunctions, three times the damages suffered and reasonable attorney's fees. • Restitution (generally where private damage case not available).

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Annex C

Summary of Submissions on Cartel Enforcement by Non-member Invitees to the OECD Global Forum on Competition

Bulgaria

Described three cases: price fixing in public transportation services in Sofia; price fixing in phone cards; market allocation in gasification services. The respondents were fined the equivalent of EUR 47 000, 9 000 and 25 500, respectively. Maximum fines for cartel conduct under Bulgarian law are EUR 150 million for organisations and EUR for individuals.

China

Described three cases: bid rigging on tenders to operate a brickyard plant and two bid rigging cases on construction contracts. In one case the respondents were fined the equivalent of EUR 6 500. The maximum fine under the 1993 China Law for Countering Unfair Competition is the equivalent of EUR 26 000.

Estonia

Described three cases: information exchange on prices among milk processors and wholesalers; price fixing in taxi services; price fixing in road transport. Fines equivalent to EUR 639 were imposed on each respondent in the taxi case. Maximum fines of to 5% of the net turnover of the offending party in the preceding year can be imposed for cartel conduct.

Indonesia

Described one case, the first brought in Indonesia: bid rigging in the supply of pipe and pipe processing services. No fines were imposed. Fines of up to the equivalent of EUR 2.875 million can be imposed for civil violations. Fines of up to EUR 11.5 million and prison terms of up to six months can be imposed for criminal violations.

Latvia

Described two cases: price fixing between a Latvian and a Russian airline on service between Riga and Moscow; agreement on contractual terms between providers of international courier post services. A fine of 0.7% of the annual turnover of the Latvian airline in the air transportation case was imposed in that case. No fines were imposed in the courier services case. A maximum fine of 10% of the respondent's total annual turnover can be imposed for cartel conduct.

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Peru

Described three cases: price fixing and information exchange in the sale of live chickens; bid rigging on construction of electricity transmission facilities; price fixing in taxi tours. Fines of the equivalent of EUR 1 800 were imposed on each respondent in the bid rigging case and of EUR 900 on one respondent in the taxi tours case. Maximum fines for cartel conduct are the smaller of the equivalent of EUR 900 000 or 10% of the respondent's gross sales or income.

Romania

Described two cases: price fixing in bottled mineral water; market allocation in the distribution of pharmaceuticals. Unspecified fines were imposed in both cases. Maximum fines for cartel conduct are 10% of the respondent's annual turnover.

Slovenia

Described two cases: price fixing in the sale of electric energy; and market allocation in the production of cultural events. Maximum fines for cartel activity are the equivalent of EUR 135 000 for enterprises and EUR 13 500 for individuals.

South Africa

Described one case: fixing of contractual terms for the purchase of citrus fruits. The maximum fine for cartel conduct is 10% of the respondent's annual turnover.

Chinese Taipei

Described three cases: market allocation by a flour association in the purchase of grain; bid rigging on a contract for the purchase of mobile cranes; price fixing and market allocation in liquefied petroleum gas. The maximum penalty for cartel conduct is fines of up to the equivalent of EUR 3.1 million and imprisonment of up to three years.

Thailand

Maximum penalties of fines of up to the equivalent of EUR 144 000 and imprisonment of up to three years.

Ukraine

Described two cases: price fixing in the provision of services for electronic cash machines; market allocation in the sale of kaolin. Sanctions not specified.

Zambia

Described two cases: conspiracy between producer and purchaser of live poultry preventing entry of new sellers; price fixing in refined petroleum products. Maximum fines for cartel conduct of the equivalent of EUR 5 220, and for criminal violations, imprisonment for up to five years.

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Part III

Recommendation of the Council concerning Effective Action Against Hard Core Cartels (Adopted by the Council at its 921st Session on 25 March 1998)

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to previous Council Recommendations' recognition that "effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports"; and that "anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries";

Having regard to the Council Recommendation that exemptions from competition laws should be no broader than necessary and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways";

Having regard to the Council's long-standing position that closer co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade, and its recommendation that when permitted by their laws and interests, Member countries should co-ordinate investigations of mutual concern and should comply with each other's requests to share information from their files and to obtain and share information obtained from third parties;

Recognising that benefits have resulted from the ability of competition authorities of some Member countries to share confidential investigatory information with a foreign competition authority in cases of mutual interest, pursuant to multilateral and bilateral treaties and agreements, and considering that most competition authorities are currently not authorised to share investigatory information with foreign competition authorities;

Recognising also that co-operation through the sharing of confidential information presupposes satisfactory protection against improper disclosure or use of shared information and may require resolution of other issues, including potential difficulties relating to differences in the territorial scope of competition law and in the nature of sanctions for competition law violations;

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Considering that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others; and

Considering that effective action against hard core cartels is particularly important from an international perspective – because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive – and particularly dependent upon co-operation – because they generally operate in secret, and relevant evidence may be located in many different countries;

I. RECOMMENDS as follows to Governments of Member countries:

A. *Convergence and effectiveness of laws prohibiting hard core cartels*

Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:

1. effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and

   a) enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

   a) "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;

   b) the hard core cartel category does not include agreements, concerted practices, or arrangements that *i*) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, *ii*) are excluded directly or indirectly from the coverage of a Member country's own laws, or *iii*) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

B. *International co-operation and comity in enforcing laws prohibiting hard core cartels*

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests.

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2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:

   a) the common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country's laws, regulations, and important interests;

   b) to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;

   c) a Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;

   d) Member countries should agree to engage in consultations over issues relating to co-operation.

In order to establish a framework for their co-operation in dealing with hard core cartels, Member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.

3. Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

4. The co-operation contemplated by this Recommendation is without prejudice to any other co-operation that may occur in accordance with prior Recommendations of the Council, pursuant to any applicable bilateral or multilateral agreements to which Member countries may be parties, or otherwise.

II. INSTRUCTS the Competition Law and Policy Committee:

1. to maintain a record of such exclusions and authorisations as are notified to the Organisation pursuant to Paragraph I. A 2b);

2. to serve, at the request of the Member countries involved, as a forum for consultations on the application of the Recommendation; and

3. to review Member countries' experience in implementing this Recommendation and report to the Council within two years on any further action needed to improve co-operation in the enforcement of competition law prohibitions of hard core cartels.

III. INVITES non-Member countries to associate themselves with this Recommendation and to implement it.

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