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**A SYNTHESIS OF RECENT CARTEL INVESTIGATIONS
THAT ARE PUBLICLY AVAILABLE**

Note by the UNCTAD secretariat

Executive summary

Cartels are considered by most experts as the most harmful form of anti-competitive practices and therefore they count among the top priorities of Competition Authorities. Given their secret nature however, Cartels are among the most difficult practices to deal with, especially for competition authorities in developing countries which have only recently begun to enforce competition law and policy. This note therefore, deals with the common issues and problems and policies that face competition agencies, provides a brief description of several recent cartel cases and explores common themes derived from these cases. The note concludes on a list of lessons for the future the study of these cases can provide.

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INTRODUCTION

1. Many experts consider anti-cartel activity the most important function of a competition agency. They feel that because hard-core cartels cause the greatest harm to consumers, finding and prosecuting these agreements should be a top priority of competition officials. Prosecuting cartels may be the most difficult of the tasks assigned to competition agencies, however. Because cartels are conceived and carried out in secret, and because cartel operators, knowing that their conduct is unlawful, do not willingly cooperate with competition officials in the course of investigations, obtaining evidence of cartel agreements requires special tools and skills.
2. Competition agencies in developing countries, and in countries that have only relatively recently begun enforcing a competition law, face special challenges in developing an anti-cartel programme. Their citizens do not have experience with competition law and policy; they may be unfamiliar with the benefits that competitive markets provide for them. In other words, the country may lack a “competition culture,” which is the foundation of an effective competition policy. More specifically, the public and other important constituencies – government, business, trade unions, educators, the legal community, regulatory officials and judges – may be unaware of the harm that cartels can cause, and of the need to assist the competition agency in its anti-cartel efforts. Equally important, the competition agency in these countries may lack experience in investigating cartels, and it may lack the necessary legal tools and other resources for the job.
3. This paper deals with the issues and problems that commonly face competition agencies in this set of countries. It begins with brief descriptions of several recent cartel cases in countries that have been actively enforcing competition laws for a relatively short period of time. An exploration of common themes from these cases follows. The paper ends with a discussion of the lessons for the future that these cases provide.
4. There is no attempt to define the relevant group of countries with precision. A common characteristic of the countries selected is that they are relatively new to competition law enforcement and in particular to anti-cartel enforcement. All of the case material presented here is public, available on the Internet. Sources include the websites of national competition agencies and international organizations, especially the Organisation for Economic Co-operation and Development. The list of cases is meant to be representative but not exhaustive; some countries have prosecuted several more cases than are described here. There is an effort, however, to include as many countries as possible. There is also an attempt to highlight recent cases – those decided in the past two or three years – as opposed to older ones. Finally, not every case described here has been completely resolved. Some are still active in the competition agency; others are under appeal in the courts.

I. CASE DESCRIPTIONS

Argentina

Cement¹

5. Five cement companies were prosecuted for operating a cartel that lasted for 18 years, from 1981 to 1999. The companies agreed on a market division arrangement that was closely

¹ Global Competition Review, 3 August 2005, at www.globalcompetitionreview.com.

monitored through their trade association. The respondents were fined a total of US\$107 million, more than three times the highest fines assessed by the Argentine authority in any previous case.

Liquid oxygen²

6. Four suppliers of liquid oxygen for medical uses were fined a total of US\$24.2 million for their participation in a cartel lasting five years, from 1997 to 2002. Important evidence of the cartel was generated in a dawn raid, which was prompted by an investigation into price increases by the ombudsman of Buenos Aires. The competition agency stated that the amounts of the fines were aggravated by the length of the cartel's existence, by the participation of top executives of the firms, and by the fact that the victims of the cartel were hospitals and other health care providers.

Brazil

7. Brazil has sharply increased its anti-cartel enforcement in recent years. As of 1999, the competition agencies had prosecuted only one cartel case under the country's competition law, which was enacted in 1988. Since 2000, however, 11 horizontal cases have been decided by CADE, the Brazilian competition tribunal, and several more have been instituted.³

Retail fuel dealers⁴

8. Retail sellers of petrol in four Brazilian cities were prosecuted for price-fixing agreements. Evidence of meetings and explicit agreements on prices was developed by means of telephone call intercepts (approved by the courts) and by oral statements given to investigators by cartel participants. The retail businesses were each fined 10 per cent of one year's pretax revenue; individual managers were fined 10 per cent of the fines imposed on their businesses.

Civil airlines⁵

9. Four airlines simultaneously increased their fares by 10 per cent on the heavily-travelled Rio de Janeiro–São Paulo route. The evidence of agreement included a meeting of the executives shortly before the price increase and the exchange of confidential information through a computerized airline price data system maintained by a third party. Each carrier was fined 1 per cent of the revenue earned on that route in a previous year.

² *Global Competition Review*, 5 August 2005, at www.globalcompetitionreview.com.

³ *Competition Policy in Brazil*, an OECD Peer Review (2005), paras. 18–19. (Note: All materials cited as originating from the OECD can be found on the OECD website at www.oecd.org/competition and also at www.cade.gov.br and www.fazenda.gov.br/seae/.)

⁴ Id., para. 20.

⁵ Ibid.

Chile

Milk processing⁶

10. Producers of raw milk complained to the Chilean competition agency of an apparent agreement among milk processors not to compete for existing customers of their rivals. The complaints were based solely on economic evidence, which included declining prices received by the producers from the processors and the inability of producers to sell their product to any processor other than the one they currently did business with. A Chilean court declined to find a cartel agreement, citing the lack of direct evidence of agreement, but it did order that the processors take certain measures to increase transparency in their dealings.

Taiwan Province of China

Petroleum products⁷

11. There are only two suppliers of petrol and diesel fuel on the Taiwan Province of China market. The competition agency concluded that the duopolists had formed an illegal agreement by means of their practice of publicly announcing price changes before these became effective, after which each would monitor the reaction of the other and maintain or withdraw the announced change as necessary. The agency's decision was supported in part by an analysis of the cost and profit structures of the two companies, which proved to be quite different. An administrative fine of NT\$6,500,000 (EUR 150,000) was levied on each company.

Carbonated beverages at convenience stores⁸

12. Four convenience store chains raised their prices for carbonated beverages by an identical amount within a brief period of time. An investigation by the Taiwan Province of China competition agency determined that the wholesale costs for these products had not increased. The chains pointed to other market forces which, they said, caused them to increase these prices. An independent analysis of these factors and others by the agency led it to conclude that there was insufficient evidence of an unlawful agreement involving the chains.

Czech Republic

Fuel distributors⁹

13. Six fuel distributors raised their prices by almost identical amounts within a period of 15 to 34 hours and maintained these higher levels for several months. The Czech competition agency found no economic justification for these increases; in fact, the prices paid by the distributors for their fuel had decreased during the relevant period. A dawn raid on the offices of the distributors produced incriminating email messages and other electronic documents. Fines totalling CZK 313,000,000 (EUR 10,000,000) were imposed.

⁶ *Competition Policy in Chile*, an OECD Peer Review, p. 39; submission by Chile to the OECD Seminar on Prosecuting Hard Core Cartels, A Case Study on the Cartel of Milk Processing Companies, 2004, also available at www.fne.cl/.

⁷ Available on the APEC website at www.apeccp.org.tw/doc/Taipei.html.

⁸ Ibid.

⁹ OECD, *Annual Report on Competition Policy Developments in Czech Republic in 2003*; also available at www.compet.cz/EngVer.htm.

Engineers and technicians¹⁰

14. The Czech Chamber of Authorised Engineers and Technicians published a “Performance and Fees Code” setting hourly fees for the work of its members. The Czech competition agency found the code to be an unlawful agreement fixing prices, and it fined the Chamber CZK 500,000 (EUR 15,000).

Hungary

Construction industry¹¹

15. In recent years, the Hungarian competition authority has successfully prosecuted several cases involving bid rigging in the construction industry. One involved five companies that conspired to allocate contracts in a motorway tender. Those companies were fined a total of EUR 25,000,000, at the time the largest fined imposed by the Hungarian agency. Another case involved a public procurement involving the construction of a block of flats. A dawn raid and the cooperation of one conspirator through a leniency programme produced the incriminating evidence. In yet another case, involving tenders for the construction of a university building, a draft agreement whereby two conspirators agreed that the winner of the tender would indemnify the loser was found in the files of one party.

Israel

Electric pipes¹²

16. Four electric pipe companies and 11 of their executives were convicted of agreeing to market their products jointly through a single company or, in the case of some, to coordinate their prices with it. The agreement led to an increase in prices of 120 per cent. In a criminal case, the companies were each fined up to NIS 600,000 (EUR 110,000), and the executives were sentenced to imprisonment, to be served in public service. The Israeli Supreme Court stressed that the appropriate sentence for the executives in such a case would be imprisonment in jail, but in this case public service was imposed because at the time of the operation of the cartel Israel's antitrust law was not widely enforced.

Gas suppliers¹³

17. An indictment was filed against the four largest gas suppliers and their executives, alleging that they had engaged in a customer allocation scheme, whereby they agreed not to compete for existing customers and to divide new customers among themselves according to an agreed quantitative method. The investigation was extensive and included the questioning of more than 170 witnesses and suspects and the seizing of tens of thousands of documents. The case was pending in court.

¹⁰ Ibid.

¹¹ Available on the website of the Hungarian competition authority, www.gvh.hu.

¹² OECD, *Annual Report on Competition Policy Developments in Israel in 2003*. Also available at www.antitrust.gov.il/Antitrust/en-US.

¹³ OECD, *Annual Report on Competition Policy Developments in Israel in 2004/05*.

Republic of Korea

Fixed-line telephone service¹⁴

18. Representatives of two major fixed-line telephone service providers met and agreed to limit price competition between them. One of the companies agreed to bring its prices to within 10 per cent of the other's, and the other firm agreed, in return, to cede 6 per cent of the market to its rival over a period of five years. The two also agreed with a third company on prices for certain Internet services. The Korean competition agency fined the three firms a total of KRW 120,000,000,000 (EUR 96,000,000). The fine assessed on one of the firms was substantially reduced in recognition of the firm's cooperation with the investigation.

Construction machinery¹⁵

19. Four manufacturers of construction machinery, including two Korean subsidiaries of foreign firms, agreed on the rate and timing of price increases over a period of more than three years. They also had meetings in which they agreed to rig bids on government procurement contracts. The firms were fined a total of KRW 71,406,000,000 (EUR 57,000,000).

Lithuania

Information technology and waste management systems¹⁶

20. The Lithuanian competition agency received a complaint that the bids submitted by three companies to supply information technology and equipment to a government agency were suspiciously similar. The bids contained many identical characteristics, including, in one instance, an identical mistake. It was evident that all three had been prepared by the same company. In the course of the investigation, all three companies submitted written statements confessing to an unlawful agreement. As the case, in 2003, was the first in which a party had confessed, the fines assessed on the companies were significantly reduced so as to encourage future cartel operators to cooperate. A similar case involving bid rigging in tenders for the construction of waste management systems was resolved in the same way, with voluntary confessions and reduced fines.

Mexico

Tortillas¹⁷

21. The Mexican competition authority has decided a series of cases (beginning in 1999) involving price-fixing agreements and horizontal territorial agreements among sellers of tortillas. The agreements had their foundation in government price controls for tortillas, which ended in the late 1990s. Tortilla manufacturers and sellers retained their membership in industry associations, through which these unlawful horizontal agreements were maintained. In one case, a business association was responsible for coordinating the activities of farmers, millers and manufacturers

¹⁴ Case summary on file at UNCTAD; also available on the website of the Korean competition agency at www.ftc.go.kr/eng/.

¹⁵ Ibid., note 13.

¹⁶ OECD, *Annual Reports on Competition Policy Developments in Lithuania in 2003 and 2004*; also available at www.konkuren.lt/english/index.htm.

¹⁷ Available on the website of the Mexican competition agency at www.cfc.gob.mx/ing_inicio.asp.

of tortilla corn dough and was the head of a programme whereby the sale of tortillas was accomplished under a single brand. The tortilla outlets selling that brand established their prices according to the association's recommendations. The Mexican competition authority found that the association had engaged in unlawful price fixing and imposed a fine. The association contended that it and the tortilla sellers were a single entity, but that argument was rejected by the competition agency and ultimately by the courts.

Peru

Harbour pilots, urban public transportation operators, taxi operators and public notaries¹⁸

22. In each of these cases, independent service providers combined in some way to jointly offer, or otherwise affect, prices for their services. While the means by which they did so varied from case to case, the question presented to the Peruvian competition agency was whether these common efforts had any legitimate function or amounted simply to cartel agreements. The agency determined that they were in fact cartels, and it prohibited the conduct.

Poland

Taxis and ticket control in public transportation¹⁹

23. The Polish competition authority learned of an agreement among taxi operators in one Polish city to charge uniform prices. The taxi operators voluntarily abandoned the agreement, and no fines were assessed. Separately, the competition agency uncovered a bid-rigging agreement between two companies relating to a call for tenders for the service of controlling tickets in the public transportation system. A cease-and-desist order was issued and a fine imposed.

Romania

Cement²⁰

24. Three cement companies, all subsidiaries of large multinational companies, were fined a total of EUR 28,500,000 for their participation in a cement cartel. The fine represented about 6 per cent of the companies' annual turnover. There was no direct evidence of agreement, however. Rather, the competition agency's decision was based on market data showing that cement prices had risen by as much as 38 per cent.

Russian Federation

25. Prosecution of cartels in Russia has been hampered by a lack of complaints made to the Russian antimonopoly agency, by the requirement imposed by the competition law that the prosecutor prove that the participants in a horizontal agreement have a collective market share of 35 per cent, by uncertainty about the applicable standard of proof, and by insufficient

¹⁸ OECD, *Competition Law and Policy in Peru*, an OECD Peer Review, pp. 21–25 (2004), also available at <http://www.indecopi.gob.pe/>.

¹⁹ OECD, *Annual Report on Competition Policy Developments in Poland in 2003*, also available at <http://www.nokik.gov.pl/en/>.

²⁰ *Global Competition Review*, 23 June 2005, at www.globalcompetitionreview.com.

investigative powers available to the competition authority. The available sanctions against cartels under the law are also considered to be inadequate.²¹ Recently there has been some increase in anti-cartel activity, however.

Cement²²

26. The city government of Moscow complained to the antimonopoly agency of a simultaneous increase in the price of cement by four leading producers. The parties were able to justify the increases to the agency, however, by showing increases in their costs. No violation was found.

Wholesale and retail petrol²³

27. Two sellers of petrol simultaneously increased their prices to identical levels. There was apparently no evidence of explicit agreement, but the antimonopoly agency found that the increases and identical prices could not be justified on the basis of the parties' costs and profitability. The parties were ordered to terminate their actions and to transfer their unlawful profits to the state budget.

Slovak Republic

Pig breeders²⁴

28. More than 50 pig breeders met at the headquarters of their association and voted on minimum prices for which they would sell their pigs to meat-packing plants. Fines totalling SKK 2,053,300 (EUR 51,332) were imposed on the 48 breeders who supported the agreement.

South Africa

Fertilizer²⁵

29. Three fertilizer manufacturers were found by the Competition Commission to have conspired through trade committees to which they belonged to limit competition among them, which resulted in higher prices and stable market shares. The Commission referred the case to the Competition Tribunal, recommending that a fine of up to 10 per cent of the turnover of each respondent be imposed.

Airlines²⁶

30. The Competition Commission referred to the Competition Tribunal a case alleging that four airline companies had conspired to simultaneously announce, in May 2004, a fuel surcharge

²¹ OECD, *Competition Law and Policy in Russia*, an OECD Peer Review, p. 25 (2004).

²² Id., p. 25.

²³ OECD, *Annual Report on Competition Policy Developments in Russia in 2003*, also available at www.maprf.ru/en/.

²⁴ 2004 Annual Report of the Antimonopoly Office of the Slovak Republic, pp. 15–16, available on the agency's website at www.antimon.gov.sk/.

²⁵ Available on the website of the South African Competition Commission at www.compcom.co.za/.

²⁶ Ibid.

in identical amounts. After the investigation, prompted by news reports of the price increase, was underway, a fifth airline applied to the Commission for leniency under the Commission's Corporate Leniency Policy. The applicant cooperated with the Commission and was not cited as a respondent in the case. The Commission recommended a fine of up to 10 per cent of the turnover of each of the respondents.

Turkey

Traffic light systems and cement²⁷

31. In March 2005, the Turkish competition agency announced that it had fined a manufacturer of traffic light systems and six of its distributors a total of EUR 6,000,000 for engaging in bid-rigging activities. The fine was the third largest imposed to date by the Turkish agency. Previously, a cement cartel had been fined EUR 10,000,000.

II. COMMON THEMES FROM THE CASES

Affected sectors

32. A striking feature of these cases is that many are clustered within a few economic sectors. For example, it seems that cement cartels exist almost everywhere. It is a rare country that has an anti-cartel programme and has not prosecuted one or more cement cartels. More generally, construction materials and construction services seem to be fertile ground for cartel operators. The reasons for the high incidence of cartel activity in these sectors are fairly obvious. Construction materials, especially cement, are homogeneous products. Producers are differentiated almost entirely by price. This homogeneity makes it easier for sellers to agree on the terms of a cartel agreement. Importantly, these products and services are often sold by means of bids or tenders to government or public bodies. These buyers are particularly vulnerable to bid-rigging activity, as is discussed further below.

33. There have been a relatively large number of cartel cases and investigations in the petroleum sector, in particular that of petrol (gasoline). There may be several reasons for the high incidence of petrol cases. Petrol is an important consumer product – for many, a necessity. Also, petrol prices have generally risen in the past few years, and while this is doubtless mostly because of increasing demand, the suspicion exists that cartels are at least partly responsible. Perhaps most important, current retail petrol prices are readily visible. This could facilitate an agreement among petrol sellers. It also could alert both consumers and competition officials to the possible existence of a cartel.

34. But here a word of caution is in order. It is axiomatic that mere simultaneous movement of prices, especially for a homogeneous product like petrol, is not by itself sufficient to prove an unlawful agreement. Such price activity could be equally consistent with active competition. In almost all countries there must be more evidence than just parallel pricing to support a cartel prosecution. Indeed, in some countries investigations of possible price fixing in petrol have failed because such additional evidence was lacking.

²⁷ *Global Competition Review*, 6 April 2005, at www.globalcompetitionreview.com.

35. Food products also seem to be disproportionately represented in the cases described above. Again, a combination of factors may be responsible. Like petrol, food is an important consumer product. It can be a homogeneous product, especially at the producer/processor level. Price information may be more readily available to both sellers and buyers in this sector. Other sectors that appear frequently in cartel cases include transportation services and professional services.

36. But the most frequently occurring common feature in the cases above (and, it seems, in cartel cases everywhere) is bid rigging on sales to government agencies. Government purchasing agents may not recognize suspicious bidding activity, and procedures that they use may lack safeguards against bid rigging. In some cases, there is even the danger that procurement procedures might be subject to corruption. The openness of public procurement can also facilitate the formation and monitoring of cartel agreements.

37. A more comprehensive study of anticompetitive practices in developing countries by Frédéric Jenny has produced strikingly similar results. In a paper to be presented to the conference for which the report at hand was prepared, Prof. Jenny identifies almost precisely the same sectors as being most vulnerable to cartel activity in these countries.

Evidence gathering – investigative tools

38. In several cases described above, the evidence of a cartel agreement was only circumstantial. It may have included evidence of parallel pricing, for example, plus evidence of meetings or communications between competitors, but not direct evidence of agreement. In many countries it is legally possible to sustain a cartel prosecution without evidence of direct agreement, but it is risky to try to do so. The case descriptions also include a few in which the circumstantial evidence was insufficient. The cartel prosecutor always strives for more direct evidence, but, as was noted above, such evidence is difficult to obtain, and doing so requires special techniques.

39. For most countries there is one most effective tool available to the cartel prosecutor – the dawn raid, or unannounced visit to the offices of suspected cartel operators for the purpose of seizing documentary or electronic evidence of a cartel agreement. More and more countries are employing the dawn raid to good effect. It was used in at least five of the cases described above, and probably more. (The public case descriptions do not always provide details about how evidence was obtained.) It is probably safe to say that an anti-cartel programme cannot be truly effective without the use of this evidence-gathering tool.

40. A second specialized investigative tool in cartel cases is the leniency programme. In such a programme, the first cartel member offering to cooperate with a cartel investigation and providing evidence implicating the other members is promised forgiveness from prosecution or, in some cases, reduced sanctions. A leniency programme can be a powerful anti-cartel weapon, but, as is discussed below, experience has shown that it is seldom effective right away. That is, the competition agency must first establish credibility in its anti-cartel programme. It must demonstrate that it will actively pursue cartels and that it will impose severe sanctions on cartel operators who are caught. Only then will there be sufficient incentive for cartel operators to break ranks and cooperate with the authorities under a leniency programme.

41. This seems to be borne out in the case descriptions above. Apparently, few resulted from a leniency programme. Certainly some countries new to anti-cartel enforcement do not yet have a formal leniency programme in place; but, for the reasons discussed above, it seems that even those that do are unlikely to benefit immediately. A critical component of any successful leniency

programme is the credible threat of severe sanctions. The case descriptions are especially instructive on this point, as is discussed below.

42. A final point should not be overlooked: without doubt, most of the cases described above began with a complaint filed with the competition agency by an individual or a business. Complainants usually do not possess enough evidence to prove that a cartel exists, but without their initiative, many cartel prosecutions would never begin. The competition agency must carefully cultivate this important source of information. (This point is discussed in more detail further below.)

Sanctions

43. Competition experts agree that the most severe sanctions available under a competition law should be reserved for cartel operators. The primary purpose of sanctions in the cartel context is as a deterrent. If sanctions, which are usually in the form of fines, are not significant, they become merely a cost of doing business for the cartel. In that case, the cartel operators can be confident of profiting significantly from their activity even if they are caught and sanctioned. A secondary purpose of sanctions against cartels is to provide an incentive for members of a cartel to defect and to cooperate with an investigation in order to avoid punishment.

44. The cases described earlier suggest that there is wide variation in sanctions imposed by countries new to anti-cartel enforcement. In a few cases, very large fines – as high as EUR 96,000,000 – were reported. In one country, individuals received a prison sentence, although this was to take the form of community service. Some case descriptions made no mention of fines or sanctions. While this does not necessarily mean that none were imposed, it is probably safe to say that in most of these cases the fines were small or nonexistent.

45. There could be several reasons for this. The conduct may not have been truly “hard core.” That is, there may not have existed an explicit agreement among competitors fixing prices, dividing markets or rigging bids, or at least there was no direct evidence of such an agreement. The cartel members may have been “naïve” – that is, not actually have known that their conduct was unlawful. Naïve cartels are much more common in developing countries and others that have not been active in prosecuting the conduct. Such cartels probably do not deserve to be sanctioned heavily, especially if their members cooperate with an investigation and immediately cease their prohibited conduct. However, it is almost certainly true that in some cases the sanction was simply too light. The competition law may not provide for sufficiently large fines or other sanctions. Alternatively, the possibility of large fines may exist but the competition agency, or a reviewing court, may have been unwilling to impose them, not understanding the importance of doing so. Such a failure can seriously undermine an anti-cartel effort, and remedying the problem should have high priority in a competition agency.

III. LESSONS FOR THE FUTURE: HOW TO IMPROVE ANTI-CARTEL ENFORCEMENT IN DEVELOPING COUNTRIES AND OTHER COUNTRIES BEGINNING AN ANTI-CARTEL EFFORT

46. ***Work to develop a competition culture.*** The common themes developed above suggest several ways in which anti-cartel enforcement can be strengthened. First is the development of a “competition culture” – an understanding by the public of the benefits of competition and broad-

based support for a strong competition policy. The process is on going; it requires communication with all parts of society – consumers, businesspeople, trade unions, educators, the legal community, government and regulatory officials, and judges – about the benefits of competitive markets to them and to their country’s economy. Anti-cartel enforcement cannot be done in isolation, however; it is interdependent with competition law enforcement. Only through demonstrable success in enforcement will the public come to understand how it can benefit from competition.

47. ***Encourage complaint submission.*** How does a robust competition culture support successful anti-cartel enforcement? Educated consumers and businesspeople will be more alert to possible cartel activity and more willing to report it. As was noted above, complaints to the competition agency have been, and in developing countries are likely to continue to be, the most common source of information about previously unknown cartels. The agency should actively encourage the public to provide such information. It can publish easy-to-understand pamphlets and other written materials explaining what cartels are, the harm that they cause and how to report them. It can provide a telephone hotline or an email address to which complaints can be made. It can publicize the important role of complaints in cartel cases that are successfully prosecuted. And it must ensure that the identity of complainants is protected as confidential information to the fullest extent possible.

48. ***Develop effective procedures for dawn raids.*** In most countries, certainly including those in which an effective leniency programme has not yet taken hold, the dawn raid is the most effective investigative tool in the investigator’s toolkit. Unfortunately, not every competition agency in a developing country has it. Legislatures are sometimes reluctant to grant a new agency the power to use such an invasive process. In debates on this issue, the agency and its supporters should stress (a) the importance of effective anti-cartel enforcement and (b) the need to have dawn raid powers for that purpose. One way of easing concerns about unfettered use of dawn raids is to require that the competition agency receive approval to conduct a dawn raid from an independent court or magistrate upon demonstrating a specified probability that an offence was committed and that relevant evidence exists on the premises to be searched.

49. Dawn raids are resource intensive; the competition agency must be selective in their use. Beyond that, the agency must become skilled in using this tool, which is not easy because the tool is so specialized. Conducting a successful dawn raid requires careful planning; a team of competent professionals must be assembled and given specific assignments. It may be that more than one location must be searched; the searches should be conducted simultaneously, if possible, and carefully coordinated. Precise procedures for searching files and copying and taking away documents must be established. Procedures for searching electronic files – on computers, servers, mobile phones, personal digital assistants (PDAs) and other electronic devices – must also be established. Having this capability may require the participation of an information technology expert on the search team.

50. ***Begin to establish a leniency programme.*** The word “begin” is important. One cannot expect the mere creation of a leniency programme to produce immediate results for the agency. The competition agency must first establish credibility – that it will discover and successfully prosecute cartels, and that it will severely punish those that are prosecuted. When this credibility is established, properly structured leniency programme will succeed. The (relatively few) countries whose leniency programmes are flourishing consider this tool to be the most effective in their arsenal, even more effective than dawn raids.

51. In any case, a first step is to fashion and announce the programme. A properly structured leniency programme should have at least the following elements:

- The first member of a cartel should receive complete immunity from prosecution and punishment. Some would say that no other cartel member should receive any leniency, in order to create the greatest possible incentive to be the first “in the door”. Some countries do offer some leniency to second or third applicants, but there should be a wide gap between the first and subsequent applicants, in order to preserve the strong incentive to be the first. (If there is no first applicant, there will be no second or third – hence the need to provide this incentive.)
- The programme should have maximum transparency so that would-be applicants can predict with certainty what the outcome of their application will be.
- The programme should apply both to situations in which the competition agency has no information about a cartel and those in which an investigation has already begun.
- The competition agency should maintain strict confidentiality regarding the fact of a leniency application and the identity of the applicant.

52. ***Focus initial investigative efforts on sectors where cartel conduct is most likely.*** There is now strong evidence, demonstrated by the cases described above, that, while cartels can occur in any economic sector, they are more likely to occur in some sectors than in others, especially in the case of developing countries. The new competition agency should focus its efforts on those sectors. What should it do? There may be a temptation to undertake economic studies of market behaviour – pricing, for example, or cost structures – in order to find conduct that suggests cartel activity. This is likely to be a mistake. Such studies are expensive, and the results, even if they show some kind of parallel conduct, are ambiguous. One area in which such studies could be fruitful, however, is public procurement. A study of bidding behaviour in situations where bid rigging is suspected might identify patterns suggesting customer allocation or bid rotation. Such studies should be conducted with the assistance of a knowledgeable procurement official who can interpret the data correctly.

53. In most instances, the best sources of information about possible unlawful conduct in the marketplace are market participants themselves – if a seller’s cartel is suspected, buyers; if a buyer’s cartel is suspected (which often occurs in the agricultural sector), sellers. Informal interviews with knowledgeable market participants can generate important leads. The news media are another useful source. Cartel operators, especially unsophisticated ones, may make public statements that betray cartel activity.

54. In countries in transition from centrally managed economies, a fruitful source for cartel investigations could be sectors whose prices were until recently controlled by the government. Participants in these sectors are used to operating under a fixed-price regime; they were probably actively involved in the price setting, providing information and recommendations to the regulator. They probably do not want to give up this comfortable life and might attempt to continue it privately.

55. ***Begin to impose strong sanctions against cartel conduct.*** As was noted above, an indispensable element of a successful anti-cartel programme is an aggressive sanctioning policy. Sanctions can take several forms, including administrative fines against businesses and natural persons; criminal sanctions, including fines and imprisonment; and recovery of compensatory damages by victims of a cartel. Administrative fines against businesses are the most common. Pecuniary sanctions should be severe enough to eliminate a cartel’s gains. The optimal fine for this purpose is a multiple of the actual gain, because not every cartel is discovered and prosecuted, a factor that businesspeople take into account in deciding whether to engage in a cartel. Conventional wisdom suggests that the optimal organizational fine is as much as three times the actual gain from the cartel.

56. Fines against cartels are growing in severity across countries. In some areas, notably in North America and Europe, they have reached very high levels indeed, sometimes exceeding billions of US dollars or euros. But they seldom if ever reach the “optimal” level of three times actual gain. There could be several reasons for this. The maximum fine allowed by the competition law may be too small. Further, it is difficult to establish actual gain accurately; the competition agency may be unwilling to undertake to do so, especially if its calculation is subject to review by a court. Finally, even if the optimal fine can be assessed, the business to which it is applied may not be able to pay it. If forced to pay, the business might be obliged to declare bankruptcy or exit the market altogether.

57. Consequently there is a growing awareness of the need to also assess sanctions against culpable individuals in cartel cases. It is, after all, individuals who decide to create cartels and who operate them. If they face personal sanctions, whether imprisonment (in a minority of countries) or large fines, they have additional reasons not to participate in cartel activity.

58. ***Educate the public about the harm caused by cartels.*** Countries new to anti-cartel enforcement probably cannot immediately begin to impose strong sanctions in their first cases. Some business operators will have been unaware that their conduct was unlawful, or formation of the cartel may have predated the enactment of the first competition law. Courts may be unwilling to approve strong sanctions when they are unfamiliar with competition policy or competition cases. Building support for strong sanctions in cartel cases requires embarking on a programme of education regarding the harm that cartels cause. While calculating harm is difficult, there is a growing body of literature demonstrating that cartels cause great harm, especially in developing countries. (Citations to some of this literature are found in the bibliography at the end of this paper.) More persuasive to the public than the economic literature, however, is evidence from specific cases prosecuted domestically. The agency should make a special effort to quantify and publicize the real harm to consumers caused by the cartels that it prosecutes. Such a campaign will be doubly beneficial: (a) it will generate public support for the anti-cartel effort, resulting in greater willingness to assist the competition agency in its investigations and cases, and (b) it will help build support for more severe sanctions against cartel operators.

59. ***Engage in international cooperation in the anti-cartel effort.*** There is an active international effort against cartels. It is now understood that globalization brings with it new challenges in competition law enforcement. Among these is the growing incidence of large international cartels affecting many countries and involving businesses operating worldwide. The international competition community is working on means of achieving greater cooperation in fighting these secret, multinational agreements. But the effort goes well beyond that. International organizations, including UNCTAD and the OECD, have long been active in studying and reporting on hard-core cartels. Also, for the past seven years, representatives of the competition agencies of more than 25 countries have met annually to discuss anti-cartel enforcement techniques. The International Competition Network has embarked on an ambitious programme to address the challenges to anti-cartel enforcement posed by international and domestic cartels.

60. Developing countries will be limited, if only by resource constraints, in their ability to participate in these international forums. But almost all of the work product generated in these forums is publicly available, usually on the Internet. Also, some of the more active national competition agencies post on their websites useful material relating to anti-cartel enforcement. These resources are a rich source of information for the less experienced competition agency. Citations to some of this work produced in the international arena are found in the bibliography below.

61. Finally, developing countries can begin to establish bilateral cooperative arrangements with their neighbors and trading partners in competition law enforcement. The past few years

have seen dramatic growth worldwide in the number of such agreements. These arrangements encourage the participating agencies to cooperate in matters of interest to them both, including cartel investigations. While much of the information generated in the course of an investigation may be confidential and cannot be shared with a foreign agency, experience has shown that competition agencies can still engage in meaningful “informal” cooperation, which can include exchanging information on the status of a case or investigation, or on legal theories and investigative leads in a case. Neighboring competition agencies can also cooperate in information gathering – for example, by jointly conducting a dawn raid.

62. ***Work to develop a relationship with the courts that will hear appeals of cartel cases.*** It is inevitable that, as a competition agency becomes more active in prosecuting cartels (and other violations of the competition law), some of its cases will be appealed. Experience across countries indicates that it is almost as inevitable that the agency will suffer setbacks in some of these appeals, perhaps in many of them. Competition cases are unique in many ways, and judges will not have had experience with them. Initially they will tend to avoid deciding cases on their merits; instead, they will concentrate on procedural issues, with which they are more familiar, and reverse some cases on that basis. In particular, in cartel cases they may be reluctant to uphold large fines assessed by the competition agency.

63. As with other issues highlighted above, solving the problem will take time. Again, a large component of a solution is education. In this instance, judges need to learn about the importance of competition policy and the principles of competition analysis. Judges must understand that cartels can inflict great harm and that strong sanctions are an indispensable component of an effective anti-cartel programme. This knowledge can be imparted through seminars, meetings and publications. At least as important, however, will be the manner in which cases are presented to the courts. Cartel cases are much more persuasive if they contain direct evidence of agreement involving the cartel participants, and evidence that the participants knew that their conduct was unlawful. The harm caused by the cartel should be emphasized, and quantified, if possible. The vital role of strong sanctions in the anti-cartel effort should be stressed.

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