



Recommendation of the Council concerning Effective Action against Hard Core Cartels

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Background Information

The Council adopted the Recommendation concerning Effective Action against Hard Core Cartels on 2 July 2019 on the proposal of the Competition Committee. The Recommendation updates and replaces the 1998 Recommendation Concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0294].

The relevance of the 1998 Recommendation was undisputed. It served as a catalyst for action against hard core cartels and contributed to the convergence of reforms for effective law enforcement. The 2019 Recommendation reflects and consolidates developments in Adherents' enforcement law, policy and practice since 1998. It aims to guide domestic reforms and improve the effectiveness of cartel enforcement on the basis of commonly agreed standards.

What are hard core cartels and what are their effects?

Hard core cartels are anticompetitive agreements or practices between competitors that aim to fix and raise prices, restrict supply and divide or share markets, thereby causing substantial economic harm. Hard core cartels are the most egregious violations of competition law.

Between 1990 and 2016, nominal affected sales by international hard core cartels exceeded USD 50 trillion. Gross cartel overcharges exceeded USD 1.5 trillion. More than 100 000 companies were liable for international price fixing. Cartel activity is not showing signs of declining: in the six-year period between 2010 and 2016 only, a record 75 new international cartels were uncovered each year. (Connor, J. (2016), The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990- July 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821254)

Hard core cartel prosecution is a priority policy objective for the OECD, and an enforcement priority for Adherents' competition authorities.

The legacy of the 1998 Recommendation

At the time of its adoption, the 1998 Recommendation was a pioneering instrument, influential in drawing attention to the existence of cartels and the harm that they cause, and steering the development of more effective domestic and international rules and procedures against cartels. The 1998 Recommendation stressed the harmful impact of cartels, and recommended adopting effective laws, effective sanctions and enforcement procedures and institutions with powers adequate to detect and punish hard core cartels.

Since its adoption, enforcement practices and policy solutions against hard core cartels have evolved. Adherents have strengthened their enforcement policies and tools. Detection and punishment of cartel conduct have increased. In parallel, the OECD, through its Competition Committee, has pursued relevant policy dialogue and helped support policy developments.

The need to improve the effectiveness of cartel enforcement

In 2018, the Competition Committee reviewed the implementation of the 1998 Recommendation and new developments. The relevant Report concluded that the 1998 Recommendation was still relevant, but lacked some of the significant developments in anti-cartel policy and enforcement practice of the last 20 years. It was therefore agreed to update it to reflect and consolidate developments in Adherents' anti-cartel enforcement regimes.

The Competition Committee will monitor the implementation of the Recommendation. It will collect statistics taking into account the OECD Private International Cartel Database that includes all known international private cartels since 1990, as well as the Secretariat's general statistics about competition agencies that include data on enforcement and information on advocacy initiatives.

*For more information, please consult: www.oecd.org/competition/cartels/.
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THE COUNCIL,

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

HAVING REGARD to the Recommendation of the Council on Fighting Bid Rigging in Public Procurement [OECD/LEGAL/0396] and the Recommendation of the Council on International Co-operation in Competition Investigations and Proceedings [OECD/LEGAL/0408], which includes detailed guidance on all aspects of competition enforcement co-operation, including co-operation in hard core cartel cases;

HAVING REGARD to the developments in the enforcement of laws and policies against hard core cartels since the adoption of the Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0294], which this Recommendation replaces;

RECOGNISING that hard core cartels are the most egregious violations of competition law;

CONSIDERING that in a globalised economy international cartels distort competition and have a detrimental effect on consumers and market participants;

CONSIDERING that Members and non-Members having adhered to this Recommendation (hereafter the “Adherents”) have a common interest in preventing hard core cartels and enforcing effectively their laws against them;

CONSIDERING that hard core cartels can only be stopped and prevented if laws, sanctions and enforcement procedures against them are effective, appropriate and have a deterrent effect;

RECOGNISING that action against hard core cartels is important from an international perspective and particularly dependent upon international co-operation among competition authorities;

On the proposal of the Competition Committee:

I. **AGREES** that, for the purposes of the present Recommendation, the following definitions are used:

- **Hard core cartels** refers to anticompetitive agreements, concerted practices or arrangements by actual or potential competitors to agree on prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by, for example, allocating customers, suppliers, territories, or lines of commerce. They do not include: (a) agreements, concerted practices, or arrangements that are reasonably related to a legitimate efficiency-enhancing integration of economic activity; (b) agreements, concerted practices or arrangements that might otherwise qualify as hard core cartels, which are directly or indirectly exempted from the coverage of Adherents’ competition laws or are mandated in accordance with Adherents’ laws.
- **Leniency programmes** refers to mechanisms offering the opportunity to cartel members to self-report their conduct, provide information and evidence and co-operate with an investigation, in exchange for immunity from, or a reduction in, sanctions, and, in some jurisdictions, immunity from proceedings/prosecution.
- **Plea negotiation and settlements** refers to case resolution tools which enable competition authorities to establish substantive findings, and facilitate and shorten procedures in a cartel case, working with the investigated parties in exchange for a reduction in sanctions.

II. **RECOMMENDS** that Adherents make hard core cartels illegal regardless of the existence of proof of actual adverse effects on markets, and design their anti-cartel laws, policies and enforcement practices

with a view to ensuring that they halt and deter hard core cartels and provide effective compensation for cartel victims, in accordance with their legal frameworks, institutional set up and procedural safeguards. To this effect, Adherents should:

1. Implement an effective cartel detection system by:
 - a. Introducing effective leniency programmes which:
 - i. Set incentives for self-reporting by providing total immunity to the first applicant that reports its cartel conduct and fully co-operates with the competition authority and sanction reductions for subsequent applicants;
 - ii. Provide clarity on the rules and procedures governing leniency programmes and the related benefits;
 - iii. Facilitate reporting by using a marker system to encourage early reporting and provide certainty to applicants;
 - iv. Establish clear standards for the type and quality of information that qualifies for leniency;
 - v. Ensure continued co-operation between the leniency applicant and the competition authority throughout the investigation by taking into account factors such as the value of information submitted and the timing of the submission in determining the level of sanction reductions;
 - vi. Provide protection or reduction from sanctions for qualifying officers and employees of corporate leniency applicants;
 - vii. Exclude the availability of immunity for cartel coercers;
 - viii. Provide appropriate confidentiality protection to leniency applicants; and
 - ix. Seek to reduce unnecessary burdens for parties seeking leniency.
 - b. Using pro-active cartel detection tools such as analysis of public procurement data, to trigger and support cartel investigations.
 - c. Facilitating the reporting of information on cartels by whistle-blowers who are not leniency applicants, providing appropriate safeguards protecting the anonymity of the informants.
2. Ensure that competition authorities have effective powers to investigate hard core cartels by providing them the powers to:
 - a. Conduct unannounced inspections (“dawn raids”) at business and private premises, and access and obtain all documents and information necessary to prove cartel conduct;
 - b. Access electronic information that could help establish a cartel violation including electronic material that is stored remotely (e.g. on ‘the cloud’) and have access to appropriate investigative techniques, such as communications interception and surveillance authorisations. For this purpose, competition authorities should have trained specialised staff and adequate hardware and software equipment;
 - c. Request and obtain information from investigated and third parties, including other government entities;
 - d. Obtain oral testimony from individual witnesses;
 - e. Impose sanctions for non-compliance with mandatory requests and obstruction of investigations.
3. Enable co-operation of their competition authorities with other public entities, such as public procurement bodies, public prosecutors and anti-corruption agencies, including by facilitating the exchange

of information and evidence among different public authorities, while ensuring adequate safeguards to protect against inappropriate disclosure.

4. Enable and incentivise early case resolution tools such as plea negotiation and settlements, which often require an admission of guilt and/or the admission of facts and/or a waiver of the right to appeal.

5. Provide for effective sanctions of a kind and at a level adequate to deter firms and individuals from participating in hard core cartels and incentivise cartel members to defect from the cartel and co-operate with the competition agency. To this effect, Adherents should introduce a combination of sanctions (civil, administrative and/ or criminal, monetary and non-monetary) for an adequate deterrent effect in their jurisdiction. Adherents should consider introducing sanctions against individuals having participated in cartels.

6. Provide a mechanism that gives anyone who has suffered harm caused by a hard core cartel the right to obtain redress or claim compensation for that harm from the persons or entities that caused it, carefully balancing the interaction of public and private enforcement, in particular to protect leniency programmes. To this effect, Adherents should aim to:

- a. Establish rules that enable parties to access the evidence necessary to bring a claim for compensation;
- b. Protect leniency statements, as well as settlement submissions, from disclosure to ensure the right balance between public enforcement by competition authorities and private enforcement by victims of cartels;
- c. Allow private enforcement actions that do not follow on infringement decisions by competition authorities, so as to allow enforcement in cases where there is no prior decision;
- d. Introduce collective redress mechanisms, which allow groups of similarly situated claimants to request compensation collectively;
- e. Grant adequate probative value to final infringement decisions by competition authorities, in private enforcement actions concerning the same hard core cartel;
- f. Suspend private enforcement limitation periods for the duration of the investigation by the competition authority.

7. Support the advocacy efforts of competition authorities vis-à-vis private and public stakeholders, regarding the effective prevention, detection and correction of hard core cartels and regulations that prevent collusive conduct.

8. Restrict exemptions, if any, from the coverage of Adherents' laws against hard core cartels to those indispensable to achieve their overriding policy objectives. To this effect, Adherents should make their exemptions transparent and periodically assess their exemptions to determine whether they are necessary and limited to achieving their objective.

III. INVITES the Secretary-General and Adherents to disseminate the Recommendation.

IV. INVITES non-Adherents to take account of and adhere to the Recommendation.

V. INSTRUCTS the Competition Committee to:

- a. Consider developing an implementation toolkit to support Adherents' implementation of the Recommendation; and

- b. Monitor the implementation of the Recommendation and report to Council no later than five years following its adoption and at least every ten years thereafter.

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