International Competition Network

Guidance on Enhancing Cross-Border Leniency Cooperation

Cartel Working Group
Subgroup 1

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1. Introduction

1.1. Objectives and Framework

As competition agencies around the globe have increased enforcement efforts against cartels, leniency[1] programmes have been adopted by dozens of International Competition Network (ICN) members. This positive development has increased the risk of detection for cartel members and has led to more successful prosecutions of international cartels. However, it has also complicated the enforcement landscape. As cartels cross borders, competition agencies are often called upon to coordinate with other jurisdictions and prospective leniency applicants face an increasingly complex choice when evaluating whether, and where, to seek leniency. This guidance is intended to provide practical advice for competition agencies to assist them in engaging with other jurisdictions on matters involving multi-jurisdictional leniency applicants, with the two parallel aims of first, making international enforcement efforts more effective and second, helping to reduce disincentives for prospective leniency applicants.
This guidance expands on the practices and principles of international cooperation in cartel enforcement contained in other ICN work products. These include the "Good Practices for Incentivising Leniency Applications" report (2019), the "Checklist for Efficient and Effective Leniency Programmes" (2017), and Chapters 2 and 9 of the Anti-Cartel Enforcement Manual, "Drafting and Implementing an Effective Leniency Policy" (2014) and "International Cooperation and Information Sharing (2013)."

1.2. Principles of International Cooperation in Cartel Investigations

The following are some general principles of international cooperation understood and assumed by this guidance document:[2]

- Cooperation can be beneficial for both competition agencies and leniency applicants. While this guidance focuses on ways that agencies can enhance cooperation, leniency applicants also play a role in facilitating effective cooperation.

- Cooperation in cartel cases is voluntary and does not limit an agency's discretion or independence. The need for and the benefits gained from cooperation will vary from case to case. Accordingly, competition agencies retain full discretion to determine the nature and extent of any cooperation with other jurisdictions in any given case.

- Effective cooperation requires mutual trust and a commitment to relationship-building between agencies. This guidance assumes that competition agencies have already established relationships of trust and engage in regular case cooperation.

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[1] The term leniency means a system of immunity and reduction of fines and sanctions (depending on the jurisdiction) that would otherwise be applicable to a cartel participant in exchange for reporting on illegal anticompetitive activities and supplying information or evidence. Leniency programmes cover both the narrower defined leniency policy (i.e. the written set of rules and conditions adopted by a competition agency) as well as other elements supplementing the policy in a wider environment. This guidance document covers leniency applications submitted both prior to and after initiation of a case by the competition agency.

[2] *See also* ICN, *Anti-Cartel Enforcement Manual Chapter 9: International Cooperation and Information Sharing* (2013) available at https://www.internationalcompetitionnetwork.org/portfolio/international-cooperation/

- In addition to a high level of trust, information sharing requires pragmatism and flexibility. Agencies are encouraged to work together to explore ways to share information through:

    - Convening regular liaison meetings on a bilateral, regional, or other common basis;
    - Forming case specific networks that encourage proactive sharing of information;
    - Establishing the necessary formal frameworks to make such exchanges of information possible through Information Gateways and International Agreements referred to in Section 3.2; and,
    - Training agency staff to have a good understanding of the kinds of information that can appropriately be shared with other agencies;

1.3. Principles of Leniency

1.3.1. Leniency Confidentiality[3]

Confidentiality is a critical issue for competition law enforcement and leniency programmes are not an exception. Leniency applicants' concerns about the confidentiality of their application and information provided to competition agencies may undermine the effectiveness of leniency programmes by diminishing the incentives to self-report and co-operate, and may also undermine the integrity and effectiveness of investigations. Cartel members may refrain from applying to a leniency programme when they are not assured about confidentiality of information and evidence they provide since a disclosure may cause, in particular: (i) damages claims under private lawsuits, (ii) commencement of investigations in other jurisdictions where the cartel member did not apply for leniency, exposing the applicant to a greater risk of liability, and (iii) retaliation from other cartel members.

In this context, it is particularly important to protect leniency confidentiality in international cartel cases. Many jurisdictions have adopted leniency confidentiality policies that protect an applicant's identity, as well as any information provided by the applicant, from disclosure to third parties, including other competition agencies, without a waiver.[4] It is important for competition agencies to provide clear guidance on rules and regulations that govern leniency confidentiality, including on what terms a competition agency will cooperate and share information with other competition agencies. This can ease the concerns of current and potential applicants and also facilitate coordination between different competition agencies.

1.3.2. Transparency and Predictability

[3] Leniency confidentiality refers to confidentiality of an application, an applicant's identity, and information and evidence provided by the applicant in the course of the leniency process.

[4] For further information about waivers, *see* Section 3.1 of this guidance, *supra* at pp. 9-11; ICN Cartel Working Group*, Leniency Waiver Templates and Explanatory Note* (available at https://www.internationalcompetitionnetwork.org/portfolio/leniency-waiver-template/) *;* ICN Cartel Working Group*, Anti-Cartel Enforcement Manual, Chapter 2: Drafting and Implementing Effective Leniency Policy,* pp. 14-15 (2014) (available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf).

It is widely acknowledged that a successful leniency programme should allow potential applicants to anticipate to a reasonable extent the consequences of their application.[5] Agencies can create certainty and predictability for applicants by providing written leniency policies, and consistently following those policies in practice. As the ICN Anti-Cartel Enforcement Manual emphasises, *"competition agencies should ensure that their leniency policies are clear, comprehensive, regularly updated, well publicised, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted."*[6] Additionally, the manual indicates that there must be transparency and certainty regarding the consequences of not coming forward. Transparency of leniency procedures and decision-making builds trust between applicants and competition agencies, provides credibility to a leniency programme, and helps create predictability and raise awareness for prospective applicants.

It is also crucial to have an open dialogue between applicants and the agency to build mutual trust and address any issues that may arise as a case proceeds. In the process of building the trust of firms and their representatives, competition agencies are expected to provide applicants with as much certainty as possible that they will not be put in a less favourable position than non-cooperators.

In cases involving cross-border enforcement, differences in leniency policies can reduce predictability for applicants and competition agencies. There are often differences between jurisdictions' leniency policies, such as when to terminate cartel participation, the quality and quantity of information that should be provided by the applicant to obtain a marker,[7] whether the application must be made in writing, and the time period within which the application must be completed. These differences may create disincentives for both competition agencies and applicants. In such cases, it is an advisable practice to discuss potential sources of differences before or at the beginning of cross-border cooperation with participation of all the parties involved. It is also important to have open dialogue between the cooperating competition agencies, and between the agencies and leniency applicants throughout the leniency process.

2. Communications Between Agencies

Communication between competition agencies is key to successful coordination in cartel cases involving multi-jurisdictional leniency applicants. Communication includes both informal and formal contacts, depending on the circumstances of the particular case, and should be ongoing throughout a case. Set forth below are some examples of effective strategies for communication, based on lessons learned in practice.

2.1. Initiating and Maintaining Communications

Identifying other jurisdictions for coordination. Many agencies have found it useful to ask the leniency applicant to do the following, at the earliest opportunity:

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5 *See also* OECD Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Cooperation and Enforcement, *Background Note on Challenges and Coordination of Leniency Programmes*, pp. 7-8., available at https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf

6 ICN Cartel Working Group*, Anti-Cartel Enforcement Manual, Chapter 2: Drafting and Implementing an Effective Leniency Policy*, *supra* note 4, at p.6.

7 For further information about marker systems, see ICN Cartel Working Group*, Anti-Cartel Enforcement Manual, Chapter 2: Drafting and Implementing an Effective Leniency Program, ibid.,* pp. 11-12.

- Indicate in which other jurisdictions it has applied for leniency, or if it is aware of an investigation in any other jurisdictions.[8] Where other leniency applications have been made, a waiver should be sought from the applicant to discuss the application with other relevant competition agencies, as appropriate.

- Provide an update if it later applies for leniency in additional jurisdictions or becomes aware of other investigations.

When should agencies initiate contact with other jurisdictions? Early contact with other jurisdictions where the leniency applicant has also applied for leniency can be fruitful, result in efficiency gains, and enhance coordination at later stages of an investigation. Agencies should consider on a case-by-case basis whether coordination with a specific jurisdiction is likely to be beneficial and whether the timing is right to initiate contact, in light of applicable laws in their jurisdictions and agency priorities.

Why are early contacts with other jurisdictions useful? Discussions between jurisdictions at the beginning of an investigation can help agencies to:

- Determine the status of leniency applications;
- Determine the potential scope and timing for cooperation;
- Agree on a tentative timetable for regular communication;
- Better align investigative timing and investigative steps;
- Avoid tip-off risk during the covert stage of an investigation; and,
- Develop theories of harm and brainstorm about possible investigative opportunities in the covert stage of an investigation.

How to contact other jurisdictions?

- The ICN Cartel Working Group Framework for Sharing Non-Confidential Information provides contact information for liaison officers at ICN member agencies who can provide the case team's contact information.[9]
- A leniency applicant's counsel can provide a point of contact at other agencies where the applicant has applied.
- Agencies should consider designating a specific contact person at their agency with responsibility for coordinating cross-border cooperation.

Regular contacts

After establishing the initial contact with another interested competition agency, it is essential to maintain regular contact in each phase of the investigation. Communication at key decision-making stages may help to promote success, and assist agencies in supporting each other's objectives and outcomes.

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[8] It is important to note that an application for leniency to one agency is never considered as an application for leniency to another agency. Therefore, it is in the interest of the applicant to apply for leniency to all potentially relevant competition agencies.

[9] *See* ICN Cartel Working Group, *Framework for Sharing Non-Confidential Information*, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_nonConfidentialInfoFramework.pdf. *See also* Promotional Flyer, available at: https://www.jftc.go.jp/en/int_relations/icn_files/Promotion_Flyer.pdf

Depending on the specifics of the case, such key stages might be, among others:

- During assessment of leniency applications;
- While planning investigative measures, including requesting a leniency applicant's continued participation in a cartel, planning and executing dawn raids, conducting interviews, or sending requests for information;
- During assessment of the evidence;
- Before public announcements of key agency decisions; and,
- Before determining potential outcomes of the case.

2.2. Exchange of Non-confidential Information to Facilitate Effective Collaboration

Competition agencies can benefit from sharing non-confidential information. This section explores the types of information that agencies may find useful to exchange during an investigation.

Exchange of information about legislation, agency policies, and procedures. Having a basic understanding of how another competition agency investigates its cases, as well as its laws and policies regarding information sharing, will help enhance collaboration, avoid conflicts that negatively impact enforcement efforts, and can often reduce the burden upon leniency applicants. Much of this information can be found in the ICN Cartel Working Group Anti-Cartel Enforcement Templates.[10]

Suggested questions to ask when collaborating with another agency may include, among others:

- Cartel Laws
  - Is the jurisdiction a civil/administrative or criminal regime?
  - What are the elements, evidentiary requirements, and standard of proof for a cartel offense?
  - What types of penalties are available? Are individual sanctions imposed?

- Enforcement Procedures
  - What is the agency's typical investigative process? What are the deadlines (if any) for the closure of the proceeding?
  - What types of investigative tools does the agency use?
  - Does the competition agency work with other domestic law enforcement or regulatory agencies and what is the role of the other domestic agencies in the investigation?
  - What are the agencies' confidentiality policies and issues?

- Leniency Policies and Procedures
  - What is the scope of the agency's leniency programme? Does it extend to firms and individuals? Is leniency available for more than one firm, or is it a "first-in-the-door" policy?
  - What types of infringements does the leniency programme cover?
  - Does a corporate leniency agreement provide coverage to individual executives and what are the agency's "carve-out" policies?
  - What is the typical timing for a grant of leniency?

[10] *See* ICN Cartel Working Group, Anti-Cartel Enforcement Templates, available at https://www.internationalcompetitionnetwork.org/working-groups/cartel/templates/.

- Are markers available under the agency's leniency programme?
- Is leniency plus[11] available under the agency's leniency programme?
- What is the agency's confidentiality policy with respect to leniency?

Divergence in Leniency Policies

A survey conducted in the course of the 2017-2018 ICN year on the key elements for an efficient and effective leniency programme and its application revealed – among others – the following differences in leniency policies across jurisdictions that have impacted leniency applicants:

- Individual vs. corporate leniency systems
- Administrative vs. criminal systems
- Scope and coverage of leniency regimes (for example, some programmes cover only hard-core cartel conduct while other programmes cover information exchanges or vertical restraints)
- Uncertainty of definitions, for example, the meaning of ringleader or coercer
- Different approaches to markers
- Different procedural rules, including different timelines for receiving the decision of the agency to grant leniency and types of evidence accepted

The respondents to the survey believed that enhanced cooperation among competition agencies is necessary to address issues arising from these differences.

Raise awareness about each jurisdiction's limitations to cooperation. Laws and policies within various jurisdictions may impact a competition agency's ability to share information with a foreign agency. In some cases, an agency may not be able to cooperate informally through waivers (described in Section 3.1) and may require formal assistance requests through a cooperation agreement or treaty. Some agencies may be prohibited from cooperating at all. When communicating with one another, agencies should educate each other at the outset about any existing legal and policy limitations.

Limits to Cooperation – Examples from ICN Member Jurisdictions

In the United States, the United States Department of Justice (U.S. DOJ) uses a grand jury to investigate cartels and grand jury secrecy rules prohibit sharing information and documents except in very limited circumstances as authorised by a U.S. federal court. In other jurisdictions, the law may require a formal submission of a request under a Mutual Legal Assistance Treaty or Convention to conduct an interview of an individual in that jurisdiction.

Exchange of information related to markets and industries. Agencies may find it useful to exchange and discuss market data and industry information with one another to assist their respective investigations:

- Competition agencies may find it useful to exchange and discuss information about market structure, market participants, the product or service involved, and other information relevant to understanding the industry under investigation.

[11] Under leniency plus, companies or individuals that do not qualify for immunity or reductions in fines, but reveal a second cartel can benefit from the disclosure by receiving a reduction of fines for the first infringement. See ICN Cartel Working Group, *Checklist for Efficient and Effective Leniency Programmes*, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/CWG_LeniencyChecklist.pdf

- A competition agency may ask another agency to obtain public records, including court filings and corporate documents, available in the other agency's jurisdiction and for assistance in interpreting the documents.
- A competition agency may contact domestic regulatory agencies within its jurisdiction to share information about the regulatory structure within the jurisdiction, and issues that may affect competition enforcement. For further discussion of interactions with domestic regulators, see Part 6 below.

2.3. Proactive Exchange of Intelligence and Activities

As noted in Section 1.3.1, it is critical for leniency programmes to ensure the protection of information provided by leniency applicants. Accordingly, it is important for agencies to understand what information can be shared with other agencies.

In most regimes, confidentiality must be maintained about the identity of leniency applicants and the substance of information and documents provided by the applicants. However, within these bounds of confidentiality, it is often possible to share high level information or intelligence with competition agencies in other jurisdictions affected by the cartel, even where a leniency application has not been made or a waiver has not been provided. As an investigation progresses and further information is gathered from a range of sources, the capacity to share general information with other agencies often increases. Disclosures of this nature may enable other jurisdictions to undertake proactive investigations related to the cartel, or take steps to preserve evidence within their jurisdiction.

Proactive exchange of intelligence may include alerting competition agencies in other jurisdictions to industries or market sectors that may warrant investigation or sharing general intelligence gathered, without divulging confidential details of investigations. In some cases, international cooperation agreements require competition agencies to notify other jurisdictions of enforcement activities carried out in that jurisdiction's territory. To the extent that any of this information relates to an investigation it is generally likely to be confidential within that agency. It would usually be shared on strict conditions that it is kept confidential within the agency to which it is disclosed and on a "need to know" basis.

3. Exchange of Confidential Information

3.1. Waivers

In order to protect the integrity of their leniency programmes, many competition agencies have adopted a policy of not disclosing to other competition agencies the identity of or information obtained from a leniency applicant without the prior consent of the applicant, unless required by law (e.g., a court order). Such consent typically takes the form of a waiver.

A waiver of confidentiality is consent from a leniency applicant to waive, within the limits set out in the consent, the confidentiality protections afforded to it in the jurisdiction of the investigating competition agency. The waiver mechanism allows leniency applicants to stipulate with which jurisdictions they are willing to allow the agency to share the information and the extent to which the information is shared. Where leniency applications are made in at least two jurisdictions, a waiver of confidentiality, whether oral or written, creates more opportunities for multi-jurisdictional cooperation by enabling information sharing between competition agencies. This benefits both the competition agency and the leniency applicant. The ability to quickly share information received from the leniency applicant facilitates

coordination of investigatory measures and potentially expedites the review and decision-making process.

Sometimes it is necessary to specify the terms of a waiver. The ICN has developed template waivers, which are of use to both competition agencies and leniency applicants in international cartel investigations. They can be utilised as a reference point in discussions between parties and agency representatives. The *ICN Explanatory Note on Waivers of Confidentiality in Cartel Investigations* complements the respective waiver templates and provides certain guidance as to the use and usefulness of the waivers.[12] Waivers relate to a specific cartel investigation and can only be used for the purpose of that investigation. Waivers are of an open-ended duration unless otherwise specified.

Exchange of information between competition agencies pursuant to the waiver of confidentiality will take place in the form of oral or written communication. While a waiver will not generally preclude the sharing of documents, in practice this is exceptional. A competition agency will generally obtain the relevant documents directly from the applicant rather than from the other agency. Waivers of confidentiality only apply with respect to the sharing of confidential information between the competition agencies specified in the waiver. They do not constitute a general waiver by the leniency applicant to disclose information to third parties.

3.1.1. Process for Obtaining Waivers

When dealing with a leniency application, it is a good practice to request that a leniency applicant provide a waiver (written or oral) that allows a competition agency to discuss the application with relevant counterpart agencies very early in the leniency process. Competition agencies should provide a full explanation of their own waiver process, including the applicable confidentiality rules, so that a leniency applicant may make an informed decision about whether to provide a waiver. A waiver of confidentiality is voluntary and it is the leniency applicant's decision whether to provide a waiver. Notwithstanding this, many competition agencies will expect the applicant, absent compelling reasons, to provide full waivers allowing communication with jurisdictions to which the applicant has made similar leniency applications as part of the leniency applicant's ongoing cooperation requirement.

3.1.2. Types of Waivers and Resolving Issues with Different Waiver Systems

Procedural Waivers allow competition agencies to coordinate on the procedural aspects of a cartel investigation. These waivers typically cover issues such as the identity of the leniency applicant in a specific sector or the likely location of the main evidence. The purpose of the procedural waiver is the coordination of key investigative steps between competition agencies. It is limited in scope and does not allow for a substantive discussion on the information provided by the leniency applicant. Some competition agencies, such as the U.S. DOJ, take the position that a waiver is not necessary to coordinate investigative steps if the leniency applicant's identity or information provided is not disclosed, and will typically only accept full waivers.

Full Waivers allow competition agencies to coordinate on the procedural aspects of an investigation as well as exchange information on the substance of a leniency applicant's submission. They allow

[12] *See* ICN Cartel Working Group, *Waivers of Confidentiality in Cartel Investigations – Explanatory Note*, *supra* note 4.

competition agencies to discuss the content of information, evidence, records or statements provided by the leniency applicant.

The ICN Cartel Working Group has created templates for both full and procedural waivers for use by competition agencies.[13]

Resolving Issues. Typically, the information a competition agency receives pursuant to a waiver will be granted the protection which is provided to any confidential information received directly by the receiving competition agency. However, as different jurisdictions may have different rules regarding confidential information, where appropriate and necessary, and in consultation with the respective competition agencies, leniency applicants may insert specific language in the waiver referring to the rules in question.

3.2. Information Gateways and International Agreements

As mentioned above, most competition agencies can only share confidential information obtained from leniency applicants pursuant to a waiver. This Section outlines mechanisms for sharing information acquired from sources other than leniency applicants.

3.2.1. Information Gateways

The competition laws in some jurisdictions contain "information gateways" which allow the competition agency to share confidential information with foreign competition agencies without prior consent from the source of the information. Jurisdictions with such provisions include Australia, Canada, Germany, and New Zealand. Article 12 of EU Regulation No 1/2003 also contains an information gateway for exchange of confidential information within the EU.[14]

New Zealand Commerce Commission – Information Gateway

Under Section 99 of the *Commerce Act* the NZCC can provide confidential information it has acquired compulsorily or investigative assistance to the requesting agency. Compulsorily acquired information is information that has been provided by a party in response to the NZCC using its statutory powers. Investigative assistance includes conducting interviews and executing search warrants on behalf of the requestor. The NZCC does not have to be aware of the matter or investigating it. If the provision of the information could impact New Zealand business interests, the NZCC must consult other government agencies. To make such a request, the requesting agency must have a cooperation agreement with the NZCC that conforms to Section 99 of the *Commerce Act* and there will be conditions that are imposed on both the storage and use of the information provided.

Agencies with information gateway provisions have the discretion to decide whether to share confidential information and may choose to provide it subject to certain restrictions (e.g., on its use or

[13] For written waiver templates, *see* ICN Cartel Working Group, *Waivers of Confidentiality in Cartel Investigations*, *Ibid*.

[14] See OECD Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Cooperation and Enforcement, *Background Note on Access to the Case File and Protection of Confidential Information*, available at https://one.oecd.org/document/DAF/COMP/WP3(2019)6/en/pdf

disclosure). The specific laws and policies of each jurisdiction should be consulted as each agency may have different requirements to share information pursuant to information gateways. The Organisation for Economic Co-operation and Development (OECD) has recommended that countries should consider the adoption of legal provisions allowing for information gateways.[15]

3.2.2. International Agreements

Competition-specific bilateral cooperation agreements contain provisions related to confidentiality, information sharing and the use of communicated information. However, the fact that the signatories of such agreements must abide by their own domestic laws may limit their ability to share confidential information without consent from the party from whom it originated. Agencies may also decide not to share information pursuant to these agreements if doing so would be incompatible with their policies or other important interests.

Jurisdictions are increasingly entering into "second generation" cooperation agreements. These agreements contain provisions enabling the exchange of confidential information under certain circumstances, without seeking prior consent from the source of the information. For example, the following agreements include information gateways: Australia and the US (1999)[16], the EU and Switzerland (2013)[17], New Zealand Commerce Commission and the Australian Competition and Consumer Commission (2013)[18], and the Nordic countries (Sweden, Norway, Finland, Iceland and Denmark) (2017).[19] All non-binding cooperation instruments, such as agency-to-agency cooperation arrangements, rely upon the existing competition laws in each competition agency's jurisdiction for the communication of confidential information (i.e., information gateways) and allow the sharing of confidential information that is already legally permissible. Many competition agencies cooperate with other competition agencies within their region through regional mechanisms such as the European Competition Network.[20]

3.2.3. Considerations before Providing Confidential Information from Sources other than Leniency Applicants

This Section relates to the sharing of confidential information without consent from sources other than leniency applicants. The decision to communicate confidential information to another agency without

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15 *See* Recommendation VII in the *OECD Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings*, available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408.

16 *See* https://www.justice.gov/sites/default/files/atr/legacy/2015/01/15/311076.pdf.

17 *See* https://ec.europa.eu/competition/international/bilateral/agreement_eu_ch_en.pdf.

18 *See* https://www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20New%20Zealand%20Commerce%20Commission%20and%20the%20Australian%20Competition%20and%20Consumer%20Commission.pdf.

19 *See* OECD Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Cooperation and Enforcement, *Background Note on Access to the Case File and Protection of Confidential Information*, *supra* note 14.

20 See ICN Cartel Working Group, *Anti-Cartel Enforcement Manual, Chapter 2*, *supra* note 2, pp. 16-17; ICN Cartel Working Group, *Cooperation between Competition Agencies in Cartel Investigations* (2007), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_Cooperation.pdf.

consent should be made on a case‐by‐case basis. When the sharing of information is permitted by their laws, agencies may consider the following factors when making the decision:[21]

- Whether both competition agencies are investigating the same or a related cartel;
- Whether the information to be disclosed is relevant to the receiving agency's investigation or proceeding;
- Whether the receiving agency grants reciprocal treatment;
- Whether the information is covered by a legal privilege such that it cannot be shared (e.g., legal professional privilege);
- Whether the receiving agency has adequate safeguards to protect the confidentiality of the information. These could include:
    - electronic protection or password protection;
    - limiting access to the information to individuals on a "need-to-know" basis; and
    - procedures for the return or disposal of the information in a manner agreed upon with the sending agency; and
- Whether the disclosure might harm the legitimate business interests of the undertaking or the interests of the individual to whom the information relates.

The sending agency should also be satisfied that the receiving agency will do the following (whether through a signed undertaking or obligations contained in a cooperation agreement):

- Protect the confidentiality of the information;
- Only use the information for the purpose for which it was provided (unless approved by the sending agency in advance);[22]
- Refrain from transmitting it to a third party (unless approved by the sending agency in advance); and
- Notify the sending agency of any third party request related to the information disclosed and oppose such disclosure (unless the sending agency has agreed to the disclosure).

3.2.4. Mutual Legal Assistance Treaties

Many countries have entered into Mutual Legal Assistance Treaties (MLATs). These are bilateral treaties, which are not specific to competition investigations. An MLAT typically allows the signatories to request various types of assistance from each other, such as the use of investigative powers (e.g., searches) and sharing of confidential information. Competition agencies should keep the following points in mind when considering making an MLAT request:[23]

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[21] Many of these considerations are identified in the *Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings* (2014), available at http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf

[22] For example, in some jurisdictions the sending agency may not allow the receiving agency to use the information in criminal proceedings.

[23] These factors are outlined in the OECD document, *Improving International Co-operation in Cartel Investigations* (2012), available at http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf.

- MLATs require the underlying offence to be a crime in at least the requesting country's jurisdiction, sometimes both ("dual criminality").
- The jurisdictions involved may have different legal standards. For example, the law of some jurisdictions requires that in order to be used in court, evidence gathered pursuant to an MLAT must be gathered respecting the rights of defence applied in the requesting jurisdiction.
- Certain investigatory methods available to the requesting jurisdiction may not be available to the requested jurisdiction (e.g., the interception of private communications).
- MLAT requests may take a lot of time. The requests may need to go through the relevant Ministry rather than the competition agency. Legal challenges can also result in delays. In many cases, it can take more than a year to receive the requested information after sending a request.
- The use of MLATs can be human and financial resource-intensive.

4. Coordination in the Pre-Inspection/Covert Stage of a Case

As outlined in Section 2, communication and building trust is a critical element of successful investigative coordination between agencies. Regular communication with other jurisdictions investigating the same cartel conduct provides an opportunity to build a greater shared understanding of the nature and extent of the cartel conduct. In addition, it enables better coordination of investigative steps to ensure parallel investigations complement each other and do not conflict. Coordination in this way increases the efficiency of such investigations for all agencies involved and reduces the cost and resources involved in common leniency investigations for agencies and applicants alike.

As noted in Section 3, many competition agencies require a waiver of consent from the leniency applicant to enable confidential information obtained from a leniency applicant to be disclosed to other competition agencies. For the purposes of this Section of the guidance, it is assumed that appropriate waivers have been sought from, and provided by, leniency applicants early in the leniency process to enable free information exchange and coordination of investigatory steps to take place, or that other appropriate information exchange frameworks exist. However, as noted in Section 2.2, the laws and policies within various jurisdictions may impact a competition agency's ability to coordinate, even after the provision of signed confidentiality waivers.

4.1. Exchanging Intelligence on Scope of Conspiracy and Investigation

It is recommended that an initial teleconference be scheduled with all jurisdictions with a common leniency applicant to ascertain the scope of the conduct and stage of investigation. The information exchanged in this initial teleconference will enable the agencies to determine whether the conduct has sufficient similarities and/or jurisdictional overlap to warrant coordination of future investigatory efforts.

4.1.1. Stage of Investigation

Some jurisdictions may be more advanced in their investigations than others. This is often very useful to agencies at the beginning of their investigations, as they can benefit from this existing technical knowledge and understanding of the industry, product or service, and operation of the alleged cartel. Sharing such knowledge may enable these jurisdictions to accelerate the initial progress of their investigations.

There is also the potential for negative consequences when investigations are at differing stages, such as tip-off risk, if agencies do not communicate or coordinate their investigative steps. Building understanding around these differences helps to minimise these consequences and harmonise approaches where appropriate.

4.1.2. Scope of Conduct

Initial exchange of information regarding the scope of the conduct might include:

- *Participants*
  Which companies and individuals are involved in the alleged conduct?
  Where are they headquartered/resident?

- *Case theory*
  What is the nature of the cartel conduct (price fixing, market sharing, bid rigging, or output restrictions)?
  What is the type of agreement alleged? Is there an over-arching agreement, or are there multiple conspiracies or local agreements/variations?
  Are there other types of anti-competitive conduct involved?
  Do the parties have a history of cartel or other anti-competitive behavior?

- *Products/services involved*
  Which products or services are the subject of the cartel conduct?
  Does the product or service vary between jurisdictions?
  Is the product/service subject to other regulation/legislation in each jurisdiction?

- *Geographic scope*
  Where and when was the agreement reached/ key meetings held?
  Where, when and how was the agreement put into effect around the world?
  Which countries does the conduct affect?
  Where are the relevant evidence and potential witnesses likely to be located?

- *Duration*
  When did the cartel start/end? Does this vary between jurisdictions?
  What time limitations apply in relevant jurisdictions?

- *Theories of harm* (where relevant)
  What is the actual or potential effect/harm of the conduct in question?
  Are there any key challenges to developing a coherent theory of harm?

Practical Example: Benefits of Cooperation on the Delineation of Cases

DG Competition of the European Commission and a third country agency had regular contacts early on in the respective proceedings in order to delineate the scope of the parallel proceedings with a view to avoiding overlaps. The leniency applicants subject to the proceeding had applied in both jurisdictions. DG Competition and the other agency discussed, in particular, the geographical scope of the conduct and coordinated with regard to an in-depth analysis of the evidence. The agencies agreed to pursue the conduct in their own respective jurisdictions and decide whether to open formal proceedings.

4.2. Coordinating Covert Investigative Steps

Understanding the focus of other jurisdictions, the evidence that has already been obtained, and the evidence that is still required, will enable jurisdictions to better target and coordinate covert investigative steps. This can reduce duplication of effort or gain efficiencies for agencies and leniency applicants alike, and streamline the information-gathering process. Types of covert coordination and cooperation may include:

- Coordinating marker wording and the timing of proffers and witness interviews;
- Coordinating requests for information from leniency applicants, subject to confidentiality requirements;
- Consulting on the sufficiency and level of disclosure by common leniency applicants;
- Sharing other information held by foreign agencies, such as market studies or general market or industry information; and,
- Sharing other evidence more easily accessible by foreign agencies, such as company registers or telephone records, through formal or informal information gateways.

Cross-border Coordination on Proffers and Leniency Interviews

Example 1 - Joint Proffer
Two foreign agencies have previously scheduled a joint initial proffer from a common leniency applicant via video conference. This can be particularly effective in cases where the legislation or conduct does not vary significantly between countries, and is an example of how agencies can work together to create efficiencies for both themselves and leniency applicants. In other jurisdictions, such as the US, joint interviews or proffers are typically avoided so each agency can maintain independent, parallel investigations.

Example 2 - Sequential Leniency Witness Interviews Between Neighbouring Countries
Two foreign agencies cooperated to ensure that a leniency witness travelling into the same geographic region was able to attend witness interviews in both countries during the same overseas trip.

4.3. Coordinating on Dawn Raids and Going Overt

Given the serious and clandestine nature of cartel conduct there is a real risk that evidence could be altered, hidden, removed or destroyed, if it is not secured when, or immediately after, an investigation enters the overt stage.

Accordingly, where a cartel involves conduct across international borders, it is best practice to communicate and coordinate the timing of dawn raids or searches and other steps that take the investigation into the overt stage, when possible, in order to minimise the risk of destruction of evidence in jurisdictions affected by the alleged conduct.

Coordination does not need to be limited to concurrent raids in different jurisdictions, but can involve coordinating the use of other formal powers (for example, statutory notices compelling businesses to supply documents or information) or measures seeking to preserve evidence in other jurisdictions on the same day that raids are conducted in other countries.

Where the law allows (see Section 3.2.1 and 3.2.4), a competition agency may also request another jurisdiction to compulsorily obtain evidence on its behalf. It is important to understand that each jurisdiction has its own rules for how formal requests for assistance can be initiated and that agencies work cooperatively to navigate the often-complex official requirements.

Practical considerations to account for when coordinating dawn raids/inspections include:

- Scope of inspections:
  - the investigated conduct, the likely period of the potential infringement, the involved undertakings (agencies need to make sure that in the case of leniency applications, they have the same relevant information);
  - the geographical scope of the conduct: In what jurisdiction or jurisdictions has the conduct taken place? How to allocate teams in order to reach the biggest impact?
  - the location of targets where evidence is most likely to be found: considerations concerning the different locations (headquarters / main production sites / main office buildings);
  - discussions on the names and the likely location of target persons and their offices, considerations of whether to inspect private homes; and,
  - considerations to focus on specific electronic devices, for example, mobile phones, or other types of evidence.

- Timing of inspections (or other investigative measures): different time zones need to be taken into account.

- Regular exchange is needed and on a strictly need-to-know basis to prevent tipping off.

5. Coordination in the Post-Inspection/Overt Stage of a Case

This is often the stage when substantive cooperation can diminish. This is understandable as agencies will frequently be following their own distinct procedures, but it is important that the dialogue continues. A dialogue about how each agency plans to move forward in the overt stage of a case can include providing notifications of key case events, discussions of evidence, further investigative steps, and the approach to the calculation of fines.

5.1. Notification of Key Decision-making Junctures or Key Developments in Case

As noted in Section 2.1, adopting a common standard practice of proactively notifying other affected jurisdictions before key events can be valuable to jurisdictions with a common interest in an investigation. Examples of key milestones or developments include:

- When a defendant is indicted/arrested/charged/proceedings are instituted;
- When a statement of objections is issued, or hearing convened;
- When an investigation is discontinued; and,
- When fines are levied or decisions/judgments made.

5.2. Discussion of Evidence

Agencies can verify that the applicants submitted relevant evidence to all agencies and can exchange views on how to interpret those documents. For example, in the *TV and computer monitor tubes* case, DG Competition had useful discussions with the U.S. DOJ on how to interpret certain pieces of information, such as the dates of meetings, indicated on documentary evidence (i.e., whether the day or the month was written first). This was particularly important for the discussions with a leniency applicant and for the precise determination of the duration of the infringement.

Competition agencies may also flag "hot" documents or documents of particular relevance for another agency. If an agency has not yet received documents mentioned by another agency, they can ask the leniency applicant to provide them. Agencies may also prepare summary tables or overviews of the evidence and discuss their content with the other agency. In some cases, evidence found during a search in one jurisdiction may contribute to proving an infringement in another jurisdiction, and the competition agencies may want to discuss such findings and whether the legal means to share such evidence exists.

Agencies normally do not physically exchange documents provided by leniency applicants. It is a good practice for each agency to request documents separately. If exceptionally it is possible to physically exchange leniency documents between two jurisdictions, such an exchange may be useful in instances where one agency already has access to translated documents (either from the applicant, or where the agency has itself prepared translations), which it may then provide to another agency to minimise delays and reduce the burden on the applicant. The sending agency should obtain consent from the applicant before doing so.

It is useful to inform the other agencies when leniency information, including leniency statements or contemporaneous documents submitted as part of the application, will be revealed through disclosure in court proceedings or other authorised disclosures, and as a result, may reach the other parties under investigation.

5.3. Coordination of Interviews and other Joint Scheduling Opportunities

Agencies may need to coordinate interviews or other investigative steps in order to obtain further information or clarification from leniency applicants in the post-inspection phase. This would reduce the duplication of efforts on the side of the agencies and the leniency applicants alike, and may contribute to more effective enforcement. Often competition agencies will need to conduct interviews of the same key witnesses. In large cases, this can lead to witnesses sitting for dozens of interviews in different countries. Working together to coordinate the timing of interviews can result in benefits for both competition agencies and the leniency applicant by reducing travel time for the interviewees, reducing witness fatigue, and reducing travel costs to the applicant. When coordinating interview timing, some considerations include:

- **Interview practices and procedures differ across jurisdictions.** Agencies should be aware of and discuss how other agencies' interview practices may differ from their own, and assess how those practices may impact the witness, as well as their case.[24]

[24] For example, in *U.S. v. Allen*, the U.S. Court of Appeals for the Second Circuit reversed the convictions of two defendants in a cartel case after ruling that interview procedures by a foreign competition agency violated the protection provided by the Fifth Amendment of the U.S. Constitution against compelled testimony, and finding

- **Legal requirements for conducting interviews differ across jurisdictions.** For example, some countries may require an MLAT request or other formal process for a foreign competition agency to conduct an interview in their jurisdiction, even if the interview is voluntary.

- **Being mindful of coordination that becomes a "joint investigation."** While coordinating on the timing of interviews is encouraged, agencies should carefully consider – before engaging in further coordination such as joint interviews, coordinating on what questions to ask or what documents to use in an interview, or exchanging copies of interview reports – whether further coordination could lead to arguments that the agencies have conducted a "joint investigation." In the U.S., for example, if an investigation is deemed a joint investigation that can potentially lead to additional disclosure obligations in the U.S. matter which can be burdensome for both jurisdictions.

5.4. Coordination on Case Outcomes

Coordination between competition agencies in the latter stages of an investigation can provide insight into determining remedies and imposing sanctions, particularly with regard to fine calculations. When agencies reach the point in an investigation of making a determination about fines, settlements, or other penalties, agencies may find it useful to engage in discussions about the role of each cartel participant – for example, whether a firm or individual is a fringe player or whether there may be aggravating circumstances; fine reductions; parental liability issues; assessments of the quality of leniency applications; or other factors that may influence the competition agency's final decision.

5.4.1. Coordination on Fines and Other Sanctions

It is important to understand the approach that other jurisdictions are taking to determine affected commerce from the conduct but also to ensure that the risk of "double counting" is mitigated where possible. The understanding of another jurisdiction's approach is of course not binding for the other jurisdiction. However, where there are different enforcement outcomes it is important for agencies to understand the basis for that approach, as parties face different outcomes in different jurisdictions. Confirmation that an agency did not include another jurisdiction's volume of commerce in its fine calculations can help the other agency negotiate fines with subsequent cartel participants.

In practice, calculating the amount of a fine in a large international cartel case is fact-intensive, case-specific, and complex. It can be very useful for agencies to exchange views on their approach to fine calculations, in particular with regard to the following:

- If leniency applicants applied in several jurisdictions, agencies may exchange views on the ranking of the leniency applicants (1st, 2nd, 3rd, etc. in applicable jurisdictions) and thus, the minimum and maximum reduction percentage of the fine each could potentially receive. If an applicant has different rankings in different jurisdictions, and the applicant contests this, the arguments raised by the applicant can be better addressed if the agencies coordinate and

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that the testimony provided by a cooperating witness who had been exposed to the interview transcripts was tainted. *United States v. Allen*, 864 F.3d 63, 68 (2d Cir. 2017).

inform each other about the circumstances under which the ranking was established (subject to confidentiality requirements).

- Agencies may also find it useful to exchange views in order to understand the other agency's approach to the value of sales (affected commerce) on the basis of which the fines are to be calculated. Such discussions can be particularly beneficial where there is a chance that the calculations would include some of the same sales.

Practical Example 1: Benefits of Cooperation on Fines

The European Commission's decision in the Maritime Car Carriers case

The European Commission adopted the decision in February 2018 by finding that five car carriers formed a cartel in the market of deep-sea transport of cars, trucks and other large vehicles on various routes between the European Economic Area ("EEA") and other continents. All five undertakings submitted leniency applications to DG Competition. There were several parallel investigations in different jurisdictions and thanks to waivers DG Competition regularly discussed the case with other agencies, including which routes (inbound, outbound or both) should be taken into account for the purpose of the fine calculation. DG Competition decided to include the sales generated on both inbound (when vehicles were transported into the EEA from another continent) and outbound (when vehicles were transported from the EEA to another continent) routes. In order to take into account, however, the fact that a part of the transport services was performed outside the EEA and, thus, a certain part of the harm fell outside the EEA, the European Commission applied a 50% reduction when calculating the fines on the parties.

- Agencies should exchange views on what type of evidence is needed to calculate affected commerce and how the agency analyzes that evidence. Agencies can coordinate to make more narrowly-tailored requests for documents and data from leniency applicants and other cooperators that focus on the harm caused in their respective jurisdictions, rather than making overly burdensome and duplicative requests. Agencies can also coordinate on assessment of the evidence, including claims of inability to pay that may be raised by cartel defendants.

- Other fine parameters, such as aggravating or mitigating circumstances, may also be discussed to assist an agency's broader understanding of how each outcome is arrived at in different jurisdictions.

- Other fine-related aspects of the case that would help to ensure that any fine imposed on the second-in or subsequent leniency applicant is sufficiently deterrent can also be discussed.

- Agencies could consider giving credit for fines paid in other jurisdictions where appropriate, such as when both jurisdictions are using the same sales as a basis for the fines assessed.[25] These discussions can ensure the penalties cover the full scope of the harm caused by the cartel, and may also help prevent overlapping fines and decrease unnecessary burdens on parties.

[25] This would likely require early cooperation from the leniency applicant with both jurisdictions.

Practical Example 2: Benefits of Cooperation on Fines

Cooperation between the Canadian Competition Bureau and the U.S. DOJ in the Motor Vehicle Components Case

In this case, Nishikawa Rubber Co. Ltd. ("Nishikawa") pleaded guilty in the United States in 2016 and paid a fine of US $130 million for its participation in an international conspiracy to fix the prices of and rig the bids for automotive body sealing products affecting Canada and the United States. The Canadian Competition Bureau ("CCB") and the U.S. DOJ worked together closely throughout their investigations. They identified affected sales of automotive body sealing products manufactured in the United States and then shipped to Canada for assembly into automobiles that were imported into the United States. These sales were included as affected commerce for purposes of calculating Nishikawa's fine. Because of the particular facts of this case, including that Nishikawa's conduct primarily targeted the United States and because the fine imposed was an effective remedy in the United States and Canada, the Commissioner of the CCB exercised his discretion to not pursue further enforcement action against Nishikawa in Canada for this conduct. This also resulted in the benefit of avoiding costly duplication of efforts.

In jurisdictions where incarceration is available as an individual sanction, agencies may consider coordinating on the timing of the implementation of prison sentences, and other aspects such as credit for time served in other jurisdictions.

Practical Example 3: Benefits of Cooperation on Individual Sanctions

Cooperation between the UK Office of Fair Trading and the U.S. DOJ in the Marine Hose Case

The Marine Hose case involved a number of competition agencies co-operating with one another. The U.S. DOJ arrested three UK individuals, together with five nationals from other countries, in May 2007. The three UK individuals were subsequently allowed to return to the UK and face charges as part of plea bargain agreements with the U.S. DOJ, which allowed for the possibility of concurrent prison sentences. They were arrested on arrival in the UK and charged with the cartel violation. In 2008, the three UK individuals pleaded guilty in the UK and were sentenced to prison terms consistent with the U.S. plea agreements. If the defendants had been sentenced to less time in the UK than called for in the U.S. plea agreements, they would have been returned to the U.S. to serve the remainder of their agreed upon sentences of between two and a half to three years. These sentences were subsequently reduced on appeal to periods of between twenty months and two and a half years.

5.4.2. Coordination on Implementation and Timing of Decisions

In terms of implementation and the timing of outcomes, agencies may have specific reasons to coordinate the adoption of their decision and public communication in leniency cases. For example, agencies may decide to adopt their decisions around the same time in order to maximise the deterrent effect in a specific market. Such coordination may be challenging considering the different stages and timelines of procedures in different jurisdictions.

In order to achieve this, agencies may need to:

- Develop a timeline together to discuss the adoption of decisions;

- Closely update each other through regular phone calls about the timeline for the adoption of decisions and the remaining procedural steps;
- Coordinate a communication strategy, including the content of press releases and other public information; and,
- Coordinate the publication of the public version of their decisions if there is a specific reason to do so.

Practical Example: Benefits of Cooperation on Implementation and Timing of Outcomes

DG Competition of the European Commission has coordinated with another agency with regard to the adoption of their decisions in two parallel leniency cases. The two agencies were in very close cooperation throughout their respective procedures and discussed various substantive issues, such as the scope of the case, the functioning of the relevant market and the characterisation of the infringement. It followed from this close cooperation that the adoption of the decision as well as the public communication of the agencies were coordinated.

6. Coordination with other Domestic Agencies

6.1. Best Practices for Coordinating with Domestic Agencies

While this guidance focuses on enhancing cross-border cooperation in relation to leniency matters, it is also important for competition agencies to build and maintain effective relationships with other domestic regulators.[26] More frequently, cartelists are also facing liability for both regulatory and criminal violations in addition to their exposure for cartel conduct. Potential leniency applicants will be calculating the risk of exposure to regulatory or other prosecutorial sanctions – for example, debarment from government contracting – as they are evaluating whether to apply for leniency. As a result of potential regulatory liabilities, leniency applicants may perceive that they will receive a less favourable outcome by applying for leniency and cooperating with the competition agency's investigation, than if they do not apply for leniency. In this context, it is important to establish robust coordination between the competition agencies and other domestic regulators to avoid outcomes that will put leniency applicants in a worse position. Building on the recommendations set out in the ICN work product *"Good Practices for Incentivising Leniency Applications"* Report (2019), this guidance provides a list of practical suggestions and examples of how to improve coordination and communication with domestic regulators.

6.1.1. Effective Communication to Enhance Cooperation

Effective communication is vital for enhancing cooperation with other domestic regulators, particularly in situations such as parallel investigations where there is concurrent jurisdiction, or to facilitate discussions on possible relief or discounts from regulatory sanctions for leniency recipients. Communication and cooperation can occur formally in the form of Memoranda of Understanding

[26] For clarity and ease of reference, when used on its own, the term "domestic regulators" in this Section refers not only to domestic sectoral regulators (for example, energy, telecommunications, and financial services regulators), but also includes other prosecutorial bodies such as anti-corruption agencies, as well as public procurement bodies.

(MOUs) between agencies, or it can happen on an informal basis. Some practical suggestions for setting up communication channels with domestic regulators are set out below:

- Nominate a single point of contact at both the competition agency and domestic regulator;
- Establish clear processes for regular contact or liaison meetings;
- Take steps to understand each other's enforcement frameworks, including respective investigative powers, confidentiality obligations, and sanctions;
- If an investigated party is subject to industry regulatory oversight, it is important to find out from the investigated party what their reporting obligations are, why they are in contact with that regulatory agency, and potentially ask for a waiver to speak to that regulator; and,
- Develop platforms or channels to share information and data on bidding and reporting.

Below are some initiatives that have helped increase effective communication and cooperation between the competition agency and domestic regulators in various jurisdictions:

- Canada has a "Tip Line," a portal shared between the Canadian Competition Bureau, Royal Canadian Mounted Police and Public Services and Procurement Canada (PSPC), for Canadians to anonymously report fraud, corruption and bid-rigging related to federal government contracts and real property agreements. In addition, PSPC regularly sends information and complaints to the Bureau. This cooperation is facilitated by a MOU between the Bureau and the former Public Works and Government Services Canada (now PSPC).

- In Brazil, the Administrative Council for Economic Defense (CADE) has close cooperation (MOU and Technical Cooperation Agreement) with most Public Prosecutors Offices (both Federal and States), and involves the prosecutor's offices in negotiations of and joint signing of many leniency agreements, which has mitigated conflicts between them.

- In Japan, the Japan Fair Trade Commission (JFTC) has annual liaison meetings with procurement agencies and conducts status surveys to prevent bid rigging. The *Involvement Prevention Act* grants the JFTC authority to require heads of procurement bodies to implement improvement measures when the JFTC finds involvement of procurement officials in bid rigging.

- In Hong Kong, the Hong Kong Competition Commission (HKCC) attends regular liaison meetings with the anti-corruption agency, the police, and other similar agencies on a number of issues of mutual interest (in particular, bid rigging). The HKCC also has an MOU with the Communications Authority, the telecommunications regulator in Hong Kong that shares concurrent jurisdiction with the HKCC, as well as the Securities and Futures Commission, Hong Kong's securities and financial market regulator.

- In Korea, there is a Consultative Group composed of public ordering institutions that holds regular meetings twice a year to exchange information and discuss detection and prevention of bid-rigging.

- In the United States, the U.S. DOJ leads the Procurement Collusion Strike Force, an interagency partnership consisting of prosecutors from U.S. DOJ offices across the country and investigators from the Federal Bureau of Investigation (FBI), the Department of Defense

Office of Inspector General, the U.S. Postal Service Office of Inspector General and other partner federal Offices of Inspector General.

- In Hungary, the Hungarian Competition Authority (GVH) has a cooperation agreement with the Public Procurement Supervision Department of the Prime Minister's Office. Under the agreement, the GVH receives tips from the Public Procurement Supervision Department on potential infringements. In the framework of the cooperation agreement, the GVH provides information to the Department on every proceeding initiated on the basis of its tips.

6.1.2. Educate Sectoral Regulators, Anti-Corruption Agencies, and Public Procurers

Providing specific training on cartel enforcement and the role of leniency programmes in detecting and preventing cartel conduct will educate domestic regulators about the vital role of leniency programmes and reduce the potential for conflicting outcomes that may create disincentives for leniency applicants and undermine leniency programmes. Training domestic regulators to identify cartels and report them to the competition agency also increases the risk of detection of cartels, which in turn enhances the strength of leniency programmes.

When conducting outreach to sectoral regulators, anti-corruption agencies, public procurement bodies, or other prosecutors, competition agencies should consider providing materials that provide guidance on tools for recognising cartel behaviour, instruments for preventing or decreasing the risk of collusion, steps to be taken when a cartel is suspected, and case examples. Competition agencies should also consider using post-outreach presentation surveys to evaluate the effectiveness of any presentations and increased awareness.

Other educational measures can include:

- Offering informative material in multiple formats (both printed and online for download) to cater to different needs and preferences;
- Publishing and circulating among domestic regulators, on a regular basis, newsletters containing recent case examples or information on current competition issues;
- Publishing and promoting the adoption of model non-collusion clauses and model non-collusion certificates among public procurers,[27] and,
- Planning joint workshops for the exchange of expertise.

6.1.3. Protection from or Discounts in Regulatory Sanctions for Leniency Recipients

Sanctions by domestic regulators in the form of debarment from future procurement projects, removal of licences or other regulatory penalties may act as a strong disincentive for cartelists to come forward and apply for leniency. Where possible, competition agencies should engage with domestic regulators to work out arrangements (or at least a mutual understanding) on the treatment of leniency recipients with respect to the imposition of regulatory sanctions. As mentioned, it is important to ensure the leniency applicant is not put in a worse position than those not applying for leniency. It is recognised that different jurisdictions may have different systems and constraints, therefore it is not possible or

[27] The HKCC published the "Model Non-Collusion Clauses and Non-Collusive Tendering Certificate" in December 2017 and promoted it among businesses and procurement bodies (both public and private).

ideal to prescribe a one-size-fits-all arrangement. Set out below are different case studies of interest that may provide insight to other jurisdictions:

- **Brazil**: In the case of the *Guapore* cartel involving petrol stations, the regulatory sanction of license removal was lifted after CADE recommended to National Agency of Petroleum to dismiss the removal of license to avoid a greater harm to the city, i.e., the shortage that would result from the sanction, as all petrol stations in the region were involved in the cartel. Under Brazilian competition law, leniency signatories are also granted immunity from criminal penalties for cartels and other related crimes. The law only authorises this kind of agreement for the first successful applicant.

- **Hong Kong**: HKCC is educating large public procurement and licensing bodies about the impact that debarment may have on leniency incentives, which may impact the HKCC's detection/investigation abilities. The aim is to explore with the relevant agencies and government departments whether they may treat the HKCC's leniency applicants more leniently with respect to debarment sanctions.

- **Japan**: If the JFTC finds a competition law violation (bid rigging, etc.) and takes a legal measure against an enterprise concerned, the enterprise is usually disqualified from bidding for contracts with governmental agencies for a certain period of time. It should be noted that each governmental agency decides whether or not it disqualifies antitrust violators from bidding and how long the duration should be based upon its own policy. However, most of the agencies generally comply with the understanding among central government ministries, which describes that the duration would be reduced by half for a leniency applicant.

6.2. Coordination with Domestic Regulators within the Framework of Mutual Assistance

It is becoming more common for competition agencies to receive requests from foreign competition agencies to assist them in understanding and possibly obtaining information held by a non-competition regulator in a jurisdiction, particularly when the competition agencies have an established relationship but the foreign competition agency does not have a relationship with the non-competition regulator.[28] There are a number of practical considerations for the competition agency that receives such a request:

- First, the competition agency will need to determine the nature of the request from the foreign agency:
    - Is the request for a point of contact at the other domestic agency? If so, this should be straightforward to respond to; or,
    - Is the request for specific assistance between the foreign agency and the other domestic agency?

- If it is a request for specific assistance the competition agency will then need to determine whether it is appropriate for them to assist. An important consideration at this stage is whether

[28] In some cases, foreign competition agencies may have established relationships with domestic regulators in another jurisdiction from prior cases and may not need assistance from the competition agency. This subsection is intended to address situations where a foreign competition agency does not have an established relationship with a domestic regulator in another jurisdiction and needs assistance.

there is a more appropriate channel for the foreign agency to obtain the information. For example, the foreign agency may need to make a request pursuant to an international agreement such as an MLAT.

- If the competition agency determines that its assistance is the most appropriate way to deal with the request then it will need to consider whether it has the appropriate information sharing gateway (whether that is through an MOU or legislation). The competition agency will need to ensure gateways exist between:
    - The competition agency and the other domestic agency, and if so, if there are any restrictions on providing information received through the gateway to a third party; and,
    - The competition agency and the foreign agency requesting assistance.

- Before contacting a domestic regulator, the competition agency should check with the requesting foreign agency to determine what information the competition agency can provide to the other domestic regulator about the request and, if relevant, the investigation. In particular, what confidentiality conditions the foreign agency may wish to place on the passing of information to the other domestic agency.

- If the competition agency is able to provide assistance, it will also need to liaise with the domestic agency to determine whether the domestic agency is able to provide the requested information.

- The competition agency will then need to work through the channels through which specific assistance can be provided. If information is passed to the foreign agency, the competition agency receiving the request will need to work with the domestic agency to consider what conditions will need to be imposed on the use of the information such as:
    - Whether any privilege attaches to the information;
    - What level of confidentiality attaches to the information; and,
    - How the information can be used by the foreign agency.