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# International Cartels: Relationships among multiple jurisdictions

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# Cooperation in investigations with other authorities



## ■ International Cartels

- Typically worldwide or multiregional
  - market sharing
  - market allocation
  - price fixing
  - customer allocation
  - bid rigging
  - information exchange

# Cooperation in investigations with other authorities



- Example case:  
“Gas insulated switchgear” (GIS)
  - 11 producers of GIS (major European and Japanese producers)
  - Home market protection in Europe and Japan
  - Project allocation for the rest of the world (except USA and Canada)
  - European fine of € 750 million in January 2007

# Cooperation in investigations with other authorities



- Cooperation in:
  - Coordination of simultaneous inspections
  - Exchange of information in pending cases (requires a waiver of the undertakings cooperating with the authorities)
  - Discussions on general orientations regarding investigations
  - Gathering of information and interviewing of witnesses on behalf of other agencies

# Cooperation in investigations with other authorities



- International Competition Network (ICN)
  - Since 2001 forum for information exchange between competition authorities
  - Currently more than 100 members
  - Annual meetings and frequent workshops
  - Since 4 years ICN Cartels Working Group (chaired by EU)
    - identifies the barriers to greater cooperation
    - proposes strategies for lowering or removing these barriers

# Cooperation in investigations with other authorities



- On European Level:  
European Competition Network (ECN)
  - Close cooperation of European competition authorities
  - Effective and consistent application of competition law throughout Europe
  - Normally only one authority active, either the Commission or a national authority
    - Information exchange on new cases and envisaged enforcement decisions
    - Coordination of investigations
    - Exchange of evidence and other information
    - Discussions on issues of common interest.

# Typical problems in the fight against international cartels



- The fight against international cartels frequently brings up questions of
  - Double jeopardy
  - Discovery
  - Private damages action
  - The area of conflict between direct settlements and private damages action

# Double jeopardy



- Is there a risk for companies that were involved in international cartels to face two fines for the same misconduct in different jurisdictions ?
- Is there a risk for individuals that were involved in international cartels to be subject to criminal sanctions for the same misconduct in different jurisdictions ?

# Double jeopardy



- Underlying legal principle “Ne bis in idem”

*“No legal action can be instituted twice  
for the same cause of action”*

- However, penalties in other jurisdictions do not alter the gravity of an infringement in Europe

# Double jeopardy



- Fines imposed by authorities of third countries are imposed in relation to the violations of their competition law
- There is generally no overlap between the different jurisdictions
- The investigations of each authority are limited to the effects the cartel had in the respective territory

# Double jeopardy



- Criminal vs. administrative procedure
  - Some jurisdictions provide for criminal procedures (such as US, UK and Japan), others for administrative (such as the EC)
  - Administrative sanctions in one jurisdiction do not exclude criminal sanctions in another (not yet an instance arisen in the EU)
  - Individuals may face criminal charges in multiple jurisdictions, if their behaviour effected different territories (has yet to happen)
  - The interplay between different sanctions in different jurisdictions is not damaging for enforcement

# Private action



- Private damages actions are possible in different jurisdictions for the same cartel behaviour
- However they are limited to the damages that in theory result from the illegal conduct in the respective territory, in which the action is brought up
- E.g.: A European claimant cannot ask for compensation for the damages suffered by Japanese customers

# Protection from discovery



## Leniency program vs private action

- Competition authorities need effective leniency programs
- Private damages action (in other jurisdictions) can discourage potential applicants to come forward
- Discovery orders may oblige immunity/leniency applicants to hand over evidence in private damages action
- Therefore it is a requirement to protect immunity/leniency applicants from discovery (e.g. offering the possibility of oral submissions) This is the current practice by the EU Commission

# Settlement procedures and private action



- Several jurisdictions (e.g. the US) provide for settlement procedures in cartel cases
- The EC hopes to introduce a direct settlement procedure in 2008
- In order to settle, companies acknowledge their involvement in the cartel and their liability for it
- In return their fine will be lowered
- Direct settlement should result in a faster and simplified procedure

# Conclusions



- The fight against international cartels has become increasingly effective
- The cooperation between the various international competition authorities has led to more transparency and legal certainty
- There is still need for improvement to achieve the maximum outcome for all the parties involved (authorities, immunity/leniency applicants, undertakings etc.)
- Each Authority is best placed to determine its leniency program as well as the sanctions that work most efficiently in its jurisdiction.