COMPETITION AND CONSUMER PROTECTION COMMISSION

CARTEL ENFORCEMENT: DEVELOPMENTS IN LENIENCY, PENALTY DETERMINATION AND REGIONAL COOPERATION

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ABSTRACT

One of the most remarkable developments in competition policy over the years has been the rise in the number of competition agencies worldwide developing leniency programmes in anti-cartel enforcement. Leniency programmes have become instrumental in uncovering cartel activities, prosecution of individuals involved in cartel conduct as well as the imposition of financial penalties for violating enterprises. There is also increasing degree of regional and international cooperation among competition agencies in an effort to enforce international or cross border cartels.

This paper will discuss the developments in leniency and the various methodologies used in determining penalties on cartels as well as the extent to which competition agencies can enhance regional cooperation in the enforcement of cartels.

1. INTRODUCTION

Several competition agencies in the world have developed leniency programmes to uncover cartels, curb cartel operations and deter enterprises from engaging in cartelistic conduct. The introduction of leniency programmes by most competition agencies has enabled them to discover more cartel activities and has enhanced their fight against cartels. For instance, the United States' Corporate Leniency Programme has been responsible for detecting and cracking more international cartels than search warrants, secret audio or videotapes, and FBI interrogations combined[1]. The use of the leniency programme in anti-cartel enforcement has also resulted in an increase in the amount of fines imposed on cartel activities. For instance, in the United States alone, companies have been fined over $2.5 billion dollars for antitrust crimes since 1997, with over 90 percent of this total tied to investigations assisted by leniency applicants[2].

In the 1990s, only the United States and a handful of other jurisdictions had leniency programme in place. Today, however, there are antitrust leniency programmes in place in more than fifty jurisdictions. The successful implementation of leniency programmes in the United States, European Union and other developed economies has led newer competition agencies in less developed countries to adopt leniency policies in anti-cartel enforcement. Although the implementation of leniency programmes differs

[1] Address by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Dep't of Justice, "Detecting and Deterring Cartel Activity through an Effective Leniency Programme," available at http://www.justice.gov/atr/speech/detecting-and-deterring-cartel-activity-through-effective-leniency-programme.

[2] Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Dep't of Justice, "Cornerstones Of An Effective Leniency Programme," available at http://www.justice.gov/atr/speech/cornerstones-effective-leniency-programme

from one jurisdiction to the other and has evolved over the years, general experience has shown that a successful implementation of a leniency programme largely depends on predictability, transparency and consistent application of the process in order to encourage cartel participants to blow the whistle.

Whereas leniency programmes are meant to help competition agencies to detect cartels and initiate or conclude investigations in cartel cases, financial penalties deter both the enterprises engaged in cartel conduct and those enterprises that intend to join or form a cartel. The penalties imposed are lower for leniency applicants and stiffer for the non-applicants. The determination of penalties like the leniency programme differs across jurisdictions depending on the legal framework obtaining in each jurisdiction.

The integration of markets has given rise to the emergence of international cartels that have effects in other jurisdictions other than the region where the conduct is carried out. Multinational corporations whose products are sold abroad are increasingly likely to face antitrust investigations and financial penalties in a number of jurisdictions. This poses a challenge to enforcement actions by individual competition agencies in the absence of cooperation and information sharing among competition agencies. In recent years, there has been increasing regional cooperation among competition agencies in anti-cartel enforcement among competition agencies in an effort to curb international cartels.

2. DEVELOPMENTS IN LENIENCY

This paper will focus at the developments in leniency in the United States and the European Union as they present benchmarks to other jurisdictions given that competition law and policy is well developed.

2.1 Leniency in the United States

Under the United States corporate leniency programme (also known as amnesty), an enterprise automatically receives a conditional grant of amnesty if it fully admits its involvement in anticompetitive activity before the Department of Justice (DoJ) investigation has begun[3]. Amnesty means that the corporation and its cooperating directors, officers, and employees will not be subject to criminal prosecution. In order to qualify for amnesty, the enterprise must be the "first in the door" to bring information about the anticompetitive activity to the Division, must report its wrongdoing with "candour and completeness," and must commit to provide "full, continuing

[3] http://www.justice.gov/atr/leniency-program

and complete cooperation" to the DoJ throughout its investigation[4]. The same amnesty standards apply if a corporation confesses its wrongdoing after the DoJ has already initiated an investigation, so long as the applicant applies early in the investigation. If the applicant applies later, the DoJ has greater discretion to reject the application.

2.2 Recent developments in the United States leniency

First application of amnesty de-trebling provisions of the 2004 Act

The implementation of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (the '2004 Act'), seeks to encourage amnesty applications by offering applicants the prospect of a significant reduction in potential civil liability, so long as the applicant also offers 'substantial cooperation' to civil plaintiffs suing on the basis of the same conduct. In exchange for such cooperation, the 2004 Act limits the amnesty applicant's civil liability to damages resulting from the applicant's own sales (eliminating the prospect of 'joint and several liability'), and also waives the 'trebling' of actual damages that is otherwise automatic in US civil antitrust cases.

Extraterritorial Effects - The U.S. Supreme Court's Empagran Decision

In *Hoffmann-La Roche Ltd. v. Empagran S.A* case, foreign purchasers of vitamin products sold in other countries claimed damages arising from the vitamins cartel following the successful prosecution of the worldwide vitamins cartel. At issue was the extraterritorial reach of the U.S. antitrust laws; the question was whether victims injured abroad by a worldwide price fixing conspiracy could bring suit in U.S. federal courts under U.S. antitrust law when the antitrust conduct also had an effect on domestic business.

Defendants and various *amici* (including the U.S. Department of Justice and various foreign governments, including Germany, Canada, Japan, Belgium, and the United Kingdom) argued, however, that permitting such foreign purchaser suits to go forward would, in fact, undermine deterrence. The key consideration identified by these governmental *amici* involved the threat posed by Empagran's expansive liability regime to their respective leniency programmes. Their concern was that companies considering amnesty applications would be discouraged from doing so if the consequence of confessing their cartel involvement included worldwide liability under U.S. law.

[4] See http://www.usdoj.gov/atr/public/guidelines

In its *Empagran* ruling, the Supreme Court determined that U.S. courts do *not* have jurisdiction under U.S. antitrust laws to try a case in which foreign buyers allege they have been injured by the price-fixing actions of foreign sellers but only where the foreign injury is *independent* of any effect on U.S. commerce[5]. The decision left open the question of whether foreign plaintiffs could bring actions in the United States if the foreign injury is *dependent* on the effect of the injury on U.S. business and, further, what is the standard for dependence?

2.3 Leniency in the European Commission

In 1996, the European Commission adopted a corporate leniency programme that offered fine reductions to enterprises that provided early and substantial help to the Commission in uncovering and prosecuting illegal cartels. Whereas the EU policy was inspired by the U.S. Department of Justice's Corporate Leniency Programme, it differed from the U.S. programme in a number of ways. In particular, in contrast to the U.S. leniency programme, the European Commission retained considerable discretion in granting a reduction in fines, the amount of the reduction, and the timing of its ultimate decision which could take several years. The resulting lack of predictability had an effect on the incentive for potential leniency applicants to come forward.

The European Commission came up with a new policy in 2002 that modified prior practice by enlarging the circumstances under which an applicant may be entitled to total immunity from fines and providing for greater predictability in the process.

Under the new rules, the European Commission can grant complete immunity from the fine:

(a) if the enterprise is the first member of the cartel to submit evidence that enabled the Commission to launch an inspection on the premises of the suspected companies (*provided that the Commission was not already in possession of sufficient evidence to launch such an inspection*); and or

(b) if the enterprise is the first member of the cartel to submit evidence that enabled the Commission to find an infringement of its competition rules (*in particular Article 81 of the Treaty of the European Community*), when the Commission is already in possession of enough information to launch an inspection but not enough to establish an infringement.

2.4 Recent developments in leniency in the European Union

[5] F. Hoffman-La Roche Ltd. v. Empagran S.A. (*Empagran I*), 542 U.S. 155, 175 (2004).

Under the new policy an enterprise can now qualify for immunity even if it was the instigator or leader of the cartel contrary to the 1996 Notice which disqualified instigators from seeking leniency.

In an effort to address the lack of predictability that characterized its prior leniency policy, the Commission has introduced a series of new procedural rules. A company wishing to apply for immunity from fines can contact the relevant services of the Commission, and the Commission will immediately inform it whether immunity is still available. If immunity is available, the company can choose either to submit its evidence to the Commission in hypothetical terms (providing a descriptive list of the evidence it proposes to disclose) or immediately provide the Commission with all the evidence in its possession.

After having examined the evidence, the Commission will, if the applicant meets the requirements, grant conditional immunity in writing. Immunity will definitively be granted at the end of the administrative procedure if the applicant has continued to meet its obligations (*i.e.*, full cooperation, termination of its involvement in the cartel, and no coercion of other companies to participate in the cartel).

The procedure is similar when applying for a reduction of the fine. The Commission will make a preliminary conclusion on whether the evidence submitted provides "significant added value." If it does reach such a conclusion, it will, no later than the date on which a statement of objections is issued, inform the applicant of its intention to apply one of the reductions described above. The final decision on the reduction will become effective at the end of the administrative procedure.

By harmonizing EU leniency policy with existing U.S. practice, the new Notice will also facilitate the ability of leniency applicants to maximize the prospect of achieving a trans-Atlantic immunity package early on in the process.

3. PENALTY DETERMINATION

The determination of penalties for cartels is different in various jurisdictions. In discussing the various methodologies used in determining penalties on cartels, this paper will focus on critical factors which are taken into account to arrive at the applicable penalty in four jurisdictions namely: the European Union (EU), the United States (US), South Africa and Zambia.

3.1 The European Union

In the European Union (EU), the European Commission has been granted the power to impose fines for the purpose of ex ante deterrence and ex post punishment of cartels. The fines on undertakings and individuals reflect gravity and duration of the infringement and the fines imposed must not exceed 10% of worldwide turnover. In order to ensure transparency and impartiality of its decisions, the Commission published fines guidelines on the method of setting fines.[6]

The fining guidelines on the method of setting fines determines the basic amount of the fine to be imposed on the enterprise, the fines guidelines takes into account the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the European Economic Area (EEA). The fines guidelines normally takes the sales made by the undertaking during the last full business year of its participation in the infringement. Where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members[7].

In determining the value of sales by an undertaking, the European Commission through fines guidelines takes into account the undertaking's best available figures. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate. Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements[8].In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area, may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned.

[6] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02)

[7] See note 6

[8] See note 6

The result will be taken as the value of sales for the purpose of setting the basic amount of the fine[9].

The fines guidelines stipulate that the basic amount of the fine is related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. The assessment of gravity is made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales.[10]In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission looks at a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented. The European Commission considers horizontal price-fixing, market-sharing and output-limitation agreements to be among the most harmful restrictions of competition. As a matter of policy, such infringements are heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale[11].

In setting fines, the European Commission also take into account aggravating and mitigating factors. Some of the aggravating factors that may lead to increase in the fines may include: where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82 in that case, the basic amount of fine can be increased by up to 100 % for each such infringement established, refusal to cooperate with or obstruction of the Commission in carrying out its investigations, role of leader in, or instigator of, the infringement may also contribute to higher basic fines.[12]

Some of the mitigating factors that can contribute to a reduction in the basic amount of fine may include factors such as: where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened, where the undertaking provides evidence that the infringement has been committed as a result of negligence, where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in

[9] ibid
[10] Op cit
[11] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02)

[12] http://ec.europa.eu/competition/antitrust/legislation/fines.html retrieved 12th February,3016

which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market[13].

The Commission may pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates. The Commission may also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount. However, the final amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement. [14] The Commission may apply the leniency rules in line with the conditions set out in the applicable notice or offer 10% off the fine if the undertaking accepts liability for cartel conduct and intends to settle.[15]

3.2 United States

In the United States (US), the Sherman Act (1890) and the Clayton Act (1914) provide the legislative authorizations to prosecute companies that violate competition law within the United States or with foreign nations. The Clayton Act provides that the amount of damages recoverable may exceed the amount of actual damages sustained[16]. If the federal government or its agencies have been victims of cartel conduct, the Department of Justice (DOJ) may obtain up to treble damages in criminal cases under the Clayton Act[17].

The United States Sentencing Guidelines (USSG) specifies the penalties for enterprises and individuals that are involved in the cartel conduct in the US. In determining the base fine, the USSG takes into account the volume of commerce of the perpetrator for the entire period of the infringement. The USSG also provides that 20% of the volume of commerce should be used to calculate the base fine amount. In this regard, a company's volume of commerce is defined as the volume of commerce done by the company in goods or services that were affected by the violation. More precisely issues relating to the determination of the value of the cartelised product include whether inter-cartel sales or captive sales are calculated.[18]

[13] ibid
[14] Article 23(2) of Regulation No 1/2003
[15] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02)
[16] http://www.bea.gov/scb/pdf/2013/07%20July/0713_fines_penalties_international_accounts.pdf retrieved 11th February, 2016
[17] Ibid
[18] The United States Sentencing Guidelines 2015

The USSG stipulates that for individuals who participated in a cartel, the volume of affected commerce can not only influence the fine imposed on them but also influence the basis for the jail terms that will be sought against such individuals. An adjustment based on the volume of commerce can be made to the base offence level indicated in the Sentencing Guidelines (the base level is 12 for antitrust offences, equating to a jail term of 10 to 16 months). The larger the volume of commerce of the company employing the individual, the larger the increase to the base offence level and therefore the longer the jail term provided under the Sentencing Guidelines[19]

The USSG excludes sales of the cartelized products between the cartel members. As regards captive sales i.e. sales which are used by the undertaking in the production of a downstream product, the issue of whether to take these into account would depend on the specifics of the case. These measures are mainly aimed at avoiding double counting and look in depth at where the US consumers have been impacted by the cartel behaviour, in the EU these types of downstream sales may be put into consideration as sales indirectly related to the infringement depending on the specifics of the, so long as there is no double counting[20].In addition, the US also considers a number of mitigating and aggravating factors to ensure that the fine imposed on the enterprise or individual is appropriate.

3.3 South Africa

In South Africa, the determination of penalties for cartel infringement is stipulated clearly in the six step methodology of the Guidelines for the determination of administrative penalties for prohibited practices.[21] The six step methodology of determining fines includes: determination of affected turnover, calculation of the base amount, duration of the contravention, statutory limit of 10% annual turnover and aggravating and mitigating factors. When determining the affected turnover, the South African Competition Commission considers the annual turnover of the firm in South Africa and exports based on the sales of products or services that can be said to have been affected by the contravention.[22]

3.4 Zambia

In Zambia, the determination of fines on cartels has been through the Competition and Consumer Protection Act No. 24 of 2010 (the Act) which

[19] ibid
[20] http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf retrieved 11th February,2016
[21] Guidelines for the determination of administrative penalties for prohibited practices (1 May 2015)
[22] See paragraph 134 of the Competition Tribunal decision in Competition Commission v. Aveng Africa Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd & BRC Mesh Reinforcing (Pty) Ltd Case No.: 84/CR/Dec09

empowers the Competition and Consumer Protection Commission (the Commission) to impose a maximum of not exceeding 10% of annual turnover of the enterprise involved in a cartel. The Act also stipulates that persons involved in a cartel should be liable upon conviction to a fine not exceeding five hundred penalty units or imprisonment for a period not exceeding five years or both.[23] Based on successive cartel cases, the maximum amount of fines that the Commission imposed on cartels was 1% of annual turnover in the case of **Top Gear and Nine others**[24]. In that case, Top Gear and nine other garages agreed to start charging customers for obtaining quotations for repairing motor vehicles that were insured. The Commission investigated the case and found that the garages were involved in the cartel to fix quotation prices for repairing motor vehicles that were insured. The Competition and Consumer Protection Tribunal (the CCPT) then fined Top Gear and nine others 1% and 0.5% of annual turnover respectively.

3.5 Relevant observations

What has been observed in all the four jurisdictions we have looked at, is that the determination of penalties for cartels has evolved overtime. Among the four jurisdictions that we have looked at, Zambia is the only country were the Competition and Consumer Protection Commission is still using the annual turnover to determine the fine to be imposed on an enterprise involved in a cartel. Most Jurisdictions have moved away from the use of annual turnover because of its weaknesses in failing to capture exports, failure to consider duration of the infringement and mitigating and aggravating factors. The use of total annual turnover in determining the fines may also lead to overcharges in fines imposed on enterprises.

The European Union, South Africa and United States have all developed new ways of determination of fines which has moved away from the use of total turnover of the enterprises involved in cartels. The methods developed in those jurisdictions encompass mitigating and aggravating factors, duration of the infringement, statutory limits as well as consideration of leniency and settlement applications. Due to the complexity involved in determination of fines, the Competition and Consumer Commission in Zambia started developing the fines guidelines that will clearly guide the process of imposition of fines on competition and consumer cases. The guidelines aim at moving away from the use of enterprises total turnover to the use of relevant sales of the product/service to which the infringement applies in the latest audited financial year available. The guidelines further aim at encompassing the duration of the infringement, mitigating and aggravating

[23] The Competition and Consumer protection Act No. 24 of 2010.
[24] Top Gear and nines others case 2012/CCPT/003

factors while taking into account the statutory limits of the fines on cartels.[25] It must be noted that in all jurisdictions that we have looked at, competition authorities may determine the fines but the courts may uphold, reduce the fine or overrule the decision made by competition authorities depending on the factors that may be considered in passing judgement.

4. INFORMATION SHARING IN CARTEL ENFORCEMENT

The increasingly global nature of cartel investigations poses a true test of African countries' cartel enforcement capabilities. These complex, international investigations require countries to bridge the gap of disparate competition laws to collect evidence across borders and bring individuals abroad to justice.[26] The best way to address the reality that business today is global in scope, whereas laws are national, is for the enforcers to cooperate so as to ensure, when competitive or deceptive practices problems do arise, that enforcement is effective, outcomes are consistent and remedies are compatible to the extent possible.

At the center of an effective law enforcement strategy in the international arena is the interplay between information sharing, enforcement coordination, and the convergence of national laws. What information can be shared depends on the relevant national laws, and national laws that limit information sharing necessarily limit cooperation and the benefits that flow from it[27]. Provisions in national competition laws generally support such cooperation, particularly with respect to cartel investigations. Some competition agencies have a clear mandate for cooperation with explicit provisions enabling, under certain conditions, the sharing of confidential information. Other jurisdictions allow cooperation among competition agencies if necessary, but do not lay out specific guidelines as to how such cooperation is to take place.[28]

Generally, competition agencies may request information from foreign counterparts at any of the cartel investigation stages; pre-investigation stage, investigation stage, and post investigation stage.

At the pre-investigation stage, a requesting competition agency is likely to need information in situations where it does not have sufficient indications of cartel behaviour, such as a leniency application or a complaint from a party that was affected by the alleged conduct. Additionally, a requesting competition agency may seek information if the information provided by an

[25] Competition and Consumer Protection Commission Fines Guidelines
[26] http://www.millerchevalier.com/portalresource/WLJ_Cross_Border_Cartel_Enforcement_Challenges
[27]https://www.ftc.gov/public-statements/2000/04/cross-border-canadaus-cooperation-investigations-and-enforcement-actions
[28] http://www.millerchevalier.com/portalresource/WLJ_Cross_Border_Cartel_Enforcement_Challenges

applicant or complainant is not sufficient for the competition agency to make a decision on opening an investigation. Based on the information provided and their respective timing, the cooperating competition agencies might decide to coordinate their future investigatory efforts.[29]

Cross-border cooperation at the pre-investigation stage will essentially relate to the timing and scope of initial investigative actions. This cooperation can include the preparation and coordination of simultaneous searches and informal discussions on the scope of such searches, such as targets and relevant product and geographic areas. Such coordinated actions offer the advantage of maintaining the element of surprise and thus increasing the likelihood of a successful outcome.[30]

At the investigation stage, it is important for requesting competition agencies to be able to obtain factual information that can serve as evidence of anticompetitive behaviour in their respective jurisdictions, especially when such evidence cannot be obtained from the parties under investigation in the national territory of the requesting competition agency. This evidence can include documents demonstrating collusion, evidence of meetings between the participants to the cartel, audio and video records of negotiations between parties of the cartel, and forensic evidence.[31]

In addition, at the investigation stage, informal discussions can be held on the state of play and timing of investigations, the scope of a case and possible remedies. Other aspects of investigations, such as the coordination of interviews, may also be discussed. This information may be necessary for exploring the possibility of coordination of a requesting competition agency's enforcement efforts with that of a requested competition agency, depending on legal arrangements. Further, competition agencies can share intelligence and substantive theories of violation and harm, as well as their views regarding the timing of review and decision. [32]

The need for many types of information that may be requested at the pre-investigation stage may also occur at the investigation stage. This information could include methodological issues, such as the theory of harm, the definition of the relevant market, and the results of market studies and more general market information that may be available from a foreign competition agency. In cases where investigatory efforts are being

[29]http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/icn_chapter_on_international_cooperation_and_information_sharing.pdf
[30] Ibid
[31] See the ICN Cartel Working Group Anti-Cartel Enforcement Manual, available online at: http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx.
[32] Ibid

coordinated by more than one competition agency, arriving at a common understanding of methodological issues is important to ensure successful coordination.[33]

The post-investigation stage also called the end of the investigation stage is where the evidence of a violation has been collected and analysed, and the investigation is completed. Depending on the jurisdiction, this stage can occur after the formal closing of an investigation, or while the investigation is still formally open.[34]

At the post-investigation stage, the most demanded information relates to issues such as determining remedies and imposing sanctions, particularly the calculation of fines, and the development of case settlement approaches. For competition agencies requesting information, the information can have either pure methodological value in the absence of coordination and cooperation in the course of investigation, or may serve as a means to avoid dual punishment for the same violation for the same legal and/or physical persons. Achieving cohesion in approaches to sanctions and remedies is important in situations where cartels affect multiple jurisdictions.[35]

The collaboration among competition agencies may involve coordinated dawn raids and information-sharing through mutual assistance *agreements***.** For instance, Switzerland has implemented the *cooperation agreement* with the European Commission[36]. In the same vein, parties to the agreement could in turn sign confidentiality agreements precluding either party to the agreement from divulging such confidential information to third parties. JFTC also has entered into Anti-competitive Co-operation Agreements with USA, EU, & Canada. Some examples of cartel cases were assistance had been sought from foreign jurisdictions include; Bid-rigging by marine hose manufactures, Price cartel by manufacturers of cathode ray tubes for televisions, Bid-rigging for automotive wire harnesses, Bid-rigging for automotive parts etc.[37]

One other effective system of sharing information was through platforms such as the webinars; ICN conferences etc. In the light of this, Agencies should engage one another and get to know each other at all levels as well as develop investigative tools on how to deal with cartel cases.

[33]See the ICN Cartel Working Group Anti-Cartel Enforcement Manual, available online at: http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx.
[34] Ibid
[35] Op. cit
[36] ICN Cartel Workshop, 2015, Cartagena-Colombia
[37] Ibid

This is a relatively new phenomenon in Zambia and no cartel with multi-jurisdictional or international dimension has ever been handled. However, the Competition Authority in Zambia (CCPC) has taken strides to enhance its engagement with other agencies both within the region and the world at large. For instance the Zambia is Chair of the Southern African Development Community (SADC) cartel enforcement working group. As chair of this Working Group, CCPC organised a teleconference last year. The main discussion of the teleconference was the proposal for the adoption of the request for information form. In addition, CCPC has taken keen interest in issues to do with regional cooperation and has joined the ICN working group and also registered on the implementation of a framework for sharing Non-confidential information with member jurisdictions.

Some of the notable challenges Zambia faces in cartel enforcement include;

- Awareness or understanding of the Leniency Programme is low thus applicants are never forthcoming.
- Absence of Bilateral agreements /MOU between agencies.
- Differences in legislation. Most laws did not provide for an obligation to exchange information. Furthermore, different jurisdictions employ different strategies of investigations.

To sum up, it must be borne in minds that even as the Competition authority seeks to build its cartel enforcement capabilities, it is likely to face many of the practical hurdles above and legal constraints that limit the ability to investigate and prosecute cartel conduct abroad.

5. CONCLUSION

This paper has highlighted developments in leniency policy, penalty determination and regional integration. The paper also stressed that most competition agencies worldwide have developed leniency programmes.

Although leniency programmes differ in various jurisdictions, most jurisdictions consider first indoor policy for total immunity. Because jurisdictions have parallel leniency policies, enterprises involved in cross-border cartels will no doubt carefully consider the different requirements for leniency in multiple jurisdictions, and co-ordinate their applications in order to avoid exposing themselves to potential liability. There is need to explore means of making application for leniency easier especially for cross border cartels considering that an enterprise cannot be the first to apply for leniency in all the jurisdictions affected by the cartel.

In the determination of penalties, most jurisdictions have developed fines guidelines which encompass a number of factors in the determination of fines. The paper has shown that the European Union, South Africa and United States have all developed new ways of determination of fines which captures exports of the enterprise involved in the cartel infringement, duration of the infringement, mitigating and aggravating factors. The paper has also shown that regional corporation can help fight cross border cartels through information sharing and joint investigations of cartels. However, competition agencies ought to ensure that as they share information and cooperate with other agencies, confidentiality with respect to leniency applicants is not breached for purposes of having a predicable process that encourages potential applicants to self-report their involvement in cartel activities.