



# **2016 ICN Cartel Workshop Madrid, 3 - 5 October**

Day 3 - Breakout session 15

**Criminalisation of antitrust infringements  
in administrative jurisdictions: Yes or No?  
When and How?**

5 October 2016



# Panel

- **Moderator:** Gian Luca Zampa
- **Discussion leaders:**
  - Stephen Blake, Competition and Markets Authority, UK
  - Laura A. Méndez, COFECE, Mexico
  - Cani Fernández, Cuatrecasas, Gonçalves Pereira, Spain - NGA
  - David Viros, Autorité de la concurrence, France
  - Gian Luca Zampa, Freshfields Bruckhaus Deringer LLP, Italy - NGA



# What do we mean by criminalisation? And why?

- What do we mean by criminalisation of antitrust enforcement?
- Why cartels should be criminalised?
- What are the differences between monetary sanctions and criminal sanctions? Which type of sanction is more effective in terms of deterrence?
- Which conducts should be criminalized and how to define them?



# Challenges and opportunities

- **Prioritisation.** How to provide legal certainty without eliminating the administrative authority's ability to decide which cases merit criminal prosecution?
- **Over-deterrence.** How to avoid deterring efficient conduct such as harmless information sharing?
- **Collaboration.** In case of parallel proceedings (i.e. administrative and criminal), how to cooperate in order to avoid different outcomes while protecting confidentiality of information?
- **International cooperation.** How to establish effective cooperation mechanisms between competition authorities to guarantee the most effective enforcement? (i.e. double jeopardy)
- **Due process.** Are there different procedural principles and standards of proof in criminal cases? If so, how to meet them?



# Interplay between administrative and criminal proceedings and international dimension

- **Initiation of criminal proceedings** – Who holds the helm?
- **Cooperating on investigations** – exchange of information + assistance in carrying out investigatory measures
- **Procedural safeguards**, esp. in the face of more intrusive powers
- **International cooperation**



# Implications for leniency programmes

- Which infringements should be crimes?
- What if there is no specific criminal immunity?
- Can leniency applications be protected before a criminal judge?
- Incentives: First in? others?
- What happens if only the individual can go to jail? What if the company can also be prosecuted?



# Criminalisation – pros and cons

- Individual responsibility and deterrence
  - Custodial sentences
- But threat must be credible and criminal enforcement is difficult
  - Takes time and requires commitment and resource
  - Judicial and societal attitudes
- Need for a well-designed regime
  - Scope of offence
  - ‘Fit’ with wider regime, including leniency



# Discussion