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DAF/COMP/GF(2011)14

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

10-Nov-2011

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Session II --

Call for Country Contributions

This document is a call for country contributions for Session II of the Global Forum on Competition to be held on 16-17 February 2012. GFC participants are invited to submit their contributions by 16 December 2011 at the latest.

JT03311271

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TO ALL GLOBAL FORUM PARTICIPANTS

Re: Improving International Co-operation in Cartel Investigations

Global Forum on Competition (16 - 17 February 2012)

Session II

Dear GFC Participant,

The OECD Global Forum on Competition will hold a roundtable on Improving International Co-operation in Cartel Investigations on 17 February 2012. You are invited to make a written contribution to this session by 16 December 2011 at the latest.

The increasing number of cartels with international reach means co-operation in cartel investigations is a topic of significant relevance to both developing and developed economies. In 2005 the OECD published its Third Report on the implementation of the 1998 Council Recommendation on Hard Core Cartels (the 2005 Report). The 2005 Report emphasised that international co-operation in discovering, investigating and prosecuting cartels had reached unprecedented levels. This session will enable countries to share their experiences since the publication of the 2005 Report, discuss how international co-operation has evolved and consider areas in which co-operation can be improved.

A number of tools already exist to facilitate international co-operation in cartel investigations. These include both hard and soft law instruments such as Mutual Legal Assistance Treaties (MLATs), Bilateral and Multilateral agreements, Regional Trade Agreements (RTAs), Memorandums of Understanding (MOUs), Letters Rogatory and confidentiality waivers. In addition, the 2005 Report emphasised the importance of informal co-operation between competition authorities, such as coordinated dawn raids/surprise inspections taking place in different jurisdictions. However, these mechanisms have their limitations and a number of hurdles to effective co-operation still exist. This is particularly the case with or between competition agencies in developing countries. One example is the inability to share confidential information, which the 2005 Report highlighted as seriously hampering cartel investigations.

The roundtable will therefore highlight what approaches and mechanisms have proved successful for international co-operation in cartel investigations, where gaps remain with the current approaches, and how the existing frameworks could be modified or improved to address these limitations. The roundtable will also explore how international co-operation works in other fields, such as bribery, tax and money laundering, to see if any practices can be extrapolated to cartel enforcement.

By focusing on improving the current frameworks in place, this session will complement the work to be carried out by the ICN Cartel Working Group (CWG) and APEC Competition Policy and Law Group (CPLG) in the area of international co-operation. The ICN intends to produce charts summarising current formal and informal information sharing mechanisms between its members, a tool which will enable agencies to view and select the most appropriate mechanism for their needs. The APEC project aims to summarise, in a survey format, the rules and procedures for obtaining information from competition authorities in APEC economies.

The quality and utility of this roundtable will be greatly strengthened by written contributions from participants. To assist with the preparation of your contribution, a number of issues and questions are attached which you may wish to use in order to guide your submissions. This is not an exhaustive list and participants are encouraged to raise and address other issues related to international co-operation in cartel investigations, in particular summaries of any recent cases you have dealt with. A suggested bibliography is also attached.

Please advise the Secretariat by 28 November 2011 if you will be making a written contribution. As noted above, written contributions are due by 16 December 2011. This deadline applies to both members and non-members. Failure to meet this deadline may result in the contribution not being taken into account in the preparation of the scenario for the roundtable discussion. In addition, late contributions may not be distributed via the meeting website www.oecd.org/competition/globalforum in advance of the meeting.

All communications regarding documentation for this roundtable should be sent to Ms. Erica Agostinho (Email: erica.agostinho@oecd.org; Tel: + 33 1 45 24 89 73; Fax: + 33 1 45 24 96 95), copying Ms. Helene Chadzynska (Email: helene.chadzynska@oecd.org).

All substantive queries relating to this roundtable should be sent to Ms. Hilary Jennings (Email: hilary.jennings@oecd.org) and to Ms. Sarah Long (Email: sarah.long@oecd.org; Tel: +33 1 45 24 92 35).

The GFC Programme Manager, Ms. Helene Chadzynska, will be happy to answer any questions you may have about the GFC more generally. She can also be reached via telephone on + 33 1 45 24 91 05.

QUESTIONS AND POINTS FOR CONSIDERATION

Where appropriate, please answer the questions below providing details of any recent international cartel cases in which your agency co-operated with a competition authority in another jurisdiction. To the extent such information can be disclosed, please describe whether co-operation was formal or informal, the type of information exchange/assistance involved, and whether the information or assistance received was useful and important for the investigation.

1. Existing tools for international co-operation

- Please identify any *formal mechanisms* and/or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of a competition authority from another jurisdiction?
- Please describe the *informal mechanisms* your competition authority has in place for co-operating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections/dawn raids in conjunction with another competition authority?
- To what extent have you used OECD instruments, e.g. the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and the 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, in your investigations? For what purpose were they used and how helpful were they?

2. Types of co-operation

- What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to the exchange of relevant information, the organisation and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc?
- How does the co-operation take place? For example, is it by telephone, email or through face to face meetings? How successful has the co-operation been? What aspects of co-operation have worked particularly well and what has been less successful?

3. International vs regional co-operation

- Which competition authorities you co-operate with the most? How often do you co-operate? Do you co-operate more with authorities located geographically close-by?

- Are you part of a regional competition network? If so, to what extent has this network assisted in the cartel investigations you have carried out?
- If you are a new/young agency to what extent do you co-operate with your neighbouring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritise requests received from newer agencies?

4. Identifying gaps and improving the current frameworks

- What are the current challenges faced by your competition authority in cartel investigations which have a cross-border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?
- How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and/or intensity of coordination?
- How do you think your current system could be improved in relation to the way in which international cartels are investigated? In what way could liaising with competition authorities in other jurisdictions be improved?
- Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?

5. Information Sharing

- What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?
- Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?
- To what extent can your authority rely on information gathered in another competition authority's investigation in your own investigation?
- Does your jurisdiction/agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?

- What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?
- Do you have any particular safeguards in place for information that has been given under an amnesty/leniency programme?

6. International co-operation within other policy areas

- Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?
- Does your authority liaise with any other regulatory authorities to discuss common problems/solutions? Please provide examples.

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