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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from the United Kingdom

-- Session II --

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- United Kingdom --

1. The United Kingdom Office of Fair Trading's (OFT) cartel enforcement regime is designed to uncover, investigate and deter cartels, which can seriously harm consumer welfare and impede economic efficiency. The OFT believes that increasing international co-operation in cartel enforcement facilitates its work and that of other competition authorities, thus strengthening cartel enforcement on a global basis.

2. This paper gives a short overview of the UK cartel enforcement regime (part 1) and the mechanisms for international co-operation (part 2). It then provides an example of practical international co-operation through the Marine Hose Cartel case (part 3). Finally it suggests some challenges and opportunities for international co-operation (part 4).

1. OFT's cartel enforcement regime

3. The OFT has a dual civil and criminal cartel enforcement regime, with powers granted under the Competition Act 1998 (the 'Competition Act') and the Enterprise Act 2002 (the 'Enterprise Act') respectively. The various powers and safeguards differ between the civil and the criminal aspects of the regime.

4. The Competition Act provisions are aimed at enforcement against undertakings and prohibit agreements between undertakings, decisions by associations of undertakings or concerted practices, which have as their object or effect the prevention, restriction or distortion of competition (the Chapter I prohibition).

5. The Competition Act gives the OFT a wide range of powers to investigate cartels, including requiring companies to produce information and the ability to enter business or domestic premises to conduct a search. The Act also gives the OFT a range of potential sanctions for breaches of the Act, including the power to impose a penalty on undertakings of up to ten per cent of their total worldwide turnover and to make a court application to disqualify individuals from acting as company directors for up to fifteen years.

6. As a complement to the OFT's powers under the Competition Act, the Enterprise Act makes it a criminal offence for individuals to commit the cartel offence (that is, broadly, making an agreement dishonestly to fix prices, share markets or engage in bid-rigging, where that agreement is made or implemented in the UK). Under the Enterprise Act, those found guilty of criminal cartel behaviour are liable to a maximum penalty of up to five years' imprisonment, an unlimited fine, disqualification from acting as company directors for up to fifteen years and confiscation orders.

2. Overview of OFT's international co-operation

7. Alongside its involvement in the OECD, the OFT is an active member of various international competition organisations and other collaborative bodies, such as the International Competition Network (ICN), the European Competition Network (ECN) and UNCTAD. The OFT believes that the work of these

organisations has greatly increased international contact, collaboration and co-operation between the various competition authorities around the world.

8. In addition to its engagement in various international organisations, the OFT also has a number of bilateral or multilateral arrangements with overseas competition agencies, including the Australian Competition and Consumer Commission (ACCC), the National Development and Reform Commission of China and the United States Federal Trade Commission. The various arrangements provide for the exchange of information on the policies, laws and rules regarding competition. However, in some cases, co-operation is not limited to an exchange of rules and policies and can extend to a practical level, allowing for the co-ordination of enforcement activities on a case-by-case basis.

3. The Marine Hose Cartel—an example of practical international co-operation

3.1 Background

9. Marine hose, a type of rubber hose, is a product used in the oil and defence industries for transporting crude oil between tankers and storage facilities. A number of marine hose suppliers, based in Japan, UK, Italy and France, participated in a global cartel in marine hose and ancillary products, which was aimed at price-fixing, market-sharing, customer allocation, restricting supplies and bid rigging. One of the participants in the cartel, an independent consultant, based in the UK, acted as a full-time co-ordinator to organise meetings, co-ordinate bids on individual contracts and to prepare and circulate monthly market share reports.

10. The cartel lasted from 1986 until 2007, when several competition authorities, including the OFT, the European Commission (EC), the US Department of Justice (DOJ) and the Japan Fair Trade Commission (JFTC) took co-ordinated enforcement action.

3.2 International co-operation

11. The Marine Hose case involved a number of competition authorities co-operating with one another, both during their initial investigations and subsequently.

3.2.1 Co-ordination of investigations and other action

12. The DOJ arrested three UK businessmen, together with five nationals from other countries, in Houston, Texas, in May 2007. The arrests were timed to coincide with searches carried out by the OFT at both business and domestic premises in the UK, as well as on-site inspections by the EC.

13. The three UK businessmen were allowed subsequently to return to the UK and face charges as part of plea bargain agreements with the DOJ. The ‘UK three’ were arrested on arrival in the UK and charged with the cartel offence.

3.2.2 Information disclosure

14. Following the completion of the OFT’s enforcement action (further details of which follow), the ACCC approached the OFT to enquire about the possibility of requesting relevant information from the OFT in relation to the Marine Hose cartel which would be of use in its own civil investigation in Australia. A formal request for the information was made by the ACCC in accordance with the relevant Memorandum of Understanding between the ACCC and OFT (amongst others) and pursuant to Part 9 of the Enterprise Act.

15. Part 9 of the Enterprise Act provides that the OFT may disclose information to overseas competition authorities, subject to a number of conditions and safeguards, including equivalent protections on self-incrimination and data protection principles. The Secretary of State may also in certain circumstances direct that a disclosure must not be made.

16. Having complied with the principles and procedures under the Enterprise Act, the OFT was able to disclose the requested information to the ACCC.

17. The ACCC commenced formal proceedings in the Australian Federal Court against a number of suppliers of marine hose in relation to the cartel's effects on Australian territory. As part of these proceedings, the ACCC used in evidence material disclosed to it by the OFT. Following the conclusion of these proceedings, Graeme Samuel, then chairman of the ACCC said, "*ACCC investigators were greatly assisted by both the United States Department of Justice and the United Kingdom Office of Fair Trading in the provision of documents and information located overseas.*"

3.3 Successful outcomes

18. Following the arrests, searches and inspections in relation to the Marine Hose cartel in May 2007, global co-ordination and enforcement action resulted in a number of successful prosecutions and other actions in a number of jurisdictions, including the United States, Australia, Japan, the UK and the European Union.

3.3.1 UK

19. In 2008, three UK businessmen – the full-time co-ordinator of the cartel and two senior employees of one of the companies involved – pleaded guilty to the cartel offence and were sentenced to terms of imprisonment 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). Under the terms of the plea agreements with the DoJ, the UK sentences had the effect of extinguishing the prison sentences that the UK defendants had agreed to serve in the US. All three were also disqualified from acting as company directors for periods of between five and seven years and confiscation orders (under the Proceeds of Crime Act 2002) were made against two of the three individuals.

3.3.2 Australia

20. In the proceedings brought by the ACCC against several marine hose suppliers involved in the cartel, the Federal Court in Melbourne ordered four companies to pay penalties exceeding AUS\$8 million for engaging in cartel conduct affecting Australian territory. The chairman of the ACCC acknowledged the role played by co-operation between competition authorities, in saying that "*international cooperation was key to this successful court outcome*".

3.3.3 Other jurisdictions

21. In the European Union, the EC brought proceedings against five companies involved in the Marine Hose cartel, fining them a total of Euros 131 million.

22. In the United States, a number of individuals, including the non-UK-national executives arrested in Houston, Texas in 2007, were charged with offences relating to their involvement in the Marine Hose cartel and a range of sanctions, including prison sentences, was imposed. In addition, a number of the companies involved in the cartel were fined for their involvement.

23. 'Cease and desist' orders were also imposed in Japan by the JFTC on a number of companies which had participated in the cartel. One of the companies was also fined for its involvement.

4. Challenges and opportunities for international co-operation

24. Although international co-operation in cartel enforcement has led to a number of successful outcomes, competition authorities still face a number of challenges in co-operating on a practical level. Principal challenges include:

- Differing requirements for co-ordination as between competition authorities. There are a large number of competition authorities operating around the world, with new authorities still being formed as different jurisdictions implement competition regimes. Given the different stages of development between the new authorities and more mature authorities and in view also of the various legal and governmental systems under which the competition authorities operate, there can be differences in the ability to co-ordinate between competition authorities, due to legal or practical requirements. Within this, challenges may also arise through inconsistent or complicated processes under domestic law for sharing information with other competition authorities.
- Tension between information disclosure and protection. The exchange of information is pivotal to effective practical co-ordination between competition authorities in global cartel enforcement. However, there is an inherent tension between such exchanges of information and ensuring the adequate protection of sensitive or confidential information. This tension has become particularly apparent in relation to the protection of information provided by leniency applicants. The balance must be struck between preserving the policy incentives in applying for leniency and the appropriate disclosure of information to other competition agencies, allowing public enforcement measures to be taken around the globe.
- Differing interests of domestic competition authorities and parties. With the spread of competition regimes and increased detection of international cartels, while domestic authorities are keen to prosecute within their own jurisdiction, parties are keen to ensure that the overall “case” and consequential liabilities are managed: this may adversely impact the ability to resolve, or resolve quickly, individual domestic cases.
- Notwithstanding these and other challenges, cooperation can also bring benefits in terms of reducing investigatory burdens, shortening timescales and encouraging parties to settle or plead guilty. Efforts are also underway to support international cooperation: for example the ICN’s Cartel Working Group is developing a set of charts to facilitate international cooperation on anti-cartel enforcement cases. The charts will set out each competition authority’s formal and informal mechanisms for information sharing, enabling members to quickly view and assess which mechanism is most appropriate for their needs.

5. Conclusion

25. Although various challenges remain, the OFT believes that there are powerful incentives to increase international co-operation in cartel enforcement, given in particular the following factors:

- Significant cross-border trade can facilitate the formation of cross-border cartels; international co-ordination in cartel enforcement can help to combat this.
- Competition regimes are being adopted by more and more jurisdictions. Whilst this is beneficial in terms of enforcement, it can also increase the risk of inconsistency and duplicative procedures as between the different regimes, which can lead to unnecessary costs and burdens (both for the authorities and for those being investigated).
- In the current global economic climate, many competition authorities are facing budgetary freezes or restrictions, meaning that they have to continue to operate effectively, but with fewer resources. Efficient international co-operation should help to temper the effects of these restrictions to some degree.