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Global Forum on Competition

IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Singapore

-- Session II --

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Singapore --

Introduction

1. In an increasingly globalised world, many businesses now carry out their activities across borders,¹ resulting in the exponential growth in international trade and investment flows and consequently the potential for illegal cross-border cartel activities. In this regard, the OECD has long recognised this phenomenon and has, as early as 1995, encouraged cooperation between agencies in the enforcement of competition law.²

2. Since its formation in 2005, the Competition Commission of Singapore (CCS) has been involved in cooperation at international and regional levels. In this submission, CCS hopes to discuss some of the benefits of international and regional cooperation as well as the challenges in the area of information sharing in order to facilitate greater enforcement cooperation in cartel investigations.

1. Benefits of International and Regional Cooperation

1.1 Capacity Building and Technical Assistance

3. CCS' experience in international cooperation in the early years was focused on capacity building and technical assistance. When CCS was first formed, it concentrated on the larger process of putting in place a sustainable competition policy framework and processes with the objective of developing Singapore's competition law and policy regime. As such, CCS was the beneficiary of technical cooperation from agencies with well-established competition regimes including the United States Federal Trade Commission ("US FTC"), UK's Office of Fair Trading, UK's Competition Commission, Australia Consumer and Competition Commission ("ACCC") and New Zealand Commerce Commission ("NZCC"). In 2010, CCS officers benefited from attachment programs with the US FTC and the EC's Directorate General for Competition ("DG Comp"). These attachments and visits proved invaluable for CCS in the early years in learning and building up know-how and technical knowledge on what was then a new area of law for Singapore.

4. As CCS grew in experience and case-handling, CCS was pleased to be able to share our experiences in agency formation with other young competition agencies. In 2009, officers from CCS were sent at the invitation of the Competition Commission of Mauritius to assist with capacity building. CCS has also worked informally with newly formed competition agencies and shared our experience with them. CCS has also hosted visiting authorities from countries such as Kazakhstan, Norway, Malaysia, Sri Lanka and Malta during which invaluable experiences and cross-fertilisation of ideas took place.

¹ See the OECD Economic Globalisation Indicators 2010: measuring Globalisation. See also OECD Science, Technology and Industry Scoreboard 2011: Innovation and Growth in Knowledge Economies.

² Refer to Recommendation C95-130, 'Cooperation between member countries on anticompetitive practices affecting international trade', 27/28 July 1995.

5. Within Singapore, CCS is involved in coordination efforts with the regulators of the carve-out sectors in the media, infocomms and the energy markets. CCS has also established a strong network of relationships with other law enforcement agencies in Singapore to facilitate informal information and intelligence sharing, where necessary. CCS is also part of the Community of Practice for Competition and Market Regulators which serves as a platform for dialogue between experts in competition regulation. This is carried out with a focus on market and competition regulation across various sectors in Singapore through ongoing dialogue and sharing of experiences so as to promote an overall culture of competition throughout the Singapore economy.

6. In South-East Asia, there is a regional grouping known as the ASEAN Experts Group in Competition (“AEGC”) formed in 2007 which focuses on competition policy and law. CCS was the first chair of the AEGC and has been a key participant in the AEGC Capacity Building Workshops which addresses various topics, including investigation techniques and enforcement in cartel investigations. In 2010, the AEGC launched the Handbook on Competition Policy and Law in ASEAN for Business and the ASEAN Regional Guidelines on Competition Policy. As competition law is fairly new in ASEAN with only 5 out of 10 countries having enacted competition laws, it is envisaged that regional cooperation will mainly take the form of technical assistance and capacity building for the near future.

1.2 Exchange of Information

1.2.1 Formal Cooperation

7. The extent and scope of CCS’ international and regional cooperation is guided by the provisions in Singapore’s multi-lateral and bilateral Free Trade Agreements relating to competition. These provisions require the signatories to cooperate in the development of any new competition measures and exchange information. Within the terms of these agreements, CCS has sought to cooperate with our trading partners.

8. The Singapore Competition Act provides a mechanism by which CCS may enter into arrangements with foreign competition bodies.³ The Act allows CCS to enter into arrangements whereby each party may, *inter alia*, provide assistance and furnish to the other party information required by the other party for the purpose of performing its functions. The Act also provides that CCS need not furnish any information to a foreign competition body pursuant to such arrangements *unless* it requires of, and obtains from, that body an undertaking in writing by it that it will comply with terms specified in that requirement.

1.2.2 Informal Cooperation

9. CCS has been utilising informal cooperation mechanisms to facilitate its work in the areas of technical expertise, policy development and case-work. In particular, CCS holds frequent dialogues with the ACCC and NZCC to facilitate general information sharing between the agencies. These close links enable the agencies to deal with competition issues across the Asia Pacific region more effectively through the sharing of ideas and capacity building initiatives. In the area of enforcement, valuable leads have been generated through such information sharing initiatives.

10. CCS is also a regular participant at international conferences and workshops on cartel enforcement held by the OECD, the International Competition Network, BRICS and ASEAN countries, sending staff at both the senior and working levels to share knowledge and build relationships. CCS finds it important to keep close links with foreign authorities and establish close personal contacts which help in building up trust and rapport at all levels.

³ Refer to Section 88 of the Competition Act.

11. CCS has also cooperated with foreign competition agencies in other policy areas. For example, in CCS' review of its Block Exemption Order for Liner Shipping Agreements, CCS engaged the EC's DG Comp and the US Federal Maritime Commission on views in relation to liner shipping agreements, regulatory developments, current shipping trends, data collection/filing. This allowed CCS to better assess the international and regulatory landscape for its review.

12. Most importantly, CCS has engaged in both regional and international cooperation with other competition authorities on a case-by-case basis when investigating international cartels with cross-jurisdictional elements. Of note would be CCS' international cooperation with an established foreign competition agency against multi-national companies by sharing information to coordinate dawn raids. This proved useful in evidence preservation. In other cases, CCS has shared general information such as theories of harm and general categories of information within the possession of that competition authority. Information is shared to the extent that such information is not confidential and where waivers have been granted to CCS to discuss the matter with the other authority and vice-versa. This is especially crucial where information is provided by leniency applicants, bearing in mind the likelihood of private actions, discovery obligations that a leniency applicant may be subject to and the varying regimes in which other jurisdictions operate (civil as opposed to criminal regimes).

2. Challenges in Information Sharing

13. Given that competition authorities operate within different legal regimes, the challenge arises when similarity of legal standards are used as a pre-condition for information sharing.

14. In CCS' experience, one area in which this has arisen is in the area of the privilege against self-incrimination. For instance, section 66 of the Singapore Competition Act provides that in the course of an investigation, a person is not excused from disclosing any information to CCS on the ground that the disclosure might incriminate him. However, such information or document is not admissible in evidence in *criminal proceedings* brought under provisions falling outside of the Competition Act, though still admissible in *all* civil proceedings. Thus, a foreign competition authority, which may operate a criminal or civil enforcement regime differing from Singapore's civil enforcement regime, may have reservations about sharing information with CCS where there are differences in the manner and extent to which the privilege is extended to persons under investigation. One way to work around this would be to ensure that the necessary waivers are given so as to allow all information to be shared.

15. At the same time, allowing for a greater level of information sharing between competition authorities may yield potential effects in other areas, such as the efficacy of leniency regimes. For instance, the ease of information sharing across jurisdictions and varying regimes may also potentially serve as a disincentive for leniency applicants if the revelation of incriminating information in a leniency application in one jurisdiction may result in the applicant being exposed in another jurisdiction, *a fortiori* if the latter jurisdiction has more severe sanctions (e.g. criminal sanctions) for cartel conduct. This may deter companies from applying for leniency in the first jurisdiction. Nonetheless, the waiver mechanism allows leniency applicants to be precise and nuanced as to which jurisdictions he or she is willing to allow the authority to share the information with and the extent to which information is shared. In practice, CCS would ensure that all necessary waivers from leniency applicants are obtained before it proceeds to discuss the information with other authorities.

16. Going forward, notwithstanding the differing criminal and civil sanctions for cartel conduct, there is something to be said for competition authorities to align their approaches to leniency, for instance, with regard to marker policies and leniency grants. Existing differences in leniency regimes lead to uncertainty, as potential leniency applicants will be unsure of the extent of information required to obtain a grant of leniency/marker in each jurisdiction and engage in "forum shopping" in deciding which jurisdictions to

apply for leniency in. For instance, in some regimes, even if the applicant has fully cooperated and furnished all the necessary information, there is still no guarantee of leniency (and therefore full immunity) from the competition authority. An alignment of these leniency requirements will aid the cooperation process as applicants would be more willing to grant substantial waivers for authorities to share information which will speed up the investigative process.

3. Conclusion

17. Capacity building and technical cooperation are the key building blocks in the fight against international cartels.

18. At the same time, the differing legal regimes can be a challenge for international cooperation especially in the area of information sharing for specific cases. The architecture of leniency regimes can have an effect on information sharing. Here, alignment of leniency regimes coupled with the necessary waivers can facilitate international cooperation in the area of information sharing. In this regard, international fora like the OECD are ideal platforms to facilitate the alignment of leniency regimes.