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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from the European Union

-- Session II --

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- European Union --

1. Existing tools for international co-operation

1. Strict cartel enforcement is one of its main pillars on which the competition policy of the European Union (EU) is based. The understanding that cartels do not respect national borders but may increasingly cover several jurisdictions, or may even be organised on a global scale, is widely accepted.

2. Within the EU there are two ways in which this development has influenced the EU approach to cartel enforcement.

3. On the one hand the EU has created a sophisticated system of regional cooperation on competition matters including the European Commission and the competition authorities of the 27 Member States of the EU). Regulation (EC) No 1/2003¹ entrusted the EU national competition authorities with a key role in applying the EU antitrust rules, in addition to the European Commission, National competition authorities can therefore apply Article 101 TFEU to cross border cartels affecting trade between two or more EU Member States. The European Competition Network ("ECN") was created to enable the European Commission and the national competition authorities to coordinate the effective application of the EU competition rules.

4. On the other hand, the EU has developed a set of formal and informal mechanisms to channel cross border cooperation in international cases with third countries. The formal mechanisms include dedicated bilateral cooperation agreements with the US, Canada, Japan and Korea on competition related matters. These agreements generally cover issues such as (positive and negative) comity, mutual notification of enforcement activities, exchange of non confidential information and regular consultations and meetings. In addition, the EU has concluded Memoranda of Understanding with agencies in Brazil, China, and Russia.

5. Provisions on international cooperation on competition matters can also be found in non-dedicated agreements, such as Free Trade Agreements (FTAs) and other trade related agreements. The EU has concluded a large number of such agreements with third countries². Apart from provisions on substance, these agreements also often include explicit provisions on cooperation.

6. It is important to note though, that the presence of an underlying agreement is not a formal prerequisite for cooperation to take place. The EU also frequently cooperates with agencies in situations where such an agreement is absent. For cooperation to take place, the decisive issue is whether both of the agencies involved see an added value in such cooperation.

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1.

² Further information on such agreements is available at the following web-page of the European Commission: <http://ec.europa.eu/competition/international/bilateral/index.html>.

2. Types of cooperation

2.1 European Competition Network

7. The ECN is a system based on the application of the EU antitrust rules which allows for case attribution and seamless working arrangements between its members, including providing assistance in inspections and the exchange of confidential information.

8. In particular, the ECN is based upon a system of parallel competences³ and flexible work sharing rules. This means that as a matter of principle any "well placed" authority can take action in a case. Indicative, non-binding principles are set out in the Network Notice, which explain when a Network member is well-placed to act.⁴ National competition authorities of the EU member States typically deal with infringements that have their main effect in the territory of the EU Member State to which they belong. If the European Commission formally initiates proceedings, the competence of national competition authorities to deal with the same case ends. In practice, the system works as follows: an authority who is well placed and willing to investigate a potential infringement informs the ECN of its intentions at an early stage of the investigation. Other authorities may signal their interest to also act in the case and in the rare cases that authorities disagree, bilateral discussions can take place to resolve the matter. By having flexible work sharing rules, effective enforcement of the EU antitrust rules is not hindered by a lack of available resources in a particular authority. Likewise, the European Commission is not prevented from dealing with a case that deals with important issues for the development of EU competition policy. The principles of work sharing as introduced by Regulation 1/2003 and the Network Notice have been fully endorsed by the Court of First Instance (now the General Court) in the *France Télécom* judgments.⁵

9. The ECN is also equipped with a number of other mechanisms to facilitate close cooperation in the application of the EU antitrust rules. For example, as is explained below in section 4, competition authorities are able to exchange and use case-related information as evidence, including confidential information pursuant to Article 12 of Regulation 1/2003. Moreover, Article 22 of Regulation 1/2003 enables national competition authorities to carry out inspections or other fact-finding measures on their territory on behalf and for the account of another national competition authority (paragraph 1) and inspections upon request by the European Commission (paragraph 2). In both cases, Article 22 inspections or fact-finding measures are governed by the national law of the Member State where the inspection or fact-finding measure takes place. That means that the investigating authority acts on the basis of its investigatory powers, as provided by national law, and has to respect the procedural rights of the undertakings under investigation, as provided by national law. The results of the investigatory measures may be exchanged on the basis of Article 12.

10. In order to guarantee the coherent application of the EU antitrust rules, Regulation 1/2003 provides for three main tools: (i) the national competition authorities are obliged to apply EU law whenever there is an effect on trade in a manner that ensures convergence between national and EU competition law (Article 3(1)); (ii) national competition authorities are obliged to inform the European Commission about an envisaged decision at least 30 days before taking it (Article 11(4)); and (iii) the European Commission can intervene to remove the national competition authority of its competence to

³ Articles 4 and 5 of Regulation 1/2003 give the Commission and the national competition authorities full parallel competences to apply Articles 101 and 102 TFEU.

⁴ Notice on cooperation within the Network of Competition Authorities OJ C 101 of 27.04.2004 (the "Network Notice"), p. 43-53, paras 8-13.

⁵ Case T-339/04 and Case T-340/04, *France Télécom v. Commission*, [2007] ECR II-521.

deal with a case if there is a serious risk of incoherence (Article 11(6)). The European Commission has not made use of the latter possibility to date. Nonetheless, a practice has developed whereby the European Commission submits comments to the national competition authorities about their proposed course of action in many cases when it is informed about a case pursuant to Article 11(4). These observations are taken very seriously by the national competition authorities and have resulted in creative, informative and productive dialogues. The special role that the European Commission plays here reflects its position as guardian of the EU Treaties.

2.2 *Cooperation with other countries*

11. In addition to the cooperation within the ECN, bilateral cooperation with third country competition authorities is part of the European Commission's daily enforcement culture. For many years, the European Commission has cooperated with other agencies both on policy and enforcement matters.

12. In the enforcement against international cartels, there is regularly cooperation with third country jurisdictions from the very early stages of the case, in particular with regard to the timing and scope of first investigative actions. Cooperation typically takes place in order to prepare/coordinate inspections ("dawn raids") and, in addition to the timing of the inspections, this may include, where the authorities deem appropriate, informal discussions on for example the scope of the investigative actions (on the inspection target, product and geographic area concerned). In international cartel cases the Commission usually cooperates with several other agencies launching the investigations with simultaneous inspections. Such coordinated inspections offer the advantage of maintaining the element of surprise thus increasing the likelihood of a successful outcome. Thereafter cooperation can continue throughout the investigation. The Commission holds for example informal discussions on the 'state of play' and timing of the investigations, the scope of the case and possible remedies and in such discussions exchanges views and own preliminary conclusions.

13. Cartel investigations are often triggered by an immunity application. In the case of international cartels, applicants regularly file for immunity in several jurisdictions. The Commission leniency programme sets out a requirement for the immunity applicant to provide information which other competition authorities the applicant has or intends to approach.

14. Also outside cases with simultaneous leniency applications, it is possible that the Commission is contacted by another authority to discuss cooperation in a case they have. It can also occur that, on the basis of the specificities of a case that the Commission has, it appears beneficial to contact another authority and propose cooperation.

3. *International vs. regional cooperation*

15. The Commission usually cooperates with several other agencies in a case relating to an international or world-wide cartel. The extent to which the Commission cooperates with other agencies (outside of the ECN framework) depends on the specific circumstances of the case, for example whether it is an international or a world-wide cartel and whether there are novel issues on which there is a need to exchange views.

16. It is clear that over the years, in parallel with an intensification of the Commission's own enforcement action against international cartels also cooperation with other agencies has intensified. Proliferation of competition agencies around the globe with increasingly anti cartel active enforcement and with active leniency policy also means that such cooperation takes place with an increasing number of agencies.

17. A decision to cooperate with another agency in cartel cases is made on a case-by-case basis. The bilateral cooperation in individual cases will naturally depend on the nature of the cases and in particular on the centre of gravity of the cartel behaviour. Traditionally, also following from the scope of the cartel cases handled, the Commission has had close cooperation with mature competition authorities in the major trading partners to the EU, but more recently also with newer agencies. The willingness to take into consideration serious concerns of the other authority, to avoid actions jeopardizing and delaying the other party's investigation and a spirit of confidence combined with open and genuine cooperation on all sides will certainly facilitate cooperation, and indeed strengthen overall the enforcement against cartels.

18. Given the potential for ECN cooperation which includes also the exchange of evidence between authorities and carrying out inspections on each other's behalf, there is a strong potential for intensive collaboration. In practice the national competition authorities always assist the Commission in inspections but national ECN authorities also do so between each other. The carrying out of inspections on behalf of another authority takes place on a regular basis. That said, such collaboration often takes place in cases where one *or* the other authority will proceed with a full investigation (but not both), based on discussions of case allocation, foreseen in the ECN. Conversely, in international matters the European Commission more often works with third country authorities in parallel, as each authority is pursuing an entire investigation individually for the effects in the respective territories.

4. Challenges in the international cooperation and improving the current frameworks

19. International cooperation is shaped according to the legal provisions of the countries involved, in particular whether the enforcement system in the cooperating jurisdiction is administrative or criminal. In particular, the exchange of evidence collected under the European Commission investigation powers is not possible even under current bilateral agreements with other competition agencies. Therefore, with sister agencies names, facts and figures stemming out of the assembled proof are not discussed. The ECN is an exception to that because all authorities in that network have powers and an obligation to apply the same EU competition rules.

20. The differences in the underlying legal systems (administrative vs. criminal) include in particular the differences in the rights of defence between companies that are addressed in the administrative systems and individuals that in some cases - in addition to companies – are addressed in criminal systems. In particular, there are important differences in this respect in the rights of non-self incrimination, legal professional privilege and privacy. To deal with issues associated with such rights of the defence, certain safeguards need to be provided if information were to be exchanged.

21. These differences stem particularly from the fact that the standards for collecting evidence to be used in a criminal procedure against individuals are usually stricter than those employed in an administrative procedure concerning companies. This means that whenever a receiving authority has a higher standard, in case evidence would be exchanged, such evidence can only be used against individuals if its collection has respected the higher standard. This is currently the principle behind evidence exchange in the European Competition Network⁶ and reflects the OECD recommended practices⁷. For example, an EU Member State applying criminal sanctions, including the possibility of a custodial sentence, cannot use in evidence information collected by the Commission under its administrative procedure.

⁶ See for reference the Commission Notice on cooperation within the Network of Competition Authorities, Official Journal C 101, 27.04.2004, p. 43-53.

⁷ See for reference the Recommendation of the OECD Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, 25 July 1995 – C(95)130/Final and the OECD Best Practices for the formal exchange of information between competition agencies in hard core cartel investigations, October 2005.

22. A further challenge is created by discovery⁸ requests in civil damage proceedings that have increasingly targeted across the globe the information provided to the European Commission and other enforcement agencies by companies applying for immunity or reduction of fines. Such requests, when they are made during ongoing enforcement proceedings may interfere with those proceedings. Moreover, companies that would consider cooperating with an antitrust authority in its investigation to receive a more lenient treatment in fines may be less willing to cooperate in the framework of the leniency policy on fear of disclosure risk.

23. In this context it should be noted that the Commission is determined to defend its leniency programme and the programmes of our ECN partners. The question is on finding the right balance between protecting the effectiveness of cartel enforcement and allowing the victims of a cartel to pursue their legitimate quest for damages. At any rate, let us not forget that damage claims often follow the enforcement action of a competition authority. As a consequence, if the authority has an effective leniency programme leading to decisions of the Commission sanctioning such reported cartels, it will be easier for the victims of a cartel on the basis of such a decision to obtain reparation. Confidentiality plays a significant role in assisting the effective enforcement of European antitrust law and encourages not only leniency cooperation, but also free and open participation by the parties under investigation. Therefore the Commission has also objected discovery of for example the Commission's Statement of Objections, recordings from oral hearing of the parties and confidential versions of the final decisions.

4.1 Information exchange within the ECN

24. In the ECN, the European Commission and the EU Member States' competition authorities have parallel competences to apply EU competition rules. Therefore a key element in this network is the ability of all the EU competition authorities to exchange and use as evidence information - including documents, statements and digital information - which has been collected by them for the purpose of applying EU competition rules (alone or together with national competition law). Article 12(1) of Regulation 1/2003 empowers competition authorities to exchange information *as intelligence* irrespective of the (criminal or administrative) nature of the underlying proceedings and irrespective of whether sanctions are imposed on individuals, provided that the exchange occurs for the purpose of applying the EU antitrust rules.

25. Conversely, the use *in evidence* of information received from another competition authority is subject to certain additional conditions, as laid down in paragraphs 2 and 3 of Article 12. Whereas Regulation 1/2003 provides for sanctions only against undertakings, some national laws also provide for sanctions against individuals for a breach of EU competition law. As far as proceedings against undertakings are concerned, Article 12(2) of Regulation 1/2003 assumes a sufficient degree of equivalence of the rights of defence in the different enforcement systems.⁹ Information collected in one system can therefore be used in evidence in another system, provided that the general conditions of Article 12(2) are fulfilled, notably that the information may be used only for the purpose of applying the EU antitrust rules and in respect of the 'subject-matter' for which it was collected.

26. Given the difference in the rights of defence between undertakings and individuals, Article 12(3) of Regulation 1/2003 provides that information collected from undertakings cannot be used in a way which would undermine the higher protection given to individuals. Information exchanged within the ECN can thus only be used *in evidence* to impose sanctions on individuals where:

⁸ Discovery is a procedural device, enabling disclosure of evidence, available to parties of civil litigation proceedings in a series of jurisdictions, notably in the United States, at federal and state level, and also in some EU countries.

⁹ See recital 16.

- the law of the transmitting authority foresees sanctions of a similar kind for infringements of EU competition rules (e.g. financial or custodial), in which case the Regulation presumes that there are sufficiently equivalent standards of rights of defence (the qualification of the sanctions or procedures at national level as administrative or criminal is irrelevant) or
- the types of sanctions which may be imposed on individuals are materially different, but the information has been collected in a way which respects the same standard in the protection of the individual's rights of defence, as provided for under the rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sentences.

27. This last provision means that a Member State authority cannot use information which has been collected by the Commission in its administrative procedure against an individual in a criminal proceeding which could result in a prison sentence.

28. There are special rules in place for leniency applicants. Exchange of information is only possible where:

- the leniency applicant has provided a waiver, or
- the applicant has already applied for leniency in the jurisdiction of the requesting authority, or
- the requesting authority agrees not to use the information to impose sanctions.

29. The question whether information was gathered in a legal manner by the transmitting authority is governed by the law of that country. When transmitting information the transmitting authority may inform the receiving authority whether the gathering of information was contested or could still be contested.

4.2 Information exchange with other countries

30. The Competition co-operation agreements that the Commission has in place with several countries do not provide for the authorities to exchange information considered confidential under their respective laws. This means in practice that information obtained by the Commission through its investigation powers (voluntary submissions, information requests or inspections) cannot be shared without a waiver from the company providing information. The legal framework allows, however, the exchange of intelligence obtained by other means and the discussions on the approach taken in the investigation with other authorities. These forms of cooperation are frequently used by the Commission.

31. When the Commission receives leniency applicants that apply simultaneously in different jurisdictions, such applicants provide waivers allowing sharing information between authorities. In international cartel cases the Commission systematically asks leniency applicants from the outset for such waivers, while there is no formal obligation to that effect in the Commission leniency programme. In this respect there are no such rights of defence issue as discussed above, because normally the applicant would have submitted the same evidence to different authorities. Therefore, in the European Commission's view, the authorities do not normally need to exchange evidence for use in their proceedings, but simply to freely discuss (on the basis of a waiver) on the evidence submitted .

32. As the Commission obtains evidence in an administrative procedure, which provides for different investigative procedures than those under criminal law, additional issues arise if one would consider the exchange of confidential information with criminal jurisdictions. As explained above, in the context of the rights of the defence, there are issues associated with the use of information for possible criminal

sanctions. In this respect, as a matter of principle, the limits imposed by the regime governing the exchange of information inside the EU would also govern the relations to third countries. The Commission would not transmit information to a third country it could not transmit to the EU Member States.

4.3 *Further improving international cooperation*

33. International cooperation in cartel cases has in practice proven to be highly productive starting from coordinated inspections but more and more often taking place throughout the proceedings. Even though there remain challenges particularly due to differences in the legal systems, such differences in the law should not stop competition authorities from cooperating, but should, in fact, urge agencies in the various jurisdictions to focus on common principles and work together across borders toward a pragmatic convergence in actions against cartels around the world. Namely, as cartel cases are more and more often international and companies cooperate in the investigations with various competition authorities, the authorities across the world have a converging interest. The approach taken in one jurisdiction – in particular as regards leniency rules and sanctions – affects the decision of a company to report a cartel and cooperate in the different jurisdictions. Moreover, as competition authorities continue to develop both multilateral and bilateral relations, cooperation in individual cartel cases between authorities is expected to intensify throughout all phases of an investigation.