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English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS

-- European Union --

27 October 2015

This document reproduces a written contribution from the European Union submitted for Item 3 of the 122nd meeting of the Working Party No. 3 on Co-operation and Enforcement on 27 October 2015.

*More documents related to this discussion can be found at:
www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm*

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1. Alpha Corporation and Beta Corporation are organized under the laws of Country A and have factories in Country A where they manufacture Component X, a piece of high-tech hardware used in electronic products. Alpha and Beta agree to charge higher prices for Component X sold to finished product integrators. These integrators are organized under the laws of Country B and have factories in Country B where they incorporate Component X into finished electronic products sold in Country C.

2. Some or all of the anti-competitive overcharge on Component X is passed on by the integrators to purchasers of the finished product in Country C. **[EU Commission comment: This is an assumption which seems to be very difficult to assess and verify in practice].** Alpha and Beta are aware that Component X is incorporated into finished products sold in Country C and Alpha and Beta discuss market conditions and track sales of the finished products in Country C.

3. In responding to the questions below, delegates should feel free to address any modifications to the scenario that raise other issues that in their view need to be considered when dealing with cartels involving intermediate goods.

1. Assume You Are Country A:

1.1 What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?

4. There are no EU precedents prosecuting pure "export cartels" in which the cartelists have no (direct or indirect) sales of the cartelised product in the EEA. Theoretically, an antitrust investigation would still be possible if there are concerns that the economic effect of the cartel would be that EU customers of the cartelised product are foreclosed because the cartelised price is too high. However, this would not be a cartel case *stricto sensu*.

5. Our standard test for jurisdiction requires "implementation in the EU" in terms of sales. Usually, this is understood as "direct sales" of the cartelised product to customers based in the EU territory. However, the test can also be met if Component X is sold in the EEA as part of a finished electronic product either by (i) one of the cartelists (so called "direct sales through transformed products"); or (ii) a third party not participating in the cartel (so called "indirect sales"). Country A has none of such direct or indirect sales.

1.2 If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?

6. Not applicable as there are no sales to country A.

1.3 Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?

7. Not applicable as there are no sales to country A.

2. Assume You Are Country B:

2.1 *What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?*

8. We would certainly investigate the case because it concerns direct sales of Component X in our jurisdiction.

2.2 *Is your analysis any different if Alpha and Beta have attended price-fixing meetings in Country B?*

9. No – it would make a difference in terms of investigative techniques (it is more likely that we could conduct an unannounced inspection if collusive contacts took place in our territory – for example, between employees based in Country B), but jurisdiction would be already established on the basis of direct sales into our territory.

2.3 *If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?*

10. We would use the direct sales of Component X into Country B as the value of sales for calculating our fine.

2.4 *Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?*

11. The fact that other competition authorities have imposed fines in relation to the same cartel is not an element of our formula.

3. Assume You Are Country C:

3.1 *What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action against Alpha and Beta?*

12. As stated above, we would have jurisdiction if Component X is sold in Country C as part of a finished electronic product either by (i) a subsidiary of one of the cartelists (so called "direct sales through transformed products"); or (ii) a third party not participating in the cartel (so called "indirect sales").

13. Starting an investigation on the basis of indirect sales only would be especially appropriate if Component X is a particularly relevant product, either because it accounts for a significant proportion of the price of the finished product, or because the finished product is widely sold in the EU.

14. However, in practice we have never pursued a case on the basis of indirect sales only.

3.2 *Is your analysis any different if Alpha and Beta have attended price-fixing meetings in Country C?*

15. No – as stated above, it would make a difference in terms of investigative techniques (it is more likely that we could conduct an unannounced inspection if collusive contacts took place in our territory – for example, between employees based in Country C), but jurisdiction would be already established on the basis of sales into our territory (either direct sales through transformed products or indirect sales).

3.3 *Is your analysis any different if Alpha and Beta have had contacts with finished product purchasers in Country C, including negotiations regarding Component X pricing?*

16. No – such meetings are not relevant for the purposes of establishing jurisdiction, but may be of relevance to decide on the appropriateness of starting proceedings.

3.4 *Is your analysis any different if, contrary to the facts outlined above, the finished products are sold around the world and Alpha and Beta are unaware or indifferent to whether the finished products are sold in Country C?*

17. No – we would still have jurisdiction to prosecute that collusion.

3.5 *Is your analysis any different if the integrators are wholly-owned subsidiaries of the finished product purchasers in Country C?*

18. Not for establishing jurisdiction.

3.6 *If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?*

19. We would use as value of sales the amount of the direct sales through transformed products or the amount of the indirect sales (using only the value of Component X, not the total price of the finished product).

20. However, in practice we have never pursued a case on the basis of indirect sales only.

3.7 *Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?*

21. The fact that other competition authorities have imposed fines in relation to the same cartel is not an element of our formula. However, we might consider that Country B would have already imposed fines by the time we intend to do so.