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## **Global Forum on Competition**

### **IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS**

**Contribution from the United States (DOJ)**

-- Session II --

*This contribution is submitted by the United States Department of Justice under Session II of the Global Forum on Competition to be held on 16 and 17 February 2012.*

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## IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- United States (DOJ) --

### 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?*

1. The United States is a party to approximately 70 mutual legal assistance agreements (MLATs), which are treaties of general application pursuant to which the United States and another country agree to assist one another in criminal law enforcement matters. The specific provisions of each treaty vary, but generally provide for such assistance as the conduct of searches, taking of witness testimony, and service of documents. The United States is also a party to an antitrust-specific mutual legal assistance agreement with Australia, an agreement authorized by domestic legislation. *See* International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 *et seq.* This agreement also provides, in appropriate circumstances, for the conduct of searches, taking of testimony and service of documents. *See* <http://www.justice.gov/atr/public/international/docs/usaus7.htm>

2. In addition, the United States (or, in some cases, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission, the U.S. antitrust agencies) is a party to “soft” antitrust cooperation agreements with Australia, Brazil, Canada, Chile, the European Union, Germany, Israel, Japan, and Mexico. The U.S. antitrust agencies also entered into memoranda of understanding with the competition authorities of China and Russia. *See* <http://www.justice.gov/atr/public/international/int-arrangements.html>. Through consultation, notification provisions and the like, these agreements serve as a catalyst for cooperation but are not necessary for cooperation to take place. These agreements, however, do not change the signatories’ laws, including the laws with regard to the treatment of confidential information. These agreements, therefore, do not allow for the sharing of confidential information that could not otherwise be exchanged.

3. The DOJ cooperates with other competition authorities on a regular basis in cartel investigations. In general, this type of cooperation has included, where not restricted by confidentiality rules, the sharing of leads and background information about the relevant industry and actors, notification of initial investigative actions which can facilitate later specific investigative requests for assistance, and the coordination of inspections and interviews. The DOJ also engages in cooperation facilitated by waivers from applicants under DOJ's leniency programs.

4. Cooperation based on the 1995 OECD recommendation is helpful. It allows the DOJ at times to learn about potential anticompetitive activity affecting the U.S. market and other jurisdictions' enforcement intentions. It has also facilitated notifications of our enforcement activities to other jurisdictions. In the DOJ's experience, the 2005 Best Practices remain useful in setting forth the parameters for potential exchange of confidential information in cartel cases.

## 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?*

5. DOJ engages in both formal and informal cooperation in cartel investigations. As described above, at the pre-investigative stage, this cooperation has included, where not restricted by confidentiality rules, the sharing of leads and background information about the relevant industry and actors, notification of initial investigative actions and the coordination of inspections and interviews. At the investigative stage, much of the cooperation DOJ engages in takes the form of formal requests for assistance pursuant to MLATs or letters rogatory. Such requests usually seek corporate documents and, less frequently, witness interviews. DOJ has occasionally been requested to provide information in the post-investigative stage. This has involved providing copies of public court filings after we have filed a case and, in some instances, providing access to non-public information that is not statutorily protected or otherwise entitled to confidential treatment. DOJ has also cooperated with other agencies on the filing of charges.

6. DOJ's experience has been that cartel cooperation is useful in an enforcement context. For example, in May 2007, while eight executives from the United Kingdom, France, Italy and Japan were arrested in the United States for their role in a conspiracy to rig bids, fix prices and allocate markets for United States sales of marine hose used to transport oil, competition authorities from the Office of Fair Trading (OFT) in the UK and the European Commission were also executing search warrants in Europe. Three of these executives, British nationals, entered plea agreements in the United States in December 2007, agreeing to jail sentences and fines, and were then escorted in custody back to the United Kingdom to allow them to cooperate with the OFT. Also, in August 2007, when announcing British Airways Plc.'s agreement to plead guilty and pay a \$300 million criminal fine for its role in conspiracies to fix the prices of passenger and cargo flights between the United States and the United Kingdom, DOJ acknowledged that this enforcement action represented successful coordination between U. S. law enforcement authorities and the UK's Office of Fair Trading.

## **2.1 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?*

7. The United States is not part of a regional competition network. DOJ cooperates frequently with competition agencies from around the world, including both new/young and more established agencies.

## **3. 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?*

8. The greatest challenge in investigating and prosecuting cross-border cartels is obtaining evidence and information located in other jurisdictions. Cooperation with other jurisdictions has at times been effective in overcoming this challenge.

9. The United States has a criminal cartel enforcement regime enforced by the DOJ. When not restricted by confidentiality rules, the DOJ may, in the pre-investigative stage, engage in the type of cooperation outlined above, such as sharing of leads and background information and coordination of inspections and interviews, even with agencies with civil or administrative enforcement regimes. With the exception of its antitrust-specific mutual legal assistance treaty with Australia, the United States generally cannot provide assistance under MLATs to jurisdictions that are pursuing civil investigations. Subject to

resource constraints, the DOJ is generally able to share publicly available information with other competition agencies, regardless of the form of their enforcement regime.

10. While challenges remain in the area of international cooperation, cooperation among jurisdictions in anti-cartel enforcement continues to become more robust, sophisticated, and effective. As agencies continue to develop relationships with each other, DOJ believes that such cooperation will continue to evolve.

#### 4. 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?*

11. The primary barrier to information sharing encountered by DOJ when requesting information from other jurisdictions generally relates to the legal and practical constraints faced by those other jurisdictions in providing the requested information. In some instances, those constraints have prevented the DOJ from obtaining certain information located outside the U.S. Specific examples cannot be provided in light of confidentiality constraints.

12. DOJ also faces legal constraints when presented with requests for information from other jurisdictions. Much of the information gathered by DOJ in the course of a criminal investigation is statutorily protected from disclosure, by, for example, Rule 6(e) of the Federal Rules of Criminal Procedure. In addition, certain confidentiality protection is afforded to information provided to the DOJ under its corporate and individual leniency programs. Such information cannot be exchanged absent appropriate court orders or waivers, respectively.

13. In order to be introduced as evidence in a criminal trial in the United States, information must meet the requirements of relevant federal rules of criminal procedure and evidence. Information received in response to a formal assistance request will, in many instances, satisfy some or all of these requirements. Information received through informal channels will usually not be in a form, at least initially, in which it would satisfy such requirements. However, DOJ is very interested in obtaining information through informal as well as formal cooperation, since even lawfully obtained information that would not, at least initially, be admissible as evidence in a criminal trial could be useful in advancing an investigation.

14. The MLATs to which the United States is a party and the antitrust-specific mutual legal assistance agreement entered into with Australia include provisions relating to confidentiality. The confidentiality provisions in the MLATs vary among treaties. The confidentiality provisions in the agreement with Australia can be found in Articles VI and the Annex. *See* <http://www.justice.gov/atr/public/international/docs/usaus7.htm>.

15. The DOJ's policy is to treat as confidential the identity of leniency applicants and any information obtained from the applicant. The DOJ will not disclose a leniency applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Further, in order to protect the integrity of the leniency program, the DOJ has adopted a policy of not disclosing to other authorities, pursuant to cooperation agreements, information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure. Notwithstanding this policy, the DOJ routinely obtains waivers to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. In addition, leniency applicants may issue press releases or, in the case of publicly traded companies, submit public filings announcing their conditional acceptance into the DOJ's Corporate Leniency Program, thereby obviating the need to maintain their anonymity.

## **5. 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.*

16. Other law enforcement agencies in the United States also face the challenge of obtaining evidence and information located in other jurisdictions. The Antitrust Division consults with other components in the DOJ and other U.S. government law enforcement agencies about meeting these challenges. Because of confidentiality concerns, specific examples cannot be provided.