

Unclassified

DAF/COMP/GF/WD(2012)51

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

07-Feb-2012

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from South Africa

-- Session II --

This contribution is submitted by South Africa under Session II of the Global Forum on Competition to be held on 16 and 17 February 2012.

JT03315501

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/GF/WD(2012)51
Unclassified

English - Or. English

IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- South Africa --

1. Introduction

1. The detection, investigation, prosecution and eradication of cartels are a priority for the Competition Commission South Africa (“the Commission”). During the 2010/2011 financial year the Commission completed 18 investigations in which it found cartel related activity and received 33 applications in terms of the Corporate Leniency Policy (CLP)¹. Many of these cases have been in the Commission’s priority sectors of construction, food and agro-processing and industrial products.

2. Given the global dimension of competition issues and the harm of international cartels, cooperation between competition agencies has become increasingly important. It is undeniable that cooperation between competition agencies can facilitate cartel investigations and prosecutions however this kind of cooperation is yet to realise its full potential – in particular for newer agencies and agencies from developing countries. From a South African perspective, while cooperation in cartel investigations has taken place in a small number of cases – the benefits of cooperation have been significant.

2. Existing tools for international cooperation

3. The importance of cooperation amongst competition agencies has been highlighted recently with more and more agencies formalising this cooperation through bilateral agreements with their foreign counterparts. To date the Commission has not entered into any formal cooperation agreements with other competition agencies. The Commission is in the process of finalising a Memorandum of Understanding (MoU) with the Namibian Competition Commission which we envision will strengthen case cooperation between the two agencies. Key elements of this MoU will include technical assistance, sharing of methodologies and substantive analysis, joint research and information exchange. The OECD’s 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade was consulted extensively during the drafting of the MoU.

4. From a regional perspective the need for cooperation between competition agencies in Southern Africa has been reflected in the 2002 Southern African Customs Union (SACU) Agreement², the 2004 COMESA Competition Regulations and the 2009 Southern African Development Community (SADC)

¹ In 2008, South Africa amended its previous Corporate Leniency Policy (CLP) that was issued in February 2004 to allow for provisions relating to the acceptance of oral statements and marker applications. In terms of the CLP, a self-confessing cartel participant may be granted immunity from prosecution if, among other things, it is first to approach the Commission and provides it with information that will be sufficient for the Commission to successfully prosecute remaining members of the cartel.

² Article 40: Southern African Customs Union (SACU) Agreement between the governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland (2002).

Declaration on Regional Cooperation in Competition and Consumer Policy.³ Actual cooperation in cartel investigations between competition agencies in member states from these regional organisations has occurred on a small but gradually increasing scale due to the large number of newly operational competition agencies in the region. The SADC secretariat has embarked on a project to facilitate cooperation among competition agencies in the region and South Africa regularly cooperates with its counterparts in the region be it in the form of capacity building, case discussions or the provision of technical assistance.

3. Types of Cooperation

5. For the Commission international cooperation in cartel investigations has mostly taken place through informal case discussions between lead investigators from various jurisdictions via conference calls, physical meetings and email correspondence. During the investigation of a suspected cement cartel in 2009 South African investigators held discussions with the Brazilian Secretariat of Economic Law; the European Commission and German Cartel Office. In this case the consultations took place during the initial phases of the investigation and the information provided to the Commission in these engagements shed new light on the modus operandi of cement cartels which greatly assisted the investigation in South Africa. International cooperation contributed to the success of the South African investigations into the cement cartel.

6. Given the secretive nature of cartels, early notification and discussions on investigations or potential investigations can be an invaluable source of information in the detection of international cartels – especially for newer agencies which have not yet developed strong detection methods. In 2007, following discussions, the Commission conducted raids in coordination with its counterparts from the European Commission and the US Department of Justice. The raids were conducted simultaneously between the three competition jurisdictions for maximum impact on a cartel involving freight forwarding companies whose reach was believed to be international. As a result of the coordination of efforts the investigation in South Africa was concluded with the signing of settlement agreements with two of the cartel members. Good working relationships are necessary to build the trust needed to facilitate this type of cooperation. The Commission's participation in international forums such as the International Competition Network, the OECD Competition Committee, UNCTAD's International Group of Experts on Competition Law, and the newly formed African Competition Forum has afforded Commission's leadership, senior managers and investigators the opportunity to create and maintain these important relationships.

7. Cooperation involving the sharing of methodologies used to address cartel behaviour in similar markets and the lending of technical assistance has proved to be useful to the Commission. In 2010 the Commission embarked on a major investigation into bid-rigging in the construction sector and for the first time initiated a special project in which firms were invited to make applications to enter into settlement discussions via a fast track procedure. In formulating an appropriate fast-track system the Commission drew lessons from the experiences of agencies in other countries such as the Netherlands and UK where fast track systems in the same industry had been utilised in previous years. As part of its advocacy to government to gain support for the project, the Commission invited the head of the Dutch Competition Agency (NMa), to share his experience with the fast-track settlement process in construction in the Netherlands with South African government Ministers and Directors General. The Commission then put together a team and developed the approach for the fast track settlement process. This included

³ SADC Declaration on Regional Cooperation in Competition and Consumer Policies between the governments of the Republic of Angola, the Republic of Botswana, the Democratic Republic of Congo, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mauritius, the Republic of Mozambique, the Republic of Namibia, the Republic of Seychelles, the Republic of South Africa, the Kingdom of Swaziland, the United Republic of Tanzania, the Republic of Zambia and the Republic of Zimbabwe (2009).

representatives from the NMa which travelled to South Africa (with the assistance of the OECD's outreach program) to provide intensive workshops on running the fast track-settlement process and related investigations. Subsequent to this a senior legal advisor from the NMa was seconded to the Commission to act as a consultant on this case for a few months. The Commission's construction investigation is still ongoing and so far the fast-track process has been a major success.

4. Challenges and opportunities for improved cooperation

8. Effective enforcement cooperation, especially with newer competition agencies and agencies from developing countries is challenged by a number of factors including the divergence of substantive rules and institutional approaches; legal restrictions with regard to the exchange of information and the lack of adequate safeguards for the protection of confidential information.

9. One particular challenge the Commission is currently facing in prosecuting members of an international cartel it has investigated is the difficulty in serving and enforcing Tribunal orders on cartel members which are not physically located within the borders of South Africa. In this case information on the cartel was brought to the Commission's attention through a leniency application. The leniency applicant complied with the Commission's information requests and provided information on all other jurisdictions in which it had applied for leniency. This enabled investigators to hold useful discussions on the strategies used by these other jurisdictions including Chile, USA, EC and Canada. However the absence of cooperation agreements enabling the Commission to serve and enforce legal orders in jurisdictions where respondents are physically located is frustrating the effective prosecution of successfully investigated international cartels.

10. Information sharing is one of the most important aspects of cooperation however the ability of agencies to exchange information with foreign agencies is sometimes restricted by national laws preventing the sharing of information. In South Africa, section 82(4) of the Competition Act 89 of 1998, as amended stipulates:

"The President may assign the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of the Act, to exchange information with a similar foreign agency."

11. At present South Africa has entered into a few international agreements wholly dedicated to or containing provisions relating to competition namely the SADC Declaration, the SACU Treaty⁴ and the Agreement on Trade Development and Cooperation with the European Commission.⁵

12. The Commission's investigation of cartel activity has largely been driven by the Corporate Leniency Policy (CLP). Most leniency applications received translate full cartel investigations. Leniency applications are undertaken on a confidential basis, in that the Commission will guard as confidential any information received from the leniency applicant, unless the applicant grants its consent for such a disclosure through the signing of a waiver. The Commission is obliged under the law⁶ to treat as confidential any information that the Competition Tribunal has determined to be confidential or that is the subject of a confidentiality claim. The Commission may, however, refer the claim to the Competition

⁴ Article 40.

⁵ Section D: Article 35 – 40: Agreement on Trade, Development and Cooperation between the European Community and its Member States and the Republic of South Africa (1999).

⁶ Section 44 of the Competition Act stipulates that the Commission is bound by a confidentiality claim. Section 45 deals with the disclosure of confidential information.

Tribunal in order to determine whether or not the information is confidential. Any person who seeks to have access to information that has been claimed to be confidential may apply to the Tribunal to make an appropriate order for the access of confidential information. Therefore the Commission cannot disclose confidential information to foreign agencies unless the Tribunal makes an appropriate order for the access of such confidential information or the owner of such information signs a waiver of the confidentiality claim.

13. The use of waivers has the potential to be a valuable tool for cooperation in international cartel cases where parties have applied for leniency in the cooperating jurisdictions. The insurance of safeguards for the treatment of confidential information facilitates the signing of waivers in these cases as does coordination in substantive analysis or remedies imposed. UNCTAD notes that cooperation in cartel cases is more effective if the jurisdiction with which information will be exchanged has a leniency programme.⁷ This is based on the premise that a leniency applicant may be more likely to grant a waiver of confidentiality of its information, if the information is likely to be shared with another jurisdiction where it has applied for leniency. Thus leniency programmes can be an important driver of cooperation between competition authorities, in particular where agencies have the ability to coordinate efforts.

5. Conclusion

14. While cooperation in the investigation of cartel cases has come a long way, there are still major gaps. The conclusion of cooperation agreements allowing for mutual legal assistance including the serving and enforcement of orders in foreign jurisdictions; jointly coordinated raids; notifications and discussions on investigations and the encouragement of waivers by leniency applicants have the potential to greatly contribute to the eradication of international cartels. However all these measures will remain inadequate in an era of global multinational enterprises. A system of treaties enabling global enforcement will eventually need to emerge to fill the gaps. Such treaties may be at a regional level as we have seen in Europe and East and Southern Africa with the establishment of the COMESA Competition Authority.

⁷ UNCTAD's 'Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level' TD/B/CJ/CLP/10 at paragraph 67 and 68, page 14 specifically gives the example of Brazilian competition authority's inability to secure the same level of cooperation from cartellists in the Vitamins case due to it not having a leniency program at the time.