

**COMMUNICATION FROM AUSTRALIA**

The following is the final text of a paper received from the Permanent Mission of Australia which was circulated as an advance copy for the Working Group's meeting of 1-2 July 2002.

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Modalities for Voluntary Cooperation

This paper discusses the possible benefits from voluntary cooperation between competition authorities in the context of increasing globalisation. The paper illustrates some of these benefits in a short case study on cooperation between the Australian Competition and Consumer Commission (ACCC), Australia's competition authority, and its overseas counterparts.

A. WHY COOPERATE?

1. With the increasing globalization of business, competition regulators are now faced with competition and enforcement issues that are truly borderless. As a result, the ACCC is liaising to a greater extent with its international counterparts to facilitate and encourage the sharing of experience and information.

2. This information sharing is most valuable in relation to evidence gathered by foreign regulators on international cartels which also operate in the domestic market.

3. Enforcement cooperation among agencies enable authorities to share experiences, potentially uncovering new matters and more often reducing the time required to investigate and resolve cartel matters - thereby maximizing the effectiveness of domestic competition regimes.

4. There are a number of compelling reasons why cooperation among competition agencies is both necessary and desirable:

- With increasing globalization, it is more possible than ever for anti-competitive conduct to transcend national boundaries and have an adverse effect on domestic markets. Some prime examples are international cartels, anti-competitive mergers and abuse of dominant position in an international market. Some obvious examples occur in industries that are international by nature, such as air and sea transport. Competition authorities have a prime interest in cooperating to solve these problems to enhance the effective enforcement of domestic competition rules.
- Effective domestic enforcement of competition rules is also based on having adequate and correct information to determine whether unlawful conduct took place or whether the effects of an acquisition were anti-competitive, for example. In the global economy, the necessary information may need to be sought from sources located in other countries. In

these circumstances, it is possible that another enforcement agency may be able to provide the information required. This has the potential to enhance the efficiency of the evidence-gathering process and reduce the time involved in resolving allegations of cartel conduct.

- Firms which operate in several countries may be subject to differing national competition rules. Procedures, time limits and the criteria for assessing the competitive impact may vary considerably. These differences can increase the costs faced by firms and create uncertainties which can distort trade flows and international investment. This situation is particularly relevant in relation to mergers where a proposal may need approval from a number of countries' competition agencies, with each country likely to have different merger laws and filing procedures. Convergence of laws and procedures and cooperation between agencies in this context has the potential to simplify processes, reduce time delays and therefore lower the costs of compliance for the companies involved.
- One final argument in support of cooperation is that in some countries, actions against anti-competitive practices can be less rigorous than in others. This may create trade and investment distortions if cartel operators, for example, choose to establish operations in those countries that do not have adequate competition regimes.

#### B. AUSTRALIA'S COOPERATION ARRANGEMENTS

5. In order to further enhance cooperative relations and seek better solutions to the challenges raised by transnational anti-competitive conduct, the ACCC has entered into formal cooperation arrangements with a number of its counterparts and will continue to seek similar arrangements with other competition authorities in the future.

6. Perhaps Australia's most significant formal agreement is the Treaty between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance. Under the Treaty, Australia and the United States may exchange evidence for use in competition law enforcement and assist each other in obtaining confidential and public information located in the other country.

7. The assistance available under the Treaty includes:

- disclosing, providing, exchanging, or discussing antitrust evidence;
- obtaining antitrust evidence on behalf of the other agency (including taking witness statements); obtaining records, documents and other evidence; locating or identifying persons or things; and executing searches and seizures; and
- providing copies of publicly available records to the other agency including documents or information in the hands of other domestic government departments or agencies.

8. The ACCC also has a tripartite cooperation arrangement with the New Zealand Commerce Commission and the Canadian Competition Bureau to promote cooperation and coordination in the application of each agency's competition and consumer laws. In addition, it has bilateral arrangements with the Chinese Taipei Fair Trade Commission, the Consumer Affairs Council of Papua New Guinea and the Fiji Commerce Commission, all covering both competition and consumer protection regulation.

9. It is important to note that the level of cooperation and information-sharing between competition authorities is not just a matter of having the necessary legal frameworks in place. A key factor in building an effective relationship between agencies is the establishment of strong personal relationships, which will provide a key grounding of understanding, familiarity and most importantly, trust. It is essential that agencies understand the processes and procedures of the agency to which they provide information, and that they be confident that information released will be used as advised and appropriately protected.

10. As noted in paragraph 13 of the Secretariat paper (WT/WGTCP/W/191), "international cartels are unlikely to respect the neatly defined territories covered by existing bilateral agreements. Rather, they tend naturally to act strategically and to seek out the cracks that exist between relevant regional and bilateral agreements". It is therefore essential that agencies develop strong links with their international counterparts. A multilateral framework is likely to be the most effective mechanism for achieving this.

#### C. COOPERATION AND EXCHANGE OF INFORMATION

11. The ACCC most commonly uses its informal networks in order to exchange information and provide enforcement assistance to its international counterparts. Informal cooperation is generally administratively easier and produces faster results.

12. Informal contact is made via telephone, e-mail, video-conference and in person. Discussions largely involve details about investigations, the exchange of non-confidential (but not necessarily public) information, requests to make initial contact with potential witnesses, the existence and sourcing of relevant information, and more general information, relating for example to the effectiveness of other agency's leniency policies on detecting hard-core cartels. Informal discussions also take place at various international events and fora.

13. The ACCC relies on its formal cooperation agreements where it is more appropriate to do so - for example, in particularly sensitive or high-profile matters, or in the provision of confidential information. The ACCC has only made one formal request seeking non-confidential information about cartel conduct, corporate structures and market dynamics. The information provided in that matter was highly useful.

#### D. EXCHANGE OF CONFIDENTIAL INFORMATION

14. Generally speaking, cooperation may be hampered by legal constraints in some countries on the exchange of confidential information. However, while the ability to share confidential information is a goal for most, the difficult task of establishing the necessary frameworks to ensure that confidential information is protected, makes this a long-term target.

15. As mentioned above, the ACCC is able to exchange confidential information with the US by virtue of the Antitrust Treaty.

#### Case Study – Vitamins

16. On 1 March 2001, the Federal Court of Australia imposed record penalties totalling A\$26 million against three animal vitamin suppliers: Roche Vitamins Pty Ltd (A\$15 million), BASF Australia Ltd (A\$7.5 million), and Aventis Animal Nutrition Pty Ltd (A\$3.5 million). The companies admitted they had engaged in price fixing and market sharing.

17. The parties approached the ACCC voluntarily after the US and Canadian vitamin proceedings became public in mid-1999 and fully cooperated with the ACCC during its investigation.

18. The parties promptly provided the ACCC with a comprehensive report containing critical information about their overseas and Australian collusive arrangements, including frank and detailed admissions.

19. Through solicitors, the parties willingly participated in a series of discussions with the ACCC and reached an agreed penalty that was put to the Court. The parties also assisted in the preparation of the relevant settlement documents.

20. The investigation progressed without the ACCC or foreign agencies invoking formal cooperation arrangements. However, informal contact was made with US, EU, Canada, New Zealand and Brazilian competition agencies, with varying levels of success. While in some instances, limitations on the exchange of confidential information impeded the extent of cooperation possible, the outcome achieved in this case highlights the importance and utility of informal contacts between competition agencies.

E. CONCLUSION

21. It is increasingly recognized that strong and effective competition regimes are necessary in order to protect economies from global anti-competitive practices. Voluntary cooperation arrangements, both formal and informal, have the potential to greatly assist in enhancing the effectiveness of competition law regimes and are therefore likely to become more prevalent in future.

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