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Global Forum on Competition

CARTEL CASE STUDIES

Key issues for discussion in Sub-Sessions

-- Session III --

This note includes the key issues suggested FOR DISCUSSION of the case studies under review in the 3 Sub-Sessions (of Session III) of the Global Forum on Competition. The case studies will be discussed on Thursday 9 February 2006 (from 9:15 am).

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KEY ISSUES FOR DISCUSSION IN SUB-SESSIONS

1. SUB-SESSION N°1

Japan: Paper Phenol Copper Clad Laminates

- Applicable legal standard: In Japan the legal standard is “liaison of legal intention.” When there is no direct evidence of agreement, what evidence in addition to that showing parallel conduct is sufficient to satisfy this standard in Japan? Does the country employ something equivalent to the “plus factor” analysis? What is the experience in other countries?
- Evidence of price discussions in Association meetings: The case report states that evidence of these discussions was contained in records of statements by participants and in the list of participants in Committee meetings. How were the participants’ statements obtained? Were they given voluntarily? Were there also relevant documents besides the lists of participants? How do other countries obtain indirect (circumstantial) evidence of this type?
- Economic evidence: Did the Tokyo High Court rely on economic evidence in addition to the parallel pricing (e.g., market structure, analysis of market conditions, possible “action against self interest”) in support of its decision? How do competition agencies and courts in other countries evaluate economic evidence?

Latvia: Hens’ Eggs

- Interviews with producers – naïve cartels: It seems that the producers willingly gave evidence that implicated them in an unlawful agreement. Why did they do this? Were they “naïve,” in the sense that they did not understand that giving this evidence could result in sanctions against them? Have other countries that only recently began an anti-cartel enforcement programme been similarly successful in obtaining evidence voluntarily? Do you expect that obtaining evidence this way will become more difficult in the future?
- Economic evidence: In addition to having strong communication evidence implicating the producers, the Competition Council also developed a significant amount of economic evidence. What are your reactions to this evidence? To the Council’s analysis of supply and demand? To the apparent willingness of the price leader (Omega) to permit its rivals to maintain their prices 2 centimes lower than its prices?
- Fines: What fines were assessed by the Council? Did the fact that there was little or no direct evidence of agreement affect the Council’s ability to impose large fines? In other countries, has the lack of direct evidence inhibited the ability of the competition agency to impose large fines?

Peru: Mandatory Traffic Accident Insurance

- Parallel conduct: The evidence of parallel conduct was especially compelling in this case – the use of the same actuary; identical, detailed pricing terms. The insurance companies attempted to justify this conduct by claiming that it was necessary for them to share such detailed cost information. Indecopi overcame these claims by showing that other enterprises had calculated their premiums without using this shared information. What defences to parallel conduct have been offered by respondents in other countries? What evidence is considered sufficient to overcome these defences?
- Government mandates: The insurance companies were required to report their prices to a government body. Did this mandate contribute to or facilitate the unlawful agreement in any way? Could the companies lawfully price below the reported prices? We have observed other instances in which there was some aspect of government involvement or regulation. How have these cases been analysed in other countries?
- Industry associations: In all three of the cases in this session the unlawful conduct was carried out through an industry association, and we have observed similar situations in other cases. What are effective investigative strategies for conducting cartel investigations where an industry association is an important part of the violation?

2. SUB-SESSION N°2

Indonesia: Day Old Chick

- Parallel pricing: The case report states that companies concerned by the investigation at one point engaged in a parallel price reduction in relation to a certain customer group. The KPPU did not consider this to be sufficient evidence of a cartel agreement. Did the KPPU assess price movements of the companies under investigation in the period prior to the reduction? What defences to parallel conduct have been offered by respondents in other countries? What evidence is considered sufficient to overcome these defences?
- Subjects of parallel conduct: The report suggests that the companies under investigation entered into very similar exclusive dealing agreements with plasma breeders. Prices are not the only competitive factors which are agreed upon among cartel members. What experience do other countries have with non price fixing cartels? Can indirect evidence typically be obtained to support such cases?
- Retaliation mechanism: According to the report the KPPU would have considered evidence on a refusal to supply a cartel breaker as an important element to support the cartel theory.. What type of retaliation mechanisms have other countries observed in their cartel cases? What was the evidence that pointed to such mechanisms?

Italy: Baby milk

- Comparative pricing analysis: The Authority relied on a comparative analysis of price levels for baby milk in European countries as one of the evidential elements pointing to cartel activity in this sector. What type of justifications did the parties in the case provide for this fact? Which justifications would other countries consider as sufficient to eliminate the indicative value of significant pricing differences?

- Information sharing: Baby milk producers made recommended retail prices available to their competitors. What other types of information sharing practices have other countries encountered in their practice? What do countries see as the essential features in order to qualify the sharing of certain information as evidence for concerted action?
- Government intervention: The unlawful conduct apparently was partially triggered by a request by the government ministry for health to lower prices. How did this fact affect the Authority's analysis of the case? Have other countries encountered cases in which there was such government involvement? What was the result?

Romania: Cement

- Interface abuse – cartels: The investigating authority did initially consider the conduct as an abuse of a (collective) dominant position. Why did it pursue such a parallel theory? Do other countries have experience with cases at the interface or borderline between abuse and cartels?
- Cross-subsidising: The report states that one of the motivations of the price leader in the cartel to engage in concerted pricing was to cross-subsidise aggressive pricing on export markets. What kind of evidence did the authority consider on this issue? How did it obtain the relevant information? Do other countries have experience with similar driving factors for cartels?
- Economic factors: The authority developed a number of economic factors to support its finding of collective dominance. Did the Council take these into account in its finding of a price fixing cartel?
- Structural links: One of the market factors considered by the authority were structural links between the cartel members through Joint Ventures. To what extent have other countries used such links as circumstantial evidence in cartel cases?

3. SUB-SESSION N°3

European Commission: PVC II

- Direct evidence: A variety of direct evidence in the form of documents was obtained. Which piece of evidence is most compelling to you and why? How did the defendants explain the documents that were found? In what ways has direct evidence in your country been rebutted?
- Analysis of evidence: Should evidence be examined individually or in totality? What is the standard in your country?
- Circumstantial evidence: If no direct evidence had been obtained, do you think enough circumstantial evidence was obtained in this case in order to make a finding that a cartel existed? If not, what additional pieces of evidence would you look to obtain? If you think enough circumstantial evidence was amassed, what piece could you eliminate and still conclude that there was a cartel?

Chinese Taipei: Cable TV

- Parallel pricing: This case reports that prices were raised nearly simultaneously by the firms identified in the case. What defenses have been offered by respondents in other countries? What evidence would be sufficient to overcome these defenses?
- Government mandates: This case indicates that cable operators must report their prices to the appropriate authority within a specific period of time. Are such rules necessary and if they are what are the alternatives? Do these rules help or hurt collusive action by firms? If rates cannot be changed for a year what effect does that have on competition?
- Defendants: This case indicates that “certain major shareholders or managers” reached a consensus that they should no longer compete. Under what circumstances does liability extend to shareholders? Were shareholders fined in this case?
- Testimony: Exactly what testimony or other evidence was compiled indicating an admission of guilt in this case? Without such evidence was there enough evidence to find the defendants guilty of price fixing in your opinion? What defenses were raised?

Ukraine: Gasoline

- Economic evidence: This case indicates that a variety of economic evidence was compiled. In particular, price in the area of concern was higher than in other areas, price decreased after the intervention, and the retail price for gasoline was the same for the two defendants yet the two defendants had different purchasing prices for petroleum. What is the value of such evidence? Do you assess each individually or as a whole? What basis would you use to determine whether a piece of economic evidence is significant or not? What type of justifications did the parties use to explain the evidence? Which justifications would other countries consider as sufficient to eliminate the indicative value of significant pricing differences?
- Market price: From the case it is not clear what fraction of consumers bought the plastic cards. Does your opinion of this case hinge upon this fact? Exactly how does the card impact the market price for gasoline? Was the card only a method for monitoring sales of the two companies or was it the vehicle which lead to the higher price? How does knowing the extent of your rival’s sales through the plastic card impact the ability of LTD A and B to raise price? Would a cartel have been alleged if LTD A and B’s market share were much lower? What other types of information sharing practices have other countries encountered in their practice?
- Parallel pricing: The case indicates that LTD A and B typically set retail prices for light oil products almost simultaneously. How did the defendants explain this fact? What types of evidence in this case leads one to conclude the identical prices are not the result of vigorous competition but rather from collusion?