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

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Global Forum on Competition

ROUNDTABLE DISCUSSION ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

-- Executive Summary --

Held on 8 February 2006

The attached Executive Summary is circulated to participants FOR INFORMATION. Participants are requested to respond with written comments, if any, before 15 May 2006, after which the proceedings including this Executive Summary will be distributed as a free publication.

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegates' written submissions and the Secretariat's background paper, several key points emerge:

1. *Circumstantial evidence is employed in cartel cases in all countries.*

Competition law enforcement officials always strive to obtain direct evidence of agreement in prosecuting cartel cases, but sometimes it is not available. Cartel operators conceal their activities and usually they do not co-operate with an investigation of their conduct, unless they perceive that it is to their advantage to participate in a leniency programme. In this context, circumstantial evidence can be important. Almost every country making a written or oral contribution to the roundtable described at least one case in which circumstantial evidence was used to significant effect. At the same time, there are limits to the use of circumstantial evidence. Such evidence, especially economic evidence, can be ambiguous. It must be interpreted correctly by investigators, competition agencies and courts. Importantly, circumstantial evidence can be, and often is, used together with direct evidence.

2. *The better practice is to use circumstantial evidence holistically, giving it cumulative effect, rather than on an item-by-item basis.*

One delegate described the methodology for evaluating circumstantial evidence as like an impressionist painting, comprising many dots or brush strokes which together form an image. Another likened the process to a jig-saw puzzle. In this way, circumstantial evidence, which by definition does not describe the specific terms of an agreement, can be better understood. The materials submitted for the roundtable described a few cases in which courts declined to use this holistic approach, requiring instead that each item of evidence be linked directly to a specific agreement. The result was that the cases failed. Of course, given the ambiguous nature of some circumstantial evidence, the holistic approach can result in errors. Business representatives urged that no case be based solely on circumstantial evidence, given the significant liability facing businesses that are found to have participated in a cartel. It did not appear that any other delegation embraced this position. On balance, the holistic approach is much preferable to a requirement that each item of circumstantial be linked directly to a specific agreement.

3. *Complicating the use of circumstantial evidence are provisions in national competition laws that variously define the nature of "agreements" that are subject to the law.*

The anti-cartel provisions of all competition laws apply to more than straightforward explicit agreements. Laws use such terms as "concerted practice," "understanding" and "arrangement." When evaluating an evidentiary record, the nature of the agreement to which it applies may not be fully clear. This issue arises in the context of "facilitating practices." These are practices, such as information exchanges, which can facilitate an underlying cartel agreement. Evidence of them is circumstantial evidence of a cartel agreement, but it is probably not sufficient by itself to

prove such an agreement. In some countries, courts have separately evaluated facilitating practices for their anticompetitive effect. In others, however, an underlying cartel agreement must be shown. In other respects, it seems that in most countries the evidentiary burden facing the law enforcement agency does not vary according to whether the conduct is considered to be an “agreement” or some other kind of concerted action described in the law.

4. *There are two general types of circumstantial evidence: communication evidence and economic evidence. Of the two, communication evidence is considered to be the more important.*

Communication evidence is evidence that cartel operators met or otherwise communicated, but does not describe the substance of their communications. It includes, for example, records of telephone conversations among suspected cartel participants, of their travel to a common destination and notes or records of meetings in which they participated. Communication evidence can be highly probative of an agreement. Almost all of the circumstantial cases described by delegations included communication evidence; in some the evidence was compelling.

5. *Economic evidence is almost always ambiguous. It could be consistent with either agreement or independent action. Therefore it requires careful analysis.*

Economic evidence can be categorized as either conduct or structural evidence. The former includes, most importantly, evidence of parallel conduct by suspected cartel members, e.g., simultaneous and identical price increases or suspicious bidding patterns in public tenders. It can also include evidence of facilitating practices, though that conduct could also be characterised as “quasi-communication evidence.” Structural economic evidence includes evidence of such factors as high market concentration and homogeneous products. Of these two types of economic evidence, conduct evidence is considered the more important. Economic evidence must be carefully evaluated. The evidence should be inconsistent with the hypothesis that the market participants are acting unilaterally in their self interest. Economics, including the use of game theory, can be instructive on how to make this judgment. It appears that in most countries, however, that kind of analysis is not yet employed. But further, economic evidence can play an important role in the initial stages of a cartel investigation. A proper analysis of it could provide a basis for deciding which of several possible cases are likely to be the most fruitful to pursue, with the hope and expectation that better evidence of agreement, both direct and circumstantial, will be discovered.

6. *National treatment of cartels, such as whether they are prosecuted as crimes or as administrative violations, can affect the burden of proof that applies to the cases, and hence the use of circumstantial evidence.*

In most countries, cartels (and other violations of the competition law) are prosecuted administratively. The principle administrative sanctions applied to this conduct are fines, usually only assessed against organisations but sometimes against natural persons, and remedial orders. In a minority of countries, but a growing one, cartels are prosecuted criminally. In most instances the burden of proof facing the competition agency is higher in a criminal case. The result is that it is usually more important that direct evidence of agreement be generated in these cases. The United States has long used the criminal process in the cartel cases prosecuted by the government, and virtually all of its cases are built on direct evidence. Still, circumstantial evidence is admissible, and useful, in that country and elsewhere.

7. *It can be difficult to convince courts to accept circumstantial evidence in cartel cases, especially where the potential liability for having violated the anti-cartel provisions of the competition law is high.*

A few jurisdictions in which there has been judicial review of decisions by competition agencies in cartel cases reported that courts sometimes view cases built on circumstantial evidence with scepticism. In this regard, as more cases are appealed to courts, the standards that they apply to circumstantial evidence are continuing to evolve. Hopefully, courts will come to see that circumstantial evidence subjected to sound economic analysis and viewed holistically can be highly probative.

8. *There are circumstances in countries that are relatively new to anti-cartel enforcement that could affect the extent to which they rely on circumstantial evidence in their cases.*

A country just beginning to enforce its competition law may face obstacles in obtaining direct evidence of a cartel agreement. It probably will not have in place an effective leniency programme, which is a primary source of direct evidence. There may be lacking in the country a strong competition culture, which could make it more difficult for the competition agency to generate co-operation with its anti-cartel programme. In short, the competition agency could have relatively greater difficulty in generating direct evidence in its cartel cases, which would imply that it will have to rely more heavily on circumstantial evidence. A few delegations confirmed that this is the situation in their countries. But there is a countervailing phenomenon: the relatively high incidence in these countries of “naïve cartels” – cartels in which their members do not attempt to conceal their activity, either because they are unaware that their conduct is unlawful or because they are not sufficiently sophisticated to do so. In the case of naïve cartels direct evidence is relatively plentiful, rendering circumstantial evidence less important. Another point was made by a few countries in which cartels were prosecuted as crimes initially under their new competition laws. It seemed that the higher burden of proof associated with criminal prosecution made the competition agency’s anti-cartel burden more difficult. The advice from these countries was to begin administratively, perhaps later moving to criminal prosecution. Finally, there was general agreement in the discussion that a strong competition culture is an essential component of a successful anti-cartel programme. Education and public persuasion are important means of developing such a culture, but an even better one is vigorous enforcement of the law. The competition agency should strive to generate good cartel cases in important sectors, supported by strong evidence and demonstrating the benefits to consumers of effective anti-cartel enforcement.