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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from France

-- Session II --

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. At the OECD meeting, there is to be a Roundtable on cartels on the afternoon of Wednesday 8 February 2006. The purpose of this note is to enable participation at the Roundtable taking the “guidelines” provided by the OECD Secretariat to each of the national competition authorities as the starting point. The question that this note addresses is: how does one prove that a cartel exists without direct evidence of agreement?

1. Framework for discussions on cases where there is no direct evidence of a cartel agreement

2. According to the note by the Secretariat, there is no easy answer, particularly for competition authorities in developing countries which are in the process of building up their investigative capacities and which are having to develop investigator training, primarily because of the wide range of methods used in different countries for prosecuting cartels. In order to begin to resolve the issue raised by the OECD, we must first ask ourselves the following questions:

- Is there any difference between a cartel and other forms of anti-competitive practice, say, horizontal agreements?
- If there is a difference, then is there an explicit, or at least implicit, definition of what constitutes a cartel?
- If such a definition exists, does it or does it not hinge on the existence of an explicit agreement between the operators who are party to the cartel?

3. It should be said that cartels are generally considered, particularly in the OECD report on the issue, to be among the most serious of anticompetitive practices which distort free competition on a given market. Detecting the existence of a cartel is therefore particularly important for the proper operation and health of the market as well as from the economic point of view. Of course, the competition authority still has to be able to amass sufficient evidence to identify a cartel. The problem with that is that companies are increasingly well informed with the result that there is less and less direct proof available to the competition authorities. This is the scenario presented to us by the question put forward by the OECD Secretariat at this Roundtable on cartels. The difficulty is compounded by fact that leniency policies, as they are known, are not yet in place in all jurisdictions. This is primarily because the necessary prerequisites for any leniency policy are long history of judicial practice and experience in competition law enforcement.

4. In the Secretariat’s view, the different categories of evidence that can be used to establish that a cartel exists are as follows:

- Direct evidence: a document or documents (including e-mail messages) essentially embodying the agreement, or a written document from one of the parties to it;
- Circumstantial evidence: records of telephone conversations or correspondence between the parties concerned, e-mails, or documents proving that cartel operators have met;

- Facilitating practices, i.e.: practices that make it easier to establish and ensure that it is sustainable: exchanging information, price policing;
- « Economic » proof: parallel conduct, particularly on pricing, which cannot be explained by the structure of the given market alone.

2. A recent case prosecuted by the French Competition Council in the urban public passenger transport market

5. France's national *Conseil de la Concurrence* (Competition council) had occasion to rule on these issues recently. Its Decision of 5 July 2005¹ on practices in the urban public passenger transport market sanctioned Kéolis, Connex and Transdev for having concerted at national level to carve up public procurement contracts let by government authorities between 1996 and 1998.

6. The Council found that the directors of these national and international transport companies had formed a **cartel** for the purposes of dividing up the national urban public passenger transport market between them. The conduct adopted by the cartel was that the three companies concerned would not compete with one another when a contract held by any one of them came up for renewal.

7. Under the aegis of the cartel, the companies could also arrange to swap contracts among themselves when there was some objective advantage that served their interests or could split a contract among themselves by using sub-contractors.

8. These anticompetitive practices enabled the companies concerned to impose their prices on the local authorities, which ended up paying higher charges for their transport network concessions than would have been the case had there been competition for the contracts.

9. Besides the fact that it allowed the Council to impose the maximum financial penalties provided for under the French *Code de commerce* -- prior to its amendment under the New Economic Regulations Act -- the Decision of 5 July 2005 also defined the identifying characteristics of a cartel. Analysis of the Decision shows that a cartel is characterised chiefly by its stability and its sustainability. In this regard, the Council held that "*active policing of the market up to and including the study of potential reprisals had made the agreement stable and sustainable, conferring on it the characteristics of a cartel*".

10. **With no direct evidence**, the Council drew on the « *classic* » **technique**, establishing the existence of the cartel from indirect evidence that was **serious, specific and corroborative**. The Council considered documentary evidence of meetings between the directors of these companies. From a number of internal memos it was able to establish that the companies had co-ordinated their behaviour at local and national level and that the market had indeed been policed so that reprisals could be taken against any company that stepped out of line.

11. In its Decision, the Council took the approach that the collusion on local markets between the companies concerned was merely the reflection of an agreement on a much wider scale at national level, one that exhibited the stability and sustainability characteristics of a cartel. A cartel on a country-wide basis has repercussions that go beyond national level to regional level, where national procurement contracts became part of a package that covers a much larger geographical scale, as in the European Union, for instance. By definition, this agreement was therefore likely to have a substantial impact on intra-

1. Décision n° 05-D-38 du 5 juillet 2005 relative à des pratiques mises en œuvre sur le marché du transport public urbain de voyageurs

community trade given its scale and its very purpose: to prevent competitors, be they domestic or foreign, from winning contracts.

12. The situation was all the more serious considering that these practices had were being carried out by some of France's best-known groups of companies, which had set an extremely bad example. This warranted exemplary sanctions against the companies concerned.

13. In this case, the Competition Council therefore decided to impose the **maximum fine** provided for under the Commercial Code – prior to its amendment under the New Economic Regulations Act -- which was applicable to the present case given that the practices had occurred some time ago – i.e. 5% of national turnover.