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CRISIS CARTELS

Contribution from the United Kingdom

-- Session III --

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-- United Kingdom --

1. Summary

1. Current or other cyclical economic conditions are not and should not be relevant to assessing the compatibility of “crisis cartels” or other agreements (for example, industrial restructuring agreements) with UK competition law.

2. That said, there has been occasion where the exceptional circumstances that arose owing to the crisis to the Northern Irish cattle industry caused by the outbreak of foot and mouth disease among cattle in 2001 mitigated against the imposition of a financial penalty for a price-fixing agreement that was found to infringe the Competition Act 1998.

3. This paper summarises UK competition policy on crisis cartels (section II) with observations on the potential incompatibility of industrial restructuring agreements (section III). UK experience in relation to the foot and mouth and financial services crises is discussed in sections IV.

2. UK competition policy on crisis cartels

4. The Office of Fair Trading (OFT) considers cartel activities to be among the most serious infringements under competition law.¹ Neither the UK Competition Act 1998 (CA98) nor the Treaty on the Functioning of the European Union (TFEU) afford different treatment of cartels during severe economic downturns.

5. In the UK, current economic conditions or other cyclical economic conditions are not (and should not be) relevant to an assessment of the compatibility of industrial restructuring agreements with competition law.

3. Industrial restructuring agreements

6. A likely occasion where this may arise is in the context of industrial restructuring agreements. The following paragraphs consider some of the key issues when assessing the compatibility of these agreements with Article 101 TFEU and the equivalent Chapter I prohibition of the CA98.

¹ For example, *OFT guidance as to the appropriate amount of a penalty* (OFT 423, 2004) provides that “The starting point [when calculating the level of financial penalty for infringements of the Competition Act 1998] will depend in particular upon the nature of the infringement. The more serious and widespread the infringement, the higher the starting point is likely to be. **Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements of Article 81 [now 101 TFEU] and/or the Chapter I prohibition.**” [emphasis added]

3.1 *Article 101(1)*

7. An agreement between producers to reduce capacity, whether sanctioned by government or otherwise, will generally fall within the Article 101(1) prohibition (and the equivalent prohibition in section 2 CA98) by object – as confirmed by the Court of Justice of the European Union in the *Irish Beef* case.²

3.2 *Article 101(3)*

8. It is possible for industrial restructuring agreements to satisfy the legal exception criteria in Article 101(3) TFEU (and the equivalent exemption criteria in section 9 CA98). However it is likely to be difficult to satisfy these criteria in practice.

3.3 *Pro-competitive benefits*

9. A restructuring agreement whereby less efficient players agree to leave the market may result in pro-competitive benefits through increased capacity utilisation rates by the remaining (more efficient) players with prices driven down as they compete to win market share held by the exiting players.

10. However, in order to show that these benefits flowed from the agreement, there would have to be evidence that the remaining competitors were unable to increase capacity utilisation, and thereby drive down prices, without the agreed exit of the less efficient players. In a market where the remaining competitors were already more efficient than the exiting player(s), it is not clear why an agreement would be needed to achieve this benefit.

11. An agreement which removes the least efficient capacity (as opposed to competitor) from the market is most likely to benefit consumers if it reduces producers' variable costs. However, such an agreement must not contain 'limitations on output increases'.

12. In addition to explicit limitations on output, it is likely to be necessary to ensure that sufficient excess capacity remains in the market to allow increases in output in practice, and that this excess capacity is sufficiently distributed between the remaining players to allow competition for switching and increased demand.

3.4 *No more restrictive than necessary*

13. It is also likely to be difficult in practice to satisfy the third criterion of Article 101(3) (namely that the agreement does not impose restrictions which are not indispensable). In many if not most cases, market forces ought to be sufficient to achieve the pro-competitive outcome.

14. There may be other less restrictive methods of achieving the same benefits. For example, in some cases it may be feasible for producers to 'moth-ball' manufacturing capacity on a unilateral basis.

15. A merger may be a possible 'less restrictive' method of achieving the pro-competitive benefits of a restructuring agreement. A structural change (a merger or structural joint venture) is capable of addressing structural overcapacity. In many cases a merger (assessed under the EU Merger Regulation or national merger control) would be a more appropriate solution to over-capacity. The merger control rules ensure an assessment of whether the pro-competitive efficiencies flowing from a merger would outweigh any anticompetitive impact.

² Case C-209/07, Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd [2008] ECR I-8637.

16. However, in many cases a merger could be more restrictive of competition than a restructuring agreement. In those cases where a merger would be 'less restrictive', there would need to be a realistic prospect of a merger taking place before this possibility could be treated as a relevant counterfactual for the purposes of the third criterion of Article 101(3).

3.5 *State Aid*

17. State Aid measures are capable of achieving efficiency benefits by removing inefficient capacity from a market. A review under the state aid rules of a proposed government scheme to remove excess capacity would address the potential competition concerns and ensure that the least efficient capacity is removed. The EU has a history of allowing government intervention to restructure industries with structural overcapacity (such as coal and steel, and shipbuilding).

18. However, state aid schemes may not be readily available in times when government funds are already stretched.

4. **UK experience (i): non-imposition of financial penalties – Northern Ireland Livestock and Auctioneers' Association**

19. While the legality of crisis cartels might not be assessed differently in times of economic downturn, there has been occasion in the UK where liability for financial penalties has been reconsidered in extraordinary times of crisis.

20. In *Northern Ireland Livestock and Auctioneers' Association*³ the outbreak of BSE (Bovine Spongiform Encephalopathy or "mad cow disease") and foot and mouth disease among cattle in 2001 caused a crisis in the Northern Irish cattle industry, resulting in increased veterinary health regulation, a reduction in throughput of cattle and the temporary closure of the markets. The NILAA recommended to its members that they introduce a standard buyer's commission to be payable by purchasers of livestock in Northern Ireland cattle markets. The OFT concluded that the NILAA had infringed the Chapter I prohibition as the recommendation amounted to a decision by an association of undertakings that had as its object the prevention, restriction or distortion of competition in the provision of services by cattle auctioneers at livestock marts in Northern Ireland.

21. Notwithstanding the finding of infringement and that price fixing practices are among the most serious infringements, the OFT decided not to impose a financial penalty. This was in part due to the overt nature of the practice (the recommendation of the NILAA had been publicised rather than covert) but also due to the exceptional circumstances of the case, in particular the effects of BSE and foot and mouth on the cattle industry in Northern Ireland generally and the burdens identified above (increased regulation, reduced throughput, temporary closure of markets) on the NILAA and its member cattle auctioneers in particular.

³ <http://www.offt.gov.uk/OFTwork/cartels-and-competition/ca98/decisions/livestock> (4 February 2003).