"International cooperation in Investigating and prosecuting hard-core Cartels affecting developing countries"

Explicit evidence of wrongdoing in competition cases is often lacking in competition cases. This is particularly the case in Hard Core Cartels. The fight against cartels is a legally and practically demanding task. First of all, cartels are by definition secretive about their illicit behaviour, and therefore competition agencies have to undertake great efforts to detect concealed cartels. Secondly, competition agencies need powers and skills to collect relevant and sufficient evidence to mount a viable case against uncooperative defenders. Thirdly, the investigation of International cartels tests the limit of competition agencies's jurisdictional reach and fourthly, the growing trend to criminalize cartel behaviour obliges many competition agencies to work to a particularly high standard of procedure and proof.

The law of evidence is concerned to regulate what evidence may be admitted at trial, and under what conditions such admissible proofs are to be admitted. The foundational requirement is that evidence can only be admitted if it is relevant. It is therefore necessary to have an understanding of the law means by "relevant". Furthermore, relevant evidence may be excluded altogether because it falls foul of exclusionary rules of evidence. These exclusionary rules - which notably include the hearsay rule, the opinion rule and the rules concerning the accused's bad character need to be understood when applied to evidence gathering on a hard core cartels.

In the case of evidence gathering on Hard Core Cartels (HCC), some rules of evidence apply in jurisdiction where Hard Core Cartels are considered both civil and criminal cases with equal force; same apply exclusively when there are criminal sanctions against Hard Core Cartels; and others again like hearsay rule, are applied more rigorously in criminal cases than in civil proceedings. In addition the exclusionary rules, the courts also enjoy discretion to exclude technically admissible evidence in a variety of circumstances, including prejudicial evidence, unfairly obtained evidence, and use of suspect witnesses.

However, even if evidence is technically admissible, having cleared all the hurdles, particularly in jurisdiction where cartels are criminal cases, its admission may be subject to a requirement that the court issues a particular form of directions, either restrictly or affording guidance on the way in which the evidence is to be employed. Such directions may be demanded for instance where prosecutions are brought after a substantial delay or the court relies upon the testimony of a witness whose evidence for some reason, is considered to be of suspect quality.

Since litigation involves the determination of the relative strength of two competing contentions, it is vital to know which party bears the burden of proving
what. In addition, the standard of proof varies according to whether the case is criminal or civil. In an indictable criminal case, for example, the legal burden normally rests with the competition authority which has to prove the existence of a cartel to the satisfaction of the court beyond reasonable doubt. In a civil case, in contrast, the competition authority bearing the legal burden need only establish its case on a balance of probabilities, showing the existence of the concerted conduct or cartel is more probable than not.

Explicit evidence on Hard-Core Cartels is often lacking. It can thus be difficult for competition authorities to furnish proof. The definition or articulation of standards for what constitute a collusive agreement, cartel and or the significance of competitive effects resulting from conduct in question may also be subjects of contention. Legal issues may also arise with regard to the manner in which evidence was gathered.

The roundtable provides an opportunity for a discussion between competition agencies, judges and public prosecutors on how courts approach these various issues relating to proof are addressed by the two arms of enforcement. The aim is to bridge the gap in understanding these issues and enforcing competition law effectively against Hard Core Cartels.

Additional issues to be discussed during this roundtable are: when and what constitutes an appropriate remedy for Hard core cartels, examples of measures of redress under different situations, as well as the judicial review of competition cases involving cartels.

There are differences among countries as to the authority vested in the competition authority and tribunals to prosecute and settle cartel cases. The extent of judicial review of competition cases will thus vary according. In this context the relationship between the judiciary and a competition enforcement body with or without a significant degree of discretion is of interest and will also form part of the discussion.

A key speech on these issues will be made by Judge Anne Spiritus-Dassesse, Belgium, and followed by 4 panellists. Delegates may wish to address in their written contribution and interventions during the roundtable the following set of issues:

One:

- Relevance and admissibility of evidence;
- Presumption and the burden of proof;
- Witnesses: Competence, compellability and various privileges;
- The opinion rule and the presentation of expert evidence;
- Confessions;
- Drawing adverse inferences from a defendant's omissions, lies or false alibis;
- The rule against hearsay;
- Identification
Two:

- Do differences in legal system, law and procedures matter for the type and form of cooperation in investigating and prosecuting Hard Core Cartels?
- What is the experience of countries participating in competition cooperation agreements in dealing with international Hard-Core Cartels?
Draft work programme
Wednesday, 1 November 2006

10:00 - 10:30  Keynote Speech:
Judge Anne Spiritus-Dassesse, Président Commerce Tribunal,
Brussels, Belgium

10:30 - 12:00  Panel Discussions

- Ms. Mariana Tavares, Ministry of Justice, Brazil
- Mr. Marcelo Mendroni, State Crime Prosecutor, Brazil
- Mr. Patrick Krauskopf, Competition Commission,
  Switzerland
- Justice Davis Dennis, President, South African Appeal
  Tribunal
- Mr. François Souty, Conseil de la Concurrence, France
- Ms. Maria Coppola Tineo, Federal Trade Commission,
  United States
- Mr. Jaime Barahona, Tribunal de Defensa de la libre
  Competencia, Chile
- Ms. Lerzan Kayihan Unal, Turkish Competition Authority
- Mr. Stephen Ryan, European Commission

12:00 - 12:30  Question and Answer Session

12:30 - 13:00  General Discussion

13:00  Lunch

Delegates wishing to speak during the session are invited to inform the
Secretariat accordingly by contacting Ms. Mispa Ewene (mispa.ewene@unctad.org)
or Mr. Pascal Garde (pascal.garde@unctad.org).