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Practical Suggestions for Better Enforcement on Cross Border Cartels

**A perspective from a private practitioner with long work
experience in the competition authority**

Contribution of

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UNCTAD IGE 19th Session
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Practical Suggestions for Better Enforcement on Cross Border Cartels

- A perspective from a private practitioner with long work experience in the competition authority

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NOTES FOR THE CHAIR
H.E. Ms. Maimuna Kibenga Tarishi (Tanzania)
International experiences and best practices in competition law
enforcement against cross-border cartels
Wednesday, 7 July 2021, 16:00 - 18:00, Room XVIII

Excellencies,
Distinguished experts,
Ladies and Gentlemen,

1. Let us take up **agenda item 7 on International experiences and best practices in competition law enforcement against cross-border cartels.**

1st round of interventions: (16h10-16h40)

9. Thank you very much, Mr. Mwemva. Now I would like to give the floor to **Mr. Joong Weon Jeong, Senior Advisor at Bae, Kim & Lee LLC of the Republic of Korea.** Based on your experience of about 20 years at the Korea Fair Trade Commission and currently as a legal advisor in a law firm, could you please share your experience and know-how in handling cross border cases and express views on what are difficulties investigated parties are facing in cross-border cartel investigations?

Mr. Jeong's Speech

1. Introduction

Thank you Ms. Tarishi. I very much appreciate this opportunity to discuss how to successfully cope with the cross border cartels along with other distinguished panellists from all over the world. I hope that sharing my experience of enforcement and international discussion with regard to cross border cartels working with the Korea Fair Trade Commission, in short KFTC, for more than 20 years will convey meaningful implications to the participants.

I will be discussing the following today. First of all, as the Chair mentioned, based on my experience, each jurisdiction would first need to establish a legal system to enforce regulations against cross border cartels. Secondly, simply having regulations in place does not solve everything that there is also a need to have a manual concerning the competition authority's roles and matters to be observed in each phase of the investigation, trial, and deliberation against the cross border cartel. Finally, I would like to make a couple of suggestions on the need to systemize the participation of the investigated party in such an enforcement process.

2. Legislations Specifically Required for Combating CBC

In a typical cross border cartel, because the perpetrating company is located in a foreign jurisdiction with no presence or asset in the investigating jurisdiction, effective enforcement requires various legislations and a sophisticated approach in applying them.

First of all, there is a need to establish a clear provision in competition law that would serve as the legal basis for extraterritorial application of the domestic law to an international cartel activity occurring outside the borders. For example, under Korean competition law, there is a provision that the competition law should apply to conduct which occurred in a foreign jurisdiction as long as the conduct inflicted an adverse impact in a Korean market.

Second, various legislative efforts are also necessary to increase cooperation with relevant authorities of the countries for effective enforcement against cross border cartels. This may include (i) mutual recognition and utilization of positive comity, which gives enforcement priority to the jurisdiction with more exposure to the relevant cross border cartel, (ii) sharing of information discovered through investigation among various competition authorities, and (iii) establishing a system in which confidentiality may be maintained in the process.

Third, in order to increase the efficiency and transparency of the competition authorities' enforcement against cross border cartels and to enhance the compliance by the companies, it is essential to harmonize relevant regulations among jurisdictions. One example of such effort is to introduce

the leniency program, which allows reduction of or even immunity from the penalty in exchange for full confession and cooperation with the investigation. If one jurisdiction in which the cross border cartel caused the anticompetitive effect has not implemented the leniency program, such may deter the cartel participant from utilizing the leniency program in other jurisdictions.

3. Preparation for Enforcement Manual through Implications from Various International Discussion about CBC

Active discussions surrounding the challenges the competition authority of each jurisdiction faces in its enforcement and ways to respond to such challenges have been taking place at various international fora including OECD and ICN, in addition to UNCTAD. The discussion topics include the legal basis of extraterritorial application, international comity, bilateral / regional / multilateral cooperation, exchange of enforcement information and simultaneous dawn raid. In addition, by entering into bilateral cooperation agreements with major trading partners, you may periodically meet with the partnering jurisdiction, share the enforcement experience, and learn from each other.

Through lessons and implications from these international discussion, each competition authority can establish an enforcement manual which will strengthen the capacities and ultimately lead to a successful investigation

and sanctions through joint efforts in case an actual cross border cartel case emerges.

4. Difficulties Investigated Parties Face in Cross-Border Cartel Investigations

Since a simultaneous investigation by multiple jurisdictions usually takes place in a cross border cartel investigation, it can be a serious burden for the investigated parties. To ease such a burden, it is advisable for a competition authority to establish a procedural mechanism to ensure transparency, predictability, consistency, and opportunity to be heard, to name a few. If the details of each competition authority's enforcement manual for cross border cartel sufficiently reflect these principles and is accurately complied with, then we may expect the burden placed on the foreign parties to significantly decrease.

As this is a topic that also calls for a more in-depth discussion, if opportunity allows, it would be meaningful to have a separate session that concentrates on this topic, where my colleague, Mr. Sanghoon Shin, who has more than 10 years of experience of working both with the KFTC and with a private law firm, may develop on the discussion. Thank you for your attention.

2nd round of interventions: (16h40-17h10)

9. Thank you very much, Mr. Mwemva for your intervention. Now I would like to give the floor to **Mr. Joong Weon Jeong of the Republic of Korea**. Following up your first intervention, what lessons can be shared to developing countries' competition authorities in addressing successfully cross-border cartels? Particularly those cartels that are regional based? What should be the role of private practitioners in developing countries' jurisdictions?

Mr. Jeong's Speech

1. Importance of International Cooperation in Improving Enforcement against Cross Border Cartel

As I mentioned in the first intervention, various efforts go into effective enforcement against cross border cartels, from introducing a legal provision that grants extraterritorial application of the regulation and leniency program to international cooperation. In the process, developing countries may especially upgrade their overall competition law enforcement system, as the KFTC did for the last two decades when its enforcement against cross border cartels was very active.

For effective enforcement against cross border cartels, strengthening international cooperation is necessary – this includes not only working together with foreign competition authorities in conducting individual investigations, but also participating in various multilateral international discussions and enhancing the cooperative relationship with major trading partners by entering into bilateral agreements with them. In this process, developing countries with a short history of competition law enforcement and less accumulated examples of enforcement are able to learn from other jurisdictions' experiences of facing challenges and overcoming them.

2. Role of Private Practitioners in Developing Countries

Private practitioners' roles are important not only with respect to the enforcement against cross border cartels, but in all investigations of antitrust cases and enforcement of the law. If there are procedural guarantees based on which private practitioners may actively engage in the competition authority's enforcement process, and if they are indeed actively intervening, this would allow fine-tuning and improvement of the legal and systemic mechanisms and assist the competition authority to refrain from making erroneous decisions.

Looking at the KFTC's example, the KFTC has long been implementing a quasi-judicial procedure in enforcing the law. The KFTC implemented and has been continuously developing systems such as separation of investigative and decision-making bodies, a deliberation procedure with an adversarial structure which allows the investigated parties to battle with the

government investigators at an equal position, and means to appeal the KFTC's decision to the court. The KFTC has also been making the effort to guarantee the private practitioner's practical and substantial participation in the process. As a result, in most of the KFTC's current cases, the investigated companies retain private practitioners in responding to the KFTC's enforcement on behalf of them, and the private practitioners actively participate in all stages of the KFTC's investigation from dawn raids to document production and employee interviews. At the KFTC's deliberation procedure, they also actively speak on behalf of the investigated party and also actively engages in appealing the KFTC's decisions in the court. The private practitioners have been successful in keeping the KFTC's enforcement in check, which significantly contributes to the KFTC's enforcement procedurally being fair and substantively drawing the right conclusion.

In light of this, there is a need for the private practitioners of the developing countries to promptly build up expertise from the early stages of competition law enforcement and make efforts to enhance the respective jurisdiction's enforcement. If the respective jurisdiction does not have enough enforcement experience, one area the private practitioner may actively engage in is introducing similar foreign precedents or noteworthy foreign enforcement systems. Cross border cartel is a very useful area where such capacity building can take place efficiently and rapidly, because it entails a lot of procedural and substantive legal issues and there are abundant precedents that are internationally famous. International conferences for

building expertise and sharing cases are most active in the field of competition law that it would be advisable to make use of such opportunities.

Thank you for listening and I hope that there will be a lot more opportunities for developing countries to take part in international discussions such as this IGE meeting to further discuss specific procedural and substantive issues with regard to the cross border cartels.



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