



## REPORTS

# Hard Core Cartels 2000

### Introduction

This report examines issues related to attacking cartels and market liberalization as well as issues related to implementing the 1998 OECD Council Recommendation Concerning Effective Action against Hard Core Cartels.

### Overview

The OECD anti-cartel programme began with the publication in 1998 of the OECD Council Recommendation Concerning Effective Action against Hard Core Cartels. The programme is an important illustration of how government enforcement of framework laws can protect against abuses by powerful enterprises. It is also important in calling global attention to a problem that cannot be addressed effectively without increased co-operation from the many non- Members with competition laws and the numerous others that are considering them.

Finally, international cartels often have particularly harmful effects on less developed countries, and the benefits to those countries of more effective anti-cartel enforcement and of increased outreach can help promote co-operation on other issues of global concern.

### Related Topics

- Best Practices for the Formal exchange of Information between Competition Authorities in Hard Core Cartel Investigations (2005)
- Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation (2005)
- Cartels Sanctions against Individuals (2004)
- Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes (2002)
- Recommendation of the Council concerning effective action against hard core cartels (1998)

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# Hard Core Cartels



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

## ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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*Publié en français sous le titre :*  
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## Globalisation and Competition Policy: Attacking Cartels and Defending Market Liberalisation

In the last few years, OECD Members' actions against price fixing and other such "hard core" cartels have halted billions of dollars in secret overcharges to individual consumers and business purchasers. The lesson of these successful cases is that such cartels are much more prevalent and harmful to the global economy than previously believed.

- A global citric acid cartel raised prices by as much as 30% and collected overcharges estimated at almost \$1.5 billion.
- Another global cartel lasted five years, raised the price of graphite electrodes 50% in various markets, and extracted monopoly profits on an estimated \$7 billion in world-wide sales.

The distorted reality in which such cartels operate was vividly expressed by ringleaders of yet another recent global cartel, who at a (supposedly) secret meeting laughed among themselves at the "famous saying" that "Our competitors are our friends; our customers are the enemy".

Based upon these and other findings, the Competition Law and Policy Committee (CLP) has called for an expanded 3-year second phase of the OECD anti-cartel programme. The CLP Report is contained in full in this booklet, as is the 1998 Council Recommendation concerning Effective Action against Hard Core Cartels, whose call for action was central to the first phase of this programme.

The programme's main goal is to reduce cartels' multi-billion dollar drain on the global economy. But it will also address the real and imagined problems of mounting public concern associated with global integration and help reduce concerns that could threaten commitment to market liberalisation. It is only one of many such steps, but it is an important one – especially in conjunction with increased competition policy outreach by the OECD, its Members, and other organisations.

In contributing to the current political economic and situation, the OECD anti-cartel programme is important first as an illustration of how government enforcement of framework laws can protect against abuses by powerful enterprises. It is also important in calling global attention to a problem that cannot be

addressed effectively without increased co-operation from the over 50 non-Members with competition laws and the many others that are considering them. Finally, international cartels often have particularly harmful effects on less developed countries, and the benefits to those countries of more effective anti-cartel enforcement and of increased outreach can help promote co-operation on other issues of global concern.

### **Phase I findings; unanticipated extent of harm requires expanded Phase II programme**

“Hard core” cartels are anticompetitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets. The 1998 Recommendation condemns such cartels as the most egregious violations of competition law, noting that by raising prices and restricting supply they make goods and services completely unavailable to some purchasers and unnecessarily expensive for others. It urges OECD countries to improve the effectiveness of their anti-cartel programs and their international co-operation, and also invites implementation by non-Member countries.

The CLP Report finds that the Recommendation has been a catalyst for impressive legislative reform and enforcement actions. New and stronger competition laws were enacted (Denmark, Netherlands, UK), as were updated substantive rules (Korea), new investigation tools (which in Canada include wiretapping and protections for whistle-blowers), and more stringent sanctions (which in Germany include criminal penalties). Nine OECD countries now have criminal penalties for such cartels, and the competition authority in Sweden has recently recommended this approach. Moreover, old statutory exemptions were repealed (most notably in Japan and Korea). In New Zealand, a study of optimal sanctions for cartels led to willingness by courts to impose larger fines and a legislative proposal for increased maximums.

In actual cases, to the extent such work can be disclosed, there were many “firsts”. The French authority made its first criminal referrals (and got its first convictions) for cartel activity. The UK brought its first international cartel case. The US obtained criminal convictions and record fines in several global cartel cases, and record fines were also imposed elsewhere, including Canada and Norway. Ireland declared cartels “public enemy No. 1”, and until recently *all* of its civil and criminal cases involved price fixing. Spain condemned cartels illustrating how local cartel activity can have international effects.

There was, however, less success in achieving the more effective co-operation that the Recommendation recognises as vital in attacking cartels, though recent reforms in Nordic countries should provide concrete benefits. To make anti-cartel enforcement truly more effective, the CLP’s most important task over the next three

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years is assisting interested authorities and countries to increase opportunities for information sharing in appropriate circumstances. Confidential business information must be protected from improper disclosure or use, but the record is clear that such information can be protected and shared among law enforcement agencies. Many agencies in other fields are authorised to gather and exchange confidential information with foreign agencies in appropriate circumstances, but nearly all competition authorities lack that authority. Moreover, most OECD countries currently ban exchanges of much information that is in no way confidential. For example:

- Most authorities are prevented from sharing *any* non-public information acquired in a law enforcement investigation, even if it is not confidential.
- Due to vagueness or overbreadth, laws intended to protect confidential business information often restrict access to information that is not confidential.
- When investigations disclose illegal conduct in another country, authorities are often barred from alerting the relevant authority even by a “tip” that reveals no confidential information.

One of the most serious impediments to effective anti-cartel activity is that most government officials, legislators, and members of the public are not aware of the amount of harm done by cartels. The CLP has not been able to estimate cartels’ global impact, and precise quantification would be impossible even if the CLP had the resources to include such a study in its future work. However, to begin overcoming this “knowledge gap”, the CLP reports that *in the United States alone, ten recently condemned international cartels*:

- cost individuals and businesses many *hundreds of millions of dollars annually*;
- affected over \$10 *billion* in US commerce, with *overcharges of over \$1 billion*;
- caused *even more harmful* economic waste estimated at *over \$1 billion*.

To calculate the global harm of all cartels, these striking numbers would need to be increased by the harm these ten cartels had outside the US, plus the harm by *a*) the many other successfully challenged international cartels, *b*) the many more successfully challenged domestic cartels (many with international effects), and *c*) the *much* larger number of undiscovered and unproven cartels. No such calculation is possible, but cartels clearly are a major – and until now invisible – drain on the world’s economy.

## The new Phase II programme

### *Reducing a multi-billion dollar drain on the economy*

The CLP programme addresses five topics of urgent concern to competition authorities:

- the extent of cartels’ overcharges and other harm;

- the real world impact of restrictions on international co-operation in cartel cases;
- optimal co-operation in cartel cases;
- optimal investigation tools for cartel cases; and
- optimal sanctions in cartel cases.

CLP work on the first topic is needed to gather and disseminate information on cartels' harm in order to overcome a "knowledge gap" that is a serious barrier to reforms that would make anti-cartel action more effective. Work on the second promotes the international co-operation that is needed to fight cartels by disclosing the impact of legal restrictions that bar effective co-operation. On the last three topics, the CLP will seek to identify best practice options that advance Members' common goal while allowing for individual differences. Active pursuit of all these topics would far exceed the CLP's current level of resources, but the CLP intends to pursue them as actively as possible, perhaps seeking to expand its capacity by work with other entities. In 2003, when Phase II is over, the CLP's will submit another report to the Council.

Both the CLP's priority focus on anti-cartel work and its attention to assisting non-Member countries are supported by findings of the Joint Group on Trade and Competition, which has stressed cartels' pernicious effects on trade and competition and joined others in calling for increased competition policy outreach. Moreover, the CLP programme supports investment liberalisation, regulatory reform, and the goals of the Guidelines for Multinational Enterprises, while also complementing OECD positions in favour of good corporate governance and against corruption.

### ***Reducing fears of globalisation and maintaining market liberalism***

Competition resulting from trade and investment liberalisation has long promoted OECD countries' economic growth. In competition policy terms, liberalisation made it less costly for sellers to meet the needs of distant buyers, and expanded choice led to lower prices, better quality, less waste, and more economic opportunity. Today's globalisation reflects these same economic forces, intensified by cost-reducing technological change, and offering the same potential benefits to all OECD and other countries.

These benefits do not come without problems. All countries experience social and economic disruption when local firms cannot compete with distant ones or new entrants that have lower costs. The disruption is greatest in some situations that occur more often in transition and developing economies – *e.g.*, when entire communities would be devastated by the failure of a firm that cannot operate profitably in a market environment. Such economies also suffer greater disruption because they often lack framework laws and institutions necessary for a well functioning market economy.

Public concern about globalisation in OECD and non-Member countries is substantial and must be addressed. International cartels are a valid concern, but there also exist fears based on misplaced notions, such as the idea that globalisation means domination by large enterprises or that competition policy means replacing social policies by the law of the jungle. To sustain the benefits of liberalisation, it is vital to show that *a*) with competition law and other protections, globalisation can reduce the power of dominant firms, and *b*) competition policy does not imply the elimination of regulations that protect overriding social values, but rather uses market incentives to reduce those regulations' costs. The anti-cartel programme can contribute much to making such a showing.

### **Anticipated benefits to Members, non-Members, and the global economy**

Addressing globalisation at last May's Ministerial meeting with non-Members, Indian Foreign Minister Singh said "the debate over the role of the state is over: it is to support the creative, entrepreneurial capacities of the people". The question, he said, is whether today's institutions are capable of addressing the challenges we face. The CLP anti-cartel programme, complemented by further competition policy outreach, can help ensure a positive answer to that question in two quite separate ways.

- *Reducing the incidence and harmfulness of hard core cartels.* The programme will increase the effectiveness of OECD *competition authorities* and add to the Recommendation's achievements with respect to *convergence and to effective anti-cartel activity by non-Member countries*. The importance of non-Members' activity is rapidly growing with globalisation, increased reliance on markets, and the spread of competition laws to over 50 non-Members.
- *Reducing unwarranted fears that may threaten globalisations' benefits.* The programme will provide an example of how enforcement of framework laws enables governments to protect the public. Since cartels often have particularly harmful effects on less developed countries, more effective anti-cartel cases and more outreach will benefit such countries and promote co-operation on other global issues.

# New Initiatives, Old Problems: A Report on Implementing the Hard Core Cartel Recommendation and Improving Co-operation

*Report by the CLP*

## 1. Background and Principal Policy Conclusions

On 25 March 1998, the Council approved a Recommendation Concerning Effective Action Against Hard Core Cartels [C(98)35/FINAL]. The Recommendation's preamble condemns hard core cartels – price fixing, bid rigging (collusive tenders), output restrictions, and market division (or sharing) – as the most egregious violations of competition law because they raise prices and restrict supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others. The preamble also explains that effective action against hard core cartels is particularly important and particularly dependent upon international co-operation. The importance stems from hard core cartels' distortion of world trade, creation of inefficiency and wasted resources, and reduction in consumer and total welfare. The need for co-operation stems from such cartels' secret operation in different countries around the globe. In addition to encouraging more effective action against such cartels, the Recommendation directs the CLP to review Member countries' experience in its implementation and to report within two years on any further action needed to improve co-operation in this area. This report responds to the Council's directive.

The report's principal policy conclusion is that further action to enhance the effectiveness of anti-cartel enforcement is vitally important to Members' economies and to the global economy. Since the Recommendation was adopted, competition authorities' increased and increasingly effective anti-cartel activity has successfully halted and penalised numerous hard core cartels, most of them domestic but many international and even global. These cases have brought important benefits, but they also provide dramatic and convincing evidence that the incidence and harmfulness of hard core cartels is significantly greater than generally thought even two years ago. The Committee has not studied the extent of this damage, and precise quantification will be impossible even if the Committee

has the resources to include such a study in its future work, but several points seem clear:

- International hard core cartels that have recently been exposed have cost individuals and businesses **many hundreds of millions of US dollars annually in the United States alone** – global overcharges on an annual basis are unknown but obviously much higher.<sup>1</sup>
- These recently exposed cartels have affected over US\$10 billion in US commerce, which implies **overcharges by these particular cartels of US\$ one billion in the United States alone, and total global overcharges by these particular cartels in the billions of dollars.**<sup>2</sup>
- In addition to those overcharges, these cartels have caused waste and inefficiency that has been **even more harmful to countries' economies and to global welfare**. It is estimated that the **average illegal gain from price fixing is 10 per cent of the selling price**, but in such cases the **harm to society may amount to 20 per cent of the volume of commerce** affected by the cartel.
- Many other international and domestic cartels have recently been exposed, and since such cartels operate in secret and are notoriously difficult to discover and prove, it seems clear that **the vast majority of recent and current hard core cartels have not been exposed**.

Thus, available information – mostly concerning the size, nature, and effects of the largest cartels – indicates that the principal policy implication of the recent successes in anti-cartel activities is the compelling need for further improvements in the effectiveness of anti-cartel enforcement and co-operation. The Joint Group on Trade and Competition has also emphasised the importance of this anti-cartel work, pointing to convergence resulting from past work and stressing cartels' pernicious effects on trade and competition, *and has joined other groups in calling for increased competition policy outreach to non-Member countries*. More detailed information concerning one recent international cartel is contained in **Box I**.

The Recommendation's call for each Member country to seek ways to become more effective in combating hard core cartels – and its focus on investigatory tools, sanctions, and international co-operation – continue to be both important and appropriate. Moreover, Members' competition authorities have been and continue to be interested in searching for means of achieving this goal that *take* into account the differences in their legal regimes and policies and in their experience with both anti-cartel activity and international co-operation. Thus, no revision to the Recommendation or new OECD instrument is appropriate at this time. Rather, ***what the OECD can and should do is assist its Member countries' competition authorities to find solutions suitable to their circumstances by studying and disseminating information on***

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### Box 1. The Global Graphite Electrodes Cartel

Nearly every major worldwide producer of graphite electrodes has pled guilty to participating in a **5 year cartel** (1992-1997) that fixed prices until the execution of search warrants in the United States and “dawn raids” in Europe. To date in the US, six corporations have been sentenced to pay **finances in excess of US\$300 million**. Three individuals have been convicted and have been sentenced to pay fines of up to \$10 million and to serve prison sentences ranging from 9 to 15 months.

The cartel affected over **\$1.7 billion dollars in US commerce alone**, and it raised the price of graphite electrodes in the United States from \$.95/lb in 1992 to \$1.56/lb in 1997 – **an increase of over 60 per cent**. The US market is estimated to be between one quarter and one third of worldwide sales of graphite electrodes, suggesting that the cartel affected **\$5-7 billion dollars in sales world-wide**. Throughout the world, the cartel resulted in **price increases from roughly \$2 000 per metric ton to \$3 200-\$3 500** in various markets.

*the need for action and on options that work toward a common overall goal but that take into account individual differences.* The five key topics are:

- a) the extent of overcharges and other harm done by hard core cartels;
- b) the real world impact of restrictions on co-operation against hard core cartels;
- c) optimal co-operation in hard core cartel cases;
- d) optimal investigatory tools for hard core cartel cases; and
- e) optimal sanctions in hard core cartel cases.

In addition, while the Hard Core Cartel Recommendation *already invites non-Member countries to associate themselves with it and to implement it, and while it has already contributed to convergence and to more effective anti-cartel enforcement by non-Member countries*, the work outlined above would make the Recommendation much more valuable in this regard. When competition officials and the Secretariat participate in policy dialogue or assistance through either the OECD's outreach program or Members' technical assistance programs, they would be able to deliver not only the Recommendation's principles, but CLP reports containing practical information on options. This, in turn, would have two important benefits:

- a) it would ***promote global reform that would directly benefit OECD Member countries and the global economy by increasing the opportunities for, and effectiveness of, co-operation between Member and non-Member countries.*** The importance of these opportunities is rapidly growing with globalisation, increased reliance on market economies, and increased adoption and enforcement of competition laws by non-Member countries;

- b) it would provide a concrete example of how framework laws provide a context in which ***governments can protect the public from abuses by powerful enterprises***. As manifested most clearly in connection with the World Trade Organisation Ministerial in December 1999, there is an urgent need for projects such as this, which both ***address the widespread public concern about global integration and provide evidence of Member countries' willingness and ability to assist emerging and transition countries in protecting their citizens***.

Active pursuit of all opportunities for useful work in this area would far exceed the Committee's resources, but the Committee intends to pursue them as actively as possible, perhaps seeking in some cases to expand the Committee's capabilities through work with other international organisations or others. In any event, the Committee will consider this topic a priority over the next three years and will report back to the Council in 2003. In general terms, the Committee's goal is that three years from now, the increased awareness of applicable sanctions and the increased risk of detection and penalty will have increased to the point where the incidence of hard core cartels decreases dramatically. Even more broadly, the Committee's goal is that consumers, enterprises, and governments around the world will recognise that with sound competition law enforcement and other appropriate protections, increased global competition can and does operate to benefit global welfare rather than to subject them to abuse by large enterprises.

## 2. Introduction and Summary

The Hard Core Cartel Recommendation recognised both the importance of halting hard core cartels and the need for co-operation in doing so. Thus, the Recommendation calls upon Members to take two sorts of actions – one relating to their individual enforcement programs, and one relating to co-operation.

- First, the Recommendation encourages each Member country to ensure that its competition laws effectively halt and deter hard core cartels. Members are urged to ensure that their sanctions and investigatory powers are adequate and that their exclusions and authorisations of what would otherwise be hard core cartels are both necessary and no broader than necessary to achieve their overriding policy objectives.
- Second, the Recommendation urges each Member to review all obstacles to law enforcement co-operation against hard core cartels. Members are reminded *a)* that they have a common interest in preventing hard core cartels, *b)* that while there should be effective safeguards for confidential information, information sharing with foreign authorities has been beneficial when it has been possible, and *c)* that most countries' laws

continue to prevent their competition authorities from such information sharing. The “deepest” forms of co-operation mentioned in the Recommendation – referred to in this report collectively as “information sharing” – were:

- gathering confidential or non-confidential information on behalf of a foreign authority, using compulsory process where necessary; and/or
- sharing with a foreign competition authority confidential information and/or non-confidential investigatory information that is contained in an authority’s files.

Many enforcement authorities in other fields, but very few competition authorities, are authorised by law to engage in such information sharing “in appropriate circumstances”, by which this report means that the requested assistance satisfies any requirements set forth in the laws of the requested country – for example, a finding that there are adequate safeguards for confidential information and that the co-operation would be consistent with national interests. Although the Recommendation notes the benefits that have resulted from the use of information sharing in appropriate circumstances, it does not call upon all Member countries to authorise this deepest form of co-operation, but rather leaves it to each country to decide what forms of co-operation are suited to its needs and to the common interest in more effective action against hard core cartels.

The Committee has supported implementation of the Hard Core Cartel Recommendation through roundtable discussions of various issues,<sup>3</sup> a CLP Report on “positive comity”, and consultation with BIAC on ways to protect legitimate business interests while enabling competition agencies to gather and share confidential information with foreign authorities in appropriate circumstances. The CLP also received a valuable presentation of evidence that had been used to convict several participants in a recent global hard core cartel. To provide data for this report, Members’ competition authorities provided responses to a Secretariat questionnaire, and the Committee’s discussions in preparing this report were also important in refining the Committee’s understanding of the relevant facts and issues.

As a means of illustrating the nature and effects of hard core cartels, **Box 2** contains information about the cartel case that was considered in depth by the Committee. The case involved the market for lysine, which is a feed additive for poultry and swine. Compared to several of the other recent cartel cases, this cartel was relatively small – affecting a global market of “only” \$600 million annually – but it provides a rare public view into a cartel’s actual operation because three individual defendants chose not to plead guilty, and the evidence the United States used in convicting them is a matter of public record.

### Box 2. The Global Lysine Cartel

The lysine cartel **doubled the world price of lysine for three years**, during which the cartel members stood the normal competitive process on its head. In competitive markets, firms vie with one another to find the most efficient, least expensive way to respond to the desires of their customers. The pernicious world of hard core cartels is exemplified by the following statement by a cartel member:

**“Our competitors are our friends. Our customers are the enemy.”**

This statement was not mere rhetoric. The lysine cartel clearly benefited the five cartel members and harmed both their immediate customers and millions of consumers throughout the world.

The cartel included all five of the world's significant lysine producers, with production facilities in the US, France, Hungary, Indonesia, Italy, Japan, Korea, Mexico, and Thailand. It **successfully fixed very precise prices (to US\$0.01 per pound) and sales quotas throughout the world**, and did so even though different prices and quotas had to be set in different places. Over the life of the conspiracy, the cartel raised prices on over **US\$1.4 billion in global sales**, which implies overcharges of US\$140 million.

In general, and due primarily to restrictive laws in most Member countries, competition authorities have thus far had far more success in implementing the Recommendation's call for action with respect to their individual enforcement programs than its call for engaging in co-operative law enforcement:

- There have been some truly remarkable accomplishments relating to individual Member countries' laws and law enforcement programs. Whole new competition laws have been enacted, as have amendments to particular competition law provisions, with updated and stricter substantive rules, new and more powerful investigatory tools, and more stringent sanctions. In addition, old exemptions have been repealed, previously unused powers have been invoked, and action against hard core cartels has been given a higher priority.
- While there has been only limited actual co-operation among Members' competition authorities in hard core cartel cases, there has been increased interest in deeper co-operation and positive action towards removing the main obstacles to it. Some competition authorities have not sought international co-operation because they focus on domestic conduct that harms their economy, rather than any international conduct that harms their economy; however, with

globalisation more countries are finding it important to devote increased attention to international cases and co-operation in order to protect domestic consumers.

For competition authorities that investigate international cartel cases and desire co-operation, the principal obstacles are the laws that deny almost all of them the authority, granted in various other fields, to engage in information sharing even when doing so would benefit both countries.

A working group from the Nordic countries' competition authorities concluded in December 1999 that "it is necessary to make it possible to exchange confidential information and to allow for investigatory assistance". The group suggested enactment of the necessary legislation, which is pending in **Denmark** and **Norway**, has been proposed in **Sweden** by the competition authority, and has been enacted in **Finland** regarding exchange of confidential information.

**Australia** and the **United States**, the only countries which two years ago had a general authorisation of information sharing in appropriate circumstances, recently completed the binding agreement necessary to implement their laws.

In the Committee's view, the 1998 Hard Core Cartel Recommendation has proved to be a very important and beneficial statement of consensus on the serious damage hard core cartels do to all of Members' (and non-members') economies. Just as significant analytical convergence had occurred by March of 1998, developments since then are largely a function of long-term trends and cannot be attributed exclusively to the Recommendation. Nevertheless, as discussed below, the Committee believes that the Recommendation has served as a valuable catalyst for a new commitment to effective action against hard core cartels. Within the Committee, and in particular in its Working Party on Co-operation, there is clearly a new level of interest in finding ways to make enforcement more effective. Moreover, while this report focuses on Member countries, the Recommendation has influenced non-Members as well. For example, in October 1998 a meeting of Western Hemisphere competition authorities issued a communiqué affirming the importance of anti-cartel activities, and non-Member competition authorities request and receive assistance concerning the Recommendation during OECD outreach activities.

Although implementation of the Recommendation has been impressive, the CLP considers the principal policy implication of this activity to be the need for even greater emphasis on improving the effectiveness of individual enforcement regimes and of international co-operation. Seeking to amend the Recommendation, however, is neither necessary nor appropriate. There is great interest among Member countries' competition authorities in pursuing various strategies to make their enforcement programs more effective, but there also are variations in

countries' international experience and perceived need for international co-operation. There is no need for identical or simultaneous actions by all countries. The experiences of Member countries that have and are developing enforcement programs with a significant international dimension can be useful models for those that have a more domestic orientation or are for any other reason less prepared to begin making particular changes. Thus, the Committee's program of work for the future is to assist competition authorities to find solutions suitable to their circumstances by studying and preparing reports on alternative means of enhancing individual enforcement programs and international co-operation,

To make possible the co-operation that would truly make anti-cartel enforcement more effective, the most important task of the Committee will be to assist interested competition authorities and Member countries to find appropriate ways to increase opportunities for information sharing in appropriate circumstances. The Committee considers it very important that confidential business information – including business secrets and other commercially sensitive information – should be protected from improper disclosure or use, but most countries impose restrictions that go well beyond providing such protection:

- Most competition agencies are prevented from sharing **any** non-public, non-confidential information they acquire in a law enforcement investigation.
- Through vagueness or overbreadth, existing laws intended to protect confidential business information often restrict access to information that is not a business secret or commercially sensitive.
- When information obtained in an investigation indicates that illegal conduct is occurring in another country, some competition authorities are barred from providing any warning to their foreign counterparts, even through a “tip” that would not reveal the bases of the tip or any other potentially confidential information.
- With respect to actual confidential business information, most competition agencies are denied the authority, granted to a few competition agencies and to many agencies in other fields, to gather and exchange such information in appropriate circumstances.

In its 1994 Convergence Report, the CLP stated that:

“If Member countries wish to facilitate action against [hard core cartels], they would need to focus on developing for competition officials the legal mechanisms for co-operation in international cartel investigations and especially for the sharing of information among national offices.”<sup>4</sup>

The Recommendation provides an affirmative answer to the question asked in 1994; Member countries **do** want to facilitate anti-cartel action. However, since most competition agencies still cannot share even non-confidential investigatory

information, the need to focus on legal mechanisms for information sharing still exists and indeed is becoming more pressing. The Committee's statements in prior work concerning the benefits of such co-operation have consistently been accompanied by acknowledgements of the need to protect confidential information, and the Committee has never found any reason why confidential information could not be protected *and* shared. Nor has it ever found any reason to ban the sharing of information that is not confidential but is given confidentiality protection simply because it was obtained in a law enforcement investigation. In the few situations – but many instances – in which confidential information has been shared in competition cases, the record is one of improved enforcement and proper protection of confidential information. Moreover, in at least the securities, tax, customs, and criminal areas, it is common for enforcement authorities to be able to use compulsory process on behalf of foreign authorities and to share highly confidential information, and there too the record indicates that confidential information can be both protected and shared.

After forwarding this report to the Council, the Committee intends to prepare and publish an expanded CLP Report on hard core cartels consisting of this report and supplemental information and analysis both from the Committee and from other sources. The expanded CLP Report will both “flesh out” this report to Council and constitute the CLP's first “further action” to improve the effectiveness of anti-cartel enforcement.<sup>5</sup> Thereafter, the Committee will to the maximum extent possible study particular topics and prepare further reports on alternative means of enhancing individual enforcement programs and international co-operation. Moreover, *in line with the many calls for increased competition policy assistance to developing economies, the Committee will seek to assure that the results of its work are shared with non-Members through the OECD's outreach program and otherwise.* Finally, given the importance to the world's economy of further action in this area, the Committee intends to submit a follow-up report to Council in 2003, which will include some discussion of the implementation of the Council's 1995 Recommendation on Co-operation.

### **3. Assessment of Implementation and Necessary Further Action**

In assessing the implementation of the Hard Core Cartel Recommendation and the further actions that are required, this report begins with a topic that is not mentioned in the Recommendation itself but is fundamental to the effective pursuit of hard core cartels. Competition authorities are increasingly aware of the harm that is being done to Member countries and the global economy by hard core cartels, and the Recommendation constitutes a clear recognition by Member countries' governments that a significant cartel problem exists. However, such government action does not automatically or quickly lead to an appreciation of the problem by legislatures, courts, other government departments, or the public. In

the Committee's view, the lack of awareness by non-experts of the harm done by such cartels is a serious impediment to competition authorities' ability to take the steps necessary for effectively halting and deterring hard core cartels. After discussing this general concern, the report considers recent and potential future activities to implement particular aspects of the Recommendation.

### **3.1. Overcoming the Knowledge Gap Concerning the Harm Done By Hard Core Cartels**

As noted above, recent hard core cartel cases indicate that even competition law enforcement officials have often underestimated the harm done by hard core cartels. Outside the competition law enforcement area, there continues to be a significant underestimation of the nature and extent of that harm. This knowledge gap may have many causes. In the first part of this century cartels were encouraged in some countries, while some others adopted the approach – recommended by the 1930 London Interparliamentary Union – that countries should permit but regulate cartels, since prohibiting them would be futile. More recently, and especially during the 1980's, a prominent “school” of economics took essentially the opposite position – that hard core cartels were harmful in theory, but were inherently so unstable that they could not often be a serious problem. Public misunderstanding created by these shifting views is aggravated by occasional examples of policy inconsistency, when individuals and governments that generally denounce hard core cartels choose to ignore their harm in particular cases. Moreover, variations in competition authorities' enforcement policies and terminology, both over time and among countries, also complicate what might be a simple and powerful message – that hard core cartels are deliberate, knowingly illegal, and all-to-often successful means of extracting monopoly profits from unsuspecting enterprises and individuals.

Whatever the precise origins of this knowledge gap, delegates' work in preparing and implementing the Recommendation shows that it is not merely a theoretical problem but a real and serious impediment to effective action against hard core cartels. For example, **Canada's** recent competition legislation was substantially delayed because the investigatory tools the Competition Commissioner was seeking – although common in Canada for investigations of legally comparable conduct – were at first regarded by the legal and business communities as more powerful than necessary in a competition case, even for secret conspiracies to fix prices. Similarly, in some Member countries underestimation of the seriousness of hard core cartels leads legislatures and/or courts to set fines that cannot possibly deter such cartels because they are too low to make the cartels unprofitable. And in seeking public assistance in fighting hard core cartels, competition authorities sometimes encounter the attitude that it would not be appropriate for an employee to “blow the whistle” on hard core cartel activity since it is not a serious violation.

The Hard Core Cartel Recommendation's preamble was written as a partial response to this knowledge gap. Council Recommendations are not intended, written, or disseminated as public information tools, but the Recommendation was an opportunity to articulate competition authorities' views in an instrument endorsed by governments. Therefore, as noted above, the preamble explains:

- how hard core cartels cause harm – by raising prices and creating artificial shortages;
- the nature of the harm to buyers – goods and services becoming completely unavailable to some and unnecessarily expensive for others;
- the nature of the harm to domestic and to international markets – creating waste and inefficiency, slowing economic growth and the achievement of other broad social goals, and distorting world trade.

Such statements are not news to competition officials or other experts, but their inclusion in a Recommendation by the OECD Council can assist agencies, such as the **Norwegian** competition authority, that are actively seeking to make non-experts more aware of the serious harm caused by hard core cartels.<sup>6</sup>

In addition, the Recommendation's definition of "hard core cartel" was a significant step in the direction of common terminology if not of analytical or legal convergence.<sup>7</sup> Characterising and condemning horizontal price fixing, bid rigging (collusive tenders), output restrictions, and market division (or sharing) as hard core cartels has no immediate legal impact, because Member countries have somewhat differing definitions, prohibitions, and exemptions relating to these four kinds of agreements. Nevertheless, the Recommendation's terminology provides a useful way of identifying the similar even though not identical kinds of agreements that are of greatest concern to Member countries' competition enforcers.

Until very recently, however, it has been difficult to make the kind of unambiguous, dramatic demonstration of the harm caused by hard core cartels that may be necessary to create a significant change in the attitudes of non-experts. Competition authorities in various countries have in the past brought some very important domestic and international cases,<sup>8</sup> and particularly interesting examples are described in **Box 3** and **Box 4**. In general, however, pre-Recommendation cases were for one reason or another insufficient to fix attention on the extent of the problem caused by hard core cartels.

However, recent cases involving global hard core cartels, and in particular three recent cartels initially discovered and penalised by the **United States**, are dramatic and serious enough that they can be and are being used to help promote a new appreciation, both within the organisation and world-wide, of the serious and substantial harm done by hard core cartels. These cases attracted attention because they were truly global, included well known enterprises from around the

### Box 3. The French TGV Cartel

French competition authorities successfully thwarted a **price fixing cartel that attempted to obtain monopoly profits in connection with the building of the high speed train system.**\* The cartel members were domestic firms, and the case illustrates the importance of international competition because the cartel was threatened by the prospect of a competitive bid from a foreign firm. The cartel members then offered to pay the other firm up to FF 75 000 000 if it would submit a higher bid on one part of the project and not bid on any other part of the project. After the firm rejected the payment and submitted the lowest bid, the conspirators corrupted the auction process in a second attempt to exclude it, but they were discovered and **fined FF 378 000 000.** The case was an important illustration of egregious conduct, and **the cartel's willingness to offer a FF 75 000 000 "payment" to exclude a foreign firm provided a tantalising hint concerning the level of the cartel members' anticipated monopoly profits.**

\* Decision No. 95-D-76 du Conseil de la concurrence, on 29 November 1995 on Procurement Market (Conseil de la concurrence, Ninth Annual Report-Year 1995, Annex 83, p. 563).

### Box 4. The Spanish Sugar Cartel

Based on a complaint from associations of businesses that use purchase sugar, and based on a particularly successful "dawn raid", the Spanish Service for the Defence of Competition uncovered and condemned a sophisticated cartel involving Spain's four sugar producers. The firms had detailed price fixing and market division agreements, sales quotas, and import and export agreements that restricted sugar supply to the level at which maximum monopoly profits could be earned. As a result, **Spanish sugar prices were for many years 5-9 per cent higher than those in the rest of Europe.** Overcharges were in the millions of euros, and other harm – such as lost exports due to the unduly high price of sugar-based products – has not been able to be estimated. The four producers received **a total of 8.7 million euros in fines.** The case illustrates how cartels injure businesses that purchase their products, thus creating harmful "ripple effects" throughout the economy. It is also noteworthy that as a result of this process, the "domestic" cartel harmed other Spanish firms' ability to compete internationally.

world, and created so much harm that they resulted in spectacular fines by the US as well as fines that are continuing to be imposed by other countries. One of these cases – the lysine cartel – was described above in **Box 2**. In addition to the facts mentioned there, it is noteworthy that the evidence clearly showed that the executives were aware that their conduct was illegal and knew that the US punished such conduct most severely. In fact, the executives declined to meet in the US until they had created a sham trade association whose “meetings” provided a cover for their getting together. In the US, where prices increased by 70 per cent during the first three months of the conspiracy, the most prominent defendant, Archer-Daniels-Midland, was fined US\$70 million, and other firms in the lysine cartel paid fines of more than US\$20 million. In **Canada**, total lysine case fines were over C\$ 17.5 million. In addition, the lysine conspiracy became the **UK**'s first international cartel case when the Office of Fair Trading referred charges against the UK subsidiaries of two cartel members to the Restrictive Practices Court. **Mexico** also took action against the lysine cartel.

The citric acid cartel involved a larger amount of commerce than the lysine cartel, though less public information is available concerning its details. Citric acid is a food additive for enhancing flavour and preventing spoilage, with annual world-wide sales of about US\$1.2 billion. The cartel raised list prices by more than 30 per cent (at least in the US). *World-wide sales of citric acid during the conspiracy were US\$4.8 billion, meaning that if the 30 per cent price increase existed for its duration and on a world-wide basis, overcharges amounted to almost US\$1.5 billion.* In the US, Archer-Daniels-Midland was fined US\$30 million, and other firms paid fines totalling US\$75 million. In **Canada**, the citric acid case produced fines of over C\$ 11.5 million,

The most recent global cartel case that has proceeded to the point where meaningful information is available involved a conspiracy to fix prices and allocate market shares for the sale of various vitamins. Pertinent facts are set forth in **Box 5**.

Cases such as these go a long way towards providing information that could end or at least reduce the knowledge gap. To the extent possible, the Committee intends to use such cases and other available evidence to educate non-experts on the damage caused by hard core cartels and on effective means to halt and deter them. It would be useful to conduct a more systematic study of the harm done by hard core cartels, if resources are adequate to do so. In any event, individual competition authorities can complement this program by engaging in similar work to ensure that there is no “communication deficit” in their own countries.<sup>9</sup> By showing that such cartels exist and are extracting tremendous amounts of money from individuals and businesses world-wide, Members' competition authorities can improve their own ability to obtain the tools they consider necessary to halt these cartels and perhaps to return some of the cartels' ill-gotten gains to their victims.

### Box 5. The Global Vitamins Cartel

The large, sophisticated firms engaged in this cartel **spent millions of dollars and thousands of employee hours to implement and hide their cartel** to fix prices and allocate market shares for the sale of certain vitamins. They succeeded in operating the cartel for a decade.

The **finest in the US case against this cartel have exceeded US\$ one billion**, and could have been higher except that Rhone-Poulenc was not fined because of its co-operation with the US authorities. (Hoffman-LaRoche and BASF paid a total of US\$725 million in fines, other firms were fined close to US\$350 million, and two Hoffman-LaRoche executives agreed to go to the US, plead guilty, serve four and five month jail terms, and pay substantial fines.) Since the maximum fine in the United States is twice the illegal profit or twice the harm to victims, **in the US alone this cartel may have produced US\$500 million in overcharges.**

In **Canada**, the fines in this case exceeded C\$ 85 million. The **EC** and the **Australian** competition authorities have both announced investigations of the vitamins cartel.

### 3.2. Implementation and Future Action in General

Most of this report's discussion of implementation and future action follows the outline of the Recommendation and thus deals first with individual enforcement programs and second with co-operation. A few noteworthy events and issues, however, cannot be placed in only one of these categories. Among the most important developments that are not easily classified are:

- The EC created a special anti-cartel unit and proposed new investigatory powers and enhanced ability to co-operate with EC Member States. (Related EC work – supporting means to overcome the restrictions that now prevent EC Member States from sharing investigatory information among themselves – is discussed in Section D, below, concerning co-operation.)
- In September 1999, eighty competition officials from nearly thirty countries gathered in Washington, DC for a seminar on hard core cartel cases, and plans are already underway for similar events in London and Stockholm in 2000.

One important avenue of future work that would benefit both individual enforcement programs and co-operation is further study of the actual benefits information sharing has had on competition enforcement and the harm that has occurred because of restrictions on such co-operation. Delegates who believe that

their anti-cartel programs would benefit from legal reform in this area have pointed out the importance of having such a study, and the Committee is well-positioned to do it.

Another possible project would be to study the different ways in which Member countries' laws define the four categories of anticompetitive agreements among competitors that the Recommendation defines as "hard core cartels" – price fixing, bid rigging (collusive tenders), output restriction, and market division (sharing).<sup>10</sup> As was the case two years ago, the Committee does not consider it necessary or useful to try to devise OECD definitions of these violations.<sup>11</sup> It may, however, be useful for the Committee to gather and disseminate information on how these violations are defined and interpreted in Member countries, because as noted below, uncertainty over such differences could create or contribute to opposition to individual or co-operative enforcement mechanisms that competition agencies often consider important.

If a competition authority is seeking new powers in hard core cartel investigations, business' attitudes may depend in significant part on their level of confidence that the powers will not eventually be used in ways that would interfere with legitimate joint venture activity. This holds true whether the new powers relate to investigatory tools, sanctions, or other matters. Thus, it is difficult to raise credible objections to granting competition authorities very powerful tools for use in cases such as the lysine conspiracy described above. Business objections are both more likely and more credible, however, if the authority seeking the powers has no reasonably clear and consistent method of distinguishing these four categories from the many other horizontal agreements that are or may be entirely legitimate. For example, when asked what sort of protections the business community considers necessary for competition agencies to exchange confidential information in hard core cartel cases, BIAC noted that the answer depends in part on how the four categories of hard core violations are defined by the relevant country. Safeguards for confidential information are necessary in any event, but enterprises are more likely to question the legitimacy of information-sharing and to insist on impossibly high levels of protection if they fear that a competition authority may, for example, investigate the quality standards of a joint venture as an output restriction, exchanges of historical information as price fixing, or jointly submitted bids as bid rigging.

### **3.3. Implementation with Respect to Individual Countries' Enforcement Programs**

In general, Member countries have taken significant – often dramatic – steps with respect to their individual enforcement against hard core cartels. New and stronger competition laws have been enacted (**Denmark, Netherlands, United Kingdom**), as have amendments providing updated substantive rules

(which in **Korea** include per se rules), new investigatory tools (which in **Canada** include wiretapping and protections for whistle-blowers), and more stringent sanctions (which in **Germany** include criminal sanctions).<sup>12</sup> In **Sweden**, the competition authority has recently proposed to the government that serious breaches of the competition act, including hard core cartels, become criminal offences. In addition, longstanding statutory exemptions have been repealed (most dramatically in **Japan** and **Korea**). **New Zealand**'s major study on optimal sanctions for hard core cartels prompted a legislative proposal for increased maximum fines and appears to have prompted a greater willingness on the part of the courts to impose larger fines.

In actual case work, to the extent that such work can be publicly disclosed, there have been many "firsts". The **French** authority made its first criminal referrals (and got its first convictions) for hard core cartel activity, and the **United Kingdom** brought its first ever international cartel case. The **US** obtained criminal convictions and record fines in the world-wide hard core cartel cases noted above, and record fines were also imposed by other authorities, including those of **Canada** and **Norway**. **Ireland**'s competition authority declared hard core cartels "public enemy No. 1", and until recently *all* of its civil and criminal cases involved price fixing. **Spain** also condemned a number of hard core cartels, several of which illustrate the dangers of local cartel activity.

#### *Developments and Future Actions with Respect to Sanctions*

Nine Member countries now have criminal sanctions for hard core cartel conduct – six for legal entities and individuals, and three for individuals only.<sup>13</sup> In addition, the government of **Sweden** has recently proposed legislation making hard core cartels criminal offences. Criminal sanctions include both fines and, in some cases, imprisonment for up to six years. Non-criminal sanctions consist primarily of administrative fines (almost always for legal entities and in six countries for individuals), and a few other options are available in some countries. Annex A is a table containing information on the sanctions available in OECD countries.

Sanctions issues are among the most important topics for continued work on how to be more effective in deterring hard core cartels. One proposed project is a study of how the level of fines is in practice determined in each country. Part of such a project could include work on how to calculate "ill gotten gains" in a hard core cartel case. A number of countries have the possibility of imposing sanctions based on the amount of ill gotten gains, but this power is not often used because of the difficulty of making the calculation. However, all of the **US**' recent fines of more than \$10 million have been calculated on this basis, and it could be useful to find some way to ensure that there is co-operation with respect to the highly specialised but important issue of calculating ill gotten gains.

<sup>12</sup>

A related project would be to study optimal sanctions for hard core cartels. **Norway** is considering work in this area and suggested the project. Such a project could include a topic in which **Canada** has expressed particular interest – increasing sanctions through special provisions that collect the “proceeds of crime” or impose “victim impact surcharges”. The Committee has not examined this subject and believes that a study by the Working Party could be very useful, though the scope and methodology of such work would need to be considered with care. In 1998, **New Zealand’s** Ministry of Commerce published a very comprehensive study of optimal sanctions, which led to a government proposal to raise the maximum penalties and in the meanwhile has apparently contributed to a greater willingness on the part of the courts to impose higher penalties within the existing statutory maximum.

#### *Developments and Future Actions with Respect to Investigatory Tools*

There do not appear to have been many important developments with respect to competition authorities’ investigatory tools, though the **Canadian** Competition Commissioner was successful in obtaining the ability to seek judicial authority for non-consensual wiretapping in hard core cartel cases. There is, however, great interest in the Committee in pursuing the related subject of leniency programs. It is widely recognised that hard core cartels are very difficult to discover and to prove. By combining increasingly high penalties with a policy of leniency or immunity to individuals or firms that “blow the whistle” on hard core cartels and provide evidence with which they can be proved, **Canada**, the **EC**, and the **United States** have dramatically improved the effectiveness of their anti-cartel programs.

The competition authorities of many other Member countries are beginning, considering, or at least interested in such programs. For example, the **UK** Cartel Task Force established several years ago has had some impressive successes, but because the authority could not impose fines, wrongdoers had no incentive to provide information to the Task Force. Since its new law authorises financial penalties, the United Kingdom is proposing a leniency program modelled on the US system. **Norway** has also been considering issues relating to the operation of a leniency program, as have the competition authorities of a number of other Member countries.

Leniency programs were discussed in a recent roundtable, and this topic warrants further study and perhaps the creation of “best practice” principles or a report on what attributes are most important to a successful program. Such analysis would shed light on the ways in which successful programs might be adapted to other legal systems, as well as what kinds of legal changes might be needed to permit such adaptation or make it more effective. However, some statutory systems do not allow a competition authority to be lenient to those who co-operate with the

authority's investigation. **Japan's** competition authority, the JFTC, must impose a surcharge on all participants in a hard core cartel; the amount of the surcharge is determined by a formula that is fixed by statute.

#### *Developments and Future Actions with Respect to Exclusions and Authorisations of Hard Core Cartels*

In direct response to the Hard Core Cartel Recommendation, **Korea** undertook a major review that led in February 1999 to the elimination of approximately 25 statutory exemptions for cartels. **Japan** continued its important review of exemptions by, for example, enacting a June 1999 law that eliminated exemptions for depression cartels, rationalisation cartels, etc. **Germany** abolished exemptions for rebate, import, and export cartels. Otherwise, there does not appear to have been much response by countries to the Recommendation's call for Member countries' to review their exclusions and authorisations of what would otherwise be hard core cartels. The Committee urges such reviews by competition authorities, but given other recent and ongoing analysis of exclusions and authorisations, the Committee does not regard further action in this area to be a priority in connection with its program for bringing about more effective action against hard core cartels.

### **3.4. Implementation and Future Actions with Respect to Co-operation and Obstacles Thereto**

#### *Co-operation among Competition Authorities in Hard Core Cartel Cases*

Co-operation among competition authorities can take a variety of forms, but in hard core cartel investigations a request for co-operation is most likely to take the form of a request for investigatory assistance. In principle, such a request could *a)* ask another authority to gather information on its behalf, using compulsory process if necessary, and/or *b)* ask that the requested authority share with it any relevant confidential or non-confidential information that is in its files or to which it has access. In fact, however, except in the context of a few special relationships and situations, no competition agencies have the legal authority to use compulsory process in gathering information on behalf of a foreign agency or to share any confidential business information, and most cannot even share any non-public but non-confidential information they have obtained in connection with their law enforcement activities.<sup>14</sup> To illustrate the nature of the co-operation addressed in this report, Annex B contains information regarding two co-operation agreements.

Most competition authorities neither made nor received any requests for co-operation in hard core cartels cases in the period April 1998 through April 1999. Knowledge of legal and practical impediments to obtaining truly useful information

was a major reason for not making requests. In addition, many competition authorities made no requests because they had no investigations of hard core cartels with an international dimension, and in some international investigations there was simply no need for information from abroad. Finally, some competition authorities had no investigations of hard core cartels.

These explanations for the scarcity of co-operation requests are important because they call attention to the fact that traditionally, many competition authorities have focused exclusively or nearly so on *domestic* restraints on competition. This has been particularly true in Europe, where the EC generally handles the substantial international cases, and the competition authorities of Member States have had little reason (and no authority) to co-operate with each other. This traditional domestic focus of many competition authorities helps explain why, even though the Hard Core Cartel Recommendation recognises the benefits of information-sharing and other forms of co-operation in cases of mutual interest, a number of competition authorities are not certain that it would benefit them specifically.

In general, competition authorities that did seek and receive information from their foreign counterparts found the information to be useful. This was true both for the confidential information that was shared under MLATs and for non-confidential information. Competition authorities that provided non-confidential information emphasised that the confidential information they were unable to share would have been much more valuable to the requesting agency.

Given economic trends toward global integration, national competition authorities can be expected increasingly to become involved in international enforcement and therefore more interested in international co-operation. **Japan** recently entered into its first co-operation agreement, with the **US**, and the latter has also entered into recent co-operation agreements with **Brazil** and **Israel**. And the Working Group of the **Nordic** competition authorities, which as noted above has recommended legislation authorising information sharing, has also recommended the conclusion of a co-operation agreement among the Nordic countries. Given the benefits that international co-operation has had when it has been used, it seems likely that unwarranted obstacles to such co-operation will increasingly be viewed as harmful both to the countries that impose them and to the global economy.

### *Obstacles to Effective Co-operation*

Competition authorities' responses to a questionnaire by the Secretariat and delegates present during a May 1999 roundtable identified the major obstacle to effective co-operation as being the legal restrictions on sharing information with, and gathering information on behalf of, foreign competition authorities. In the past,

competition authorities' attitudes towards these issues were connected with broader policy concerns relating to such things as differential sanctions and different substantive and procedural rules, but delegates now see the issues in more pragmatic terms as a question of assessing the likely benefits and costs. At the same time, countries do have differing positions on some of these issues, with some having already authorised or proposed authorising such co-operation, others seeking authorisation, and others with differing levels of uncertainty how the benefits and costs would lie with respect to their own particular situations. As indicated above, the greatest uncertainty generally exists where competition authorities have little experience in international cases and may never have felt a need for information from abroad.

Resource constraints would obviously impose limits on the ability of competition authorities to grant assistance requests, but they are not in and of themselves barriers to initiating information sharing programs. Clearly, no competition authority could accept so many requests for assistance that it was unable to fulfil its law enforcement and other responsibilities, but the Recommendation specifically provides that a request for assistance may be denied on **any** grounds, including the competition authority's resource constraints.

Moreover, there are additional ways to deal with resource issues. For example, the recent Australia/United States agreement provides that if resource constraints would prevent the granting of a request an authority would otherwise choose to grant, the authority may grant the request on the condition that the requesting authorities provide personnel or monetary resources to compensate in whole or in part for the costs of compliance. Similar provision for cost recovery is available under the Canada-US MLAT.

Since resource issues can be dealt with by denying requests and other means, the expression of concern about resource constraints may reflect uncertainty over how free a country is in theory and in fact to decline requests. The Committee considered this issue in its recent Report on positive comity. Under 1995 OECD Recommendation on co-operation, requests for investigative assistance and for positive comity are governed by the same standard – they are to be given “full and sympathetic consideration”. Part II.A.I.3.b) of the Report, which is fully applicable here, states as follows:

There is no precise standard by which requested countries should decide whether to [grant a request]... The phrase “full and sympathetic consideration” necessarily implies that **a request should not be automatically rejected merely because of considerations that would exist in all or virtually all such requests**. For example, a request should not automatically be rejected merely because the... the necessary resources could provide more short-term benefit for the requested country's economy if spent on another case. **The cost/benefit analysis**

*is that of the requested country, but it should take into account the interests of the requesting country and the long-term benefits of more effective competition enforcement...*

*The likely cost to the requested country of diverting law enforcement resources from pursuing other illegal conduct is relevant to whether a request should be granted. This cost should be weighed against future savings in enforcement costs, other benefits from the reciprocal nature of positive comity, and the benefits of more effective competition law enforcement.*

#### *Review of Obstacles to Effective Co-operation*

Few Member countries have responded in a visible way to the Recommendation's urging that they undertake a review of obstacles to co-operation and consider possible means of overcoming them in a manner consistent with their important interests. For a number of years, the **Canadian** authority has been working towards new legislation that would expand its current authority to engage in mutual assistance in competition matters, including those involving hard core cartels. It is noteworthy that Canadian legislation already authorises sharing confidential information in hard core cartel investigations in two situations. First, *under the Competition Act, the Canadian authority is legally empowered to communicate confidential information when doing so is for the purposes of the administration or enforcement of the Act, such as when Canada and another country are investigating the same or related matters and communicating confidential information to the foreign authority will advance Canada's investigation.* Second, *Canada can gather and share confidential information on behalf of other countries pursuant to requests under its MLATs with those countries. However, a precondition to utilizing the underlying legislative authority (the Mutual Legal Assistance in Criminal Matters Act) is that these countries must treat hard core cartels as criminal violations. Accordingly, the current gap in Canada's legislative authority is with respect to gathering and communicating confidential information solely for the purposes of foreign, non-criminal investigations.*

The most important review of obstacles to information sharing is occurring in **Denmark, Finland, Iceland, Norway and Sweden**. As noted above, a working group of their competition authorities studied the possible need and means to deepen co-operation, and recently concluded that "it is necessary to make it possible to exchange confidential information and to allow for investigatory assistance". The group suggested enactment of the necessary legislation, which is pending in **Denmark and Norway**, has been proposed in **Sweden** by the competition authority, and has been enacted in **Finland** regarding exchange of confidential information.

Also in Europe, the **EC** and its Member States have done some work in this area. Although EC Member States are authorised to share investigatory information with the EC, they are generally prohibited from such co-operation with each other. This legal framework apparently was satisfactory when national competition

authorities focused on domestic cases and the EC handled important cases affecting several Member States, but it creates difficulties now that economic trends towards globalisation are making national competition authorities more interested in international cases. The EC has worked with national competition authorities to find means of increasing their ability to co-operate, and continuing decentralisation of competition enforcement in the EU may permit and stimulate co-operation among them. The EC has also expressed interest in being able to gather and share confidential and other investigatory information with national competition authorities from outside the EC.

Information sharing is also one of the issues being considered by the International Competition Policy Advisory Committee that was established by the US Department of Justice. Representatives of many OECD competition authorities and the Secretariat participated in the Committee's hearings, and the Secretariat has reviewed many of the papers submitted to the Committee, but the Committee's final report *was issued too recently for its contents to be considered by the CLP*.

### **3.5. The Benefits and Costs of Information Sharing**

In approving the Hard Core Cartel Recommendation, Member countries explicitly recognised the benefits that have resulted when competition authorities have been able to exchange confidential information with a foreign competition authority in cases of mutual interest.<sup>15</sup> This does not imply that each Member country has concluded that exchanging confidential information would benefit its individual interests, but it is important to recognise that the benefits of such exchanges in cases of mutual interest is established by the Recommendation itself.

Two issues remain. The first, which relates to the benefits to individual countries, has been raised as a "reciprocity" or "need/benefit" issue by some delegates whose competition authorities have focused on domestic matters and never felt the need to obtain information from abroad. The second issue concerns the costs of information sharing.

#### *Prior CLP Analysis and the Current Legal Context*

The CLP has been examining issues relating to information-sharing for over 15 years, and its repeated statements concerning the benefits of such co-operation have consistently been accompanied by acknowledgements of the need to protect confidential information. In all of this work, the Committee has never found any reason why confidential information could not be protected **and** shared. Nor has it ever found any reason to ban the sharing of information that is not confidential but is given confidentiality protection simply because it was obtained in a law enforcement investigation. In the few situations – but many instances – in which confidential information has been shared in competition cases, the record is one of

<sup>15</sup> 32

improved enforcement and properly protected confidential information. Moreover, in at least the securities, tax, customs, and criminal areas, it is common for enforcement authorities to be able to use compulsory process on behalf of foreign authorities and to share highly confidential information, and there too the record indicates that confidential information can be both protected and shared:

- In its 1984 “Information Collection Report”, the CLP concluded that Member countries should consider means of sharing confidential information with foreign competition authorities, “provided that adequate assurances to preserve the confidentiality of the information are received from those authorities”.<sup>16</sup> This “suggestion for action” by the CLP advised Member countries that confidentiality considerations should not be an absolute bar to providing information to foreign competition authorities.
- In 1994, the CLP’s Convergence Report stated that: “While recognising the need to protect commercially sensitive information, effective enforcement of competition laws in a global economy would be facilitated if appropriate mechanisms existed for the sharing of confidential information among competition law enforcement officials”.<sup>17</sup> In other words, competition enforcement would be more effective if protections for confidential information were included in a mechanism for sharing it. Information sharing was seen as “particularly important for the successful prosecution of international cartels, bid-rigging and similar anti-competitive practices which are covert, have highly negative economic effects and can correspond closely to criminal fraud”.<sup>18</sup>
- The Council’s 1995 revisions to its Recommendation on co-operation, suggested by the CLP, added provisions on how competition authorities might implement the long-standing call to co-ordinate their investigations and share information with each other. As examples of the information that competition authorities might share, the Recommendation listed 1) information obtained on a voluntary basis or in the public domain, 2) factual and analytical material from its files, and 3) information obtained on behalf of a foreign competition authority using compulsory process.
- Today, confidentiality restrictions continue in almost all circumstances to stand as an absolute bar to providing foreign competition authorities 1) any of the non-public, non confidential information that is acquired during an investigation, or 2) any confidential business information. The laws of almost all Members prohibit the sharing of almost all of the information described in the 1995 Recommendation, except for information in the public domain. Moreover, with exceptions involving sharing between Australia and New Zealand, the EC and its Member States, and Australia and the US, no competition authorities are authorised to use compulsory process on behalf of foreign authorities except in criminal cases.<sup>19</sup>

- Recently, however, a few Member countries have included protections for confidential information into a statutory mechanism that authorises information sharing with foreign competition agencies in appropriate circumstances. Various other countries are now considering this approach.

#### *General Observations Regarding Benefits and Costs*

As noted above and in the Recommendation itself, the benefits of co-operation in anti-cartel enforcement are clear, and sharing confidential information has benefited competition law enforcement when it has been used in the past. Given the limits of unilateral enforcement, it may be impossible for unilateral action by *any* single country to prove and to halt anticompetitive activity if the necessary documents and people are located in many different countries. The need for co-operation is most obvious when many countries may be harmed by conduct that none of them can remedy on their own, but co-operation may be essential to effective anti-cartel enforcement in other situations as well. Moreover, when several countries investigate the same conduct without at least sharing information and analysis, the total investigation costs are likely to be higher not only to taxpayers, but also to the targeted firms and to third parties. Finally, countries' unilateral attempts to obtain evidence located in a foreign country or to issue remedial orders in transnational cases have sometimes been a source of conflict among Member countries. Such conflict is costly in itself and also because it can both 1) impede the adoption of more effective and efficient collective approaches, and 2) increase the barriers to unilateral information gathering.

The benefits of sharing confidential information are also illustrated by the harm caused by competition agencies' inability to engage in such co-operation. The EC has pointed out that the inability to share confidential information is a significant impediment to effective anti-cartel enforcement, and the interest of the Nordic countries' competition authorities in seeking authorisation for such co-operation stemmed in significant part from their inability to investigate an apparent hard core cartel through unilateral action supplemented by sharing non-confidential information. *The US authorities believe that the absence of assistance from foreign authorities in sharing or securing evidence has impeded its ability to prosecute international cartels in several instances. In one instance, for example, the absence of assistance meant that the United States was unable to prosecute a major international cartel involving more than \$1 billion in commerce.* In another situation, the inability of two countries to share confidential information prevented co-ordinated action and thus gave a target of the investigation an opportunity to destroy relevant evidence.

Since requests to provide confidential information can be turned down if they impose undue direct costs or raise other policy concerns, the main potential costs of authorising information sharing are *a)* the risk that some confidential information will be disclosed or used improperly, and *b)* the risk that having such authority will

make it more difficult for a competition authority to obtain the information it needs for its needs in its purely domestic cases. After a brief discussion of some preliminary matters, each of these risks will be discussed.

#### *Past Record of Sharing Confidential Information in Competition Cases*

Sharing confidential information in competition cases is currently authorised only in very limited situations, but there have been many instances of sharing such information in those situations. A number of general observations are possible:

- EC Member States are not only permitted but required in various circumstances to share confidential information with the EC, and confidential information collected by the EC can in some situations be shared with Member States. Competition enforcement in the EU has been built on this system, and its benefits are obvious and substantial. The EC and its Member States have in fact protected the confidentiality of the shared information, and the fact that this information sharing exposes enterprises to additional charges and penalties does not appear to be an impediment to any authority's ability to gather information.
- Pursuant to MLAT agreements, confidential information may be shared in criminal competition cases, and although the process for use of letters rogatory has some disadvantages, it does provide a means of obtaining confidential information in some cases. Most MLAT-based co-operation has been between Canada and the US, and the US reports that it has successfully obtained confidential information through MLATs or letters rogatory from close to a dozen different countries. Again, the benefits to effective enforcement against hard core cartels are well known. Moreover, the Committee is not aware of either significant problems in protecting the confidentiality of the shared information, or harm to the authorities' ability to gather information.
- Confidential information may also be shared between Australia and New Zealand, and between Australia and the US. There has been little co-operation, in part because the agreement needed to permit it between Australia and the United States was signed only recently.

#### *The Benefits of Information Sharing to a Particular Country*

As noted above, even though the benefits of sharing confidential information in cases of mutual interest are recognised in the Hard Core Cartel Recommendation, some competition authorities are not certain that such information sharing would benefit them specifically. True, exchanging confidential information makes for more effective enforcement by competition authorities that in fact investigate actual international cartel cases, but what are the benefits to a competition authority that

has not done so? Stated in reciprocity terms, the question being asked by these authorities is whether they would receive reciprocal benefits for any assistance they provide.

There are a number of responses to this question:

- First, as a general policy matter, the benefits of information exchanges and other forms of co-operation should not be assessed by asking whether co-operation will produce tangible benefits in every instance. Rather, the focus should be on assessing the benefits to a country of its improved ability to obtain evidence, the benefits it receives from cases brought by foreign agencies using information the country has provided, and the overall benefits it receives from the reduction in hard core cartel activity.
- Second, since global integration is increasing the number of competition authorities with an interest in bringing at least some international cases, it seems likely that an increasing number of countries will conclude that the general benefits of information sharing would also benefit their individual law enforcement programs. Within the EU, the trend is reinforced by moves toward a more decentralised system in which national authorities can play a larger role in some international cases.
- Third, even if a competition authority engages only in purely domestic enforcement, it can benefit from receiving confidential information from a foreign agency in the following circumstances:
  - obtaining a “tip” from a foreign agency about previously unsuspected illegal domestic conduct;
  - obtaining information located abroad that is relevant to a domestic investigation; and
  - obtaining evidence establishing that domestic activity relating to an international cartel has violated domestic laws and caused domestic harm.

#### *The Risk of Improper Disclosure or Use of Confidential Information*

It is perhaps axiomatic that sharing confidential information to some extent increases the possibility that it may be improperly disclosed or used. However, in competition law enforcement and in other fields, the sharing of confidential information has been authorised and practised subject to many safeguards. In general, a country’s most important safeguard is the right to decline assistance on a case-by-case basis, which can be exercised whenever there appear to be unacceptable risks and can also be used to impose any conditions on assistance that are considered necessary to ensure adequate protection. This ability to

condition assistance provides not only protection but flexibility, which could be particularly useful for a competition authority that is just beginning an information-sharing regime. For example, although information sharing is most valuable when the information can be used as evidence, a requested authority could – at the outset of its program or in a particular case – decide that information may be read but not copied, or may not be used as evidence in a criminal (or any) case. Moreover, enabling legislation and/or implementing agreements providing for such co-operation also typically contain additional safeguards, such as definitions of “covered offences” and mandatory descriptions of “permitted uses”. The recent Australia/US mutual assistance agreement, for example, contains a variety of these kinds of safeguards, which have been used for many years by many Member countries to protect confidential information.<sup>20</sup>

As noted above, the applicable safeguards appear to have worked very well in the field of competition law enforcement. Moreover, they appear to have worked well in the securities, tax, customs, and criminal areas, where sharing confidential information is commonplace. In the securities area, where the program for sharing confidential securities information began in 1982 as a means to prevent conflict over “extraterritoriality”, the program has not only promoted effective enforcement while protecting confidential information, but contributed to substantive harmonisation of securities law.

It is sometimes suggested that the record of proper protection of confidential information in the past is not meaningful to assessing the risks of improper disclosure or use of confidential information in competition investigations. The usual basis for this argument is that confidential information in competition matters is “more confidential” than that in other areas because it is prospective – *i.e.*, relates to firms’ plans for the future. The argument is flawed in several important respects:

- First, the argument ignores the fact that a great deal of confidential information has been shared in the past in competition cases. Such sharing is routine between the EC and its member States, common under MLATs in criminal cases, and sometimes viable through letters rogatory. There is no evidence that there have been significant problems in protecting confidential information in those situations.
- Second, even if the information in competition matters were more confidential than securities or tax information, the excellent record of these other programs in preventing improper disclosure or use would be a powerful indication that international information sharing programs are able to protect against improper disclosure or use.

- Third, prospective information is in general more likely than historical information to be confidential, but there is no logical or other basis for the assertion that information in competition cases is more confidential than that in the other fields – either because it is prospective or for any other reason:
  - Prospective information is not necessarily more confidential than historical information; indeed, business secrets, as opposed to business plans, are historical.
  - Whether prospective or not, the information shared in the securities, tax, and criminal areas is sometimes highly confidential and may often be as or more confidential than that involved in competition cases.
  - Most requests for information sharing in hard core cartel cases are likely to relate to establishing the fact of an agreement; such information is historical and not confidential.

Moreover, delegates to the Committee have pointed out that in merger cases, which typically involve information that is much more confidential than that in hard core cartel cases, businesses increasingly make voluntary waivers of confidentiality protections in order to permit competition authorities to co-operate. This practice leads some to believe that confidentiality concerns about information sharing in cartel cases are often exaggerated, since businesses typically are viewed as having an economic incentive to expedite merger investigations but to slow down cartel investigations.

In terms of available protections, the only comparative information of which the Committee is aware relates to the protections available from the US securities agency and US competition authorities. The International Antitrust Enforcement Assistance Act clearly permits the US competition agencies to provide much greater assurances of protection than the securities agency can provide.<sup>21</sup>

#### *The Need and the Means to Protect Confidential Information*

Despite the Committee's disagreement with some arguments concerning the risks of improper disclosure or use and about the relative confidentiality of information in competition cases, the Committee has consistently agreed with the business community concerning the importance of protecting confidential information in any information sharing system. Moreover, a great deal of the business community agrees that confidential information can be protected and shared, and as discussed below it appears that most of the protections desired by the business community are present in the laws of, and the agreement between, Australia and the US.

In the Committee's consultation with BIAC, the main thrust of the BIAC presentation was the central importance of providing comparable "downstream protection" for confidential information. In other words, any requested information

– regardless of how confidential it may or may not be – should be shared only if there is adequate assurance that it will be subject to comparable protection in the requesting country. The BIAC representative considered this approach – essentially, the approach taken by Australia and the US – to be the most promising approach because legal protections are visible and able to be compared. In contrast, a system dependent on competition authorities’ assessment of the confidentiality of the requested information would be more subjective, and even an international definition of “business confidential information” would be meaningless in this context. It was also emphasised that in general the business community supports the Hard Core Cartel Recommendation. Although cartels may bring monopoly profits to businesses that engage in them, their principal victims may often be other businesses; thus, this is not a “business versus government” issue. For example, BIAC’s US affiliate, the US Council for International Business, supported enactment of the International Antitrust Enforcement Assistance Act, though it would have preferred that US authorities be required to provide notice to a firm or person before sharing confidential information it had submitted, and it still has reservations on this point.

The consultation with BIAC also touched upon issues relating to sanctions and co-operation. The BIAC representative noted a general and understandable concern that business not “pay twice” for the same harm, but documents BIAC submitted made the far broader claim that if an international cartel operates in and injures a great many countries, co-operative action by only a few countries would be sufficient to halt the cartel and impose adequate sanctions.<sup>22</sup> Indeed, it was suggested that penalties imposed by more than a few countries would be “rent-seeking”. In the Committee’s view, these arguments are logically flawed and incorrectly imply that hard core cartels can be deterred by fines that are significantly less than the illegal monopoly profits they have reaped. In addition to making competition enforcement more effective, co-operation can make it more efficient, reducing investigation costs for both governments and businesses. And prohibition orders by one or two countries may be sufficient to bring a particular cartel to a halt. However, since each country’s fines and other penalties generally take into account only its own harm, the members of a global cartel are likely to retain most of their monopoly profits if they are penalised by only a few countries. That is not the way to deter hard core cartels.

The consultation also contained some discussion of the International Chamber of Commerce’s March 1996 statement on sharing confidential information, as well as its May 1999 statement on sharing confidential information in merger cases. The ICC’s 1996 statement noted that its European members felt that convergence in competition law was not sufficient for enforcement co-operation to include sharing confidential information, whereas other members, especially in North America, did

not regard further convergence as a precondition for such co-operation. The statement went on to express the unanimous view of its members that any legislation providing for such co-operation should contain specified procedural safeguards, and as noted above most of these safeguards appear to exist in the Australian and US systems.

The ICC's principal recommendation was that confidential information be shared only after notice to its submitter unless doing so would jeopardise an investigation.<sup>23</sup> This recommendation has limited application to investigations of hard core cartels, because secrecy is generally essential in such matters and would often be jeopardised by notice. And it should be recognised that even if the existence and general nature of an investigation may be known to the company in question, notice may well jeopardise the investigation.<sup>24</sup> Moreover, no notice is required under MLATs, and it is unclear why there should be additional procedural requirements merely because a hard core cartel is investigated as a non criminal violation. Nor is notice required in connection with the sharing of confidential information between the EC and a Member State.<sup>25</sup>

#### *The Risk that Authority to Share Information May Make it More Difficult to Collect Information*

One issue that has concerned some Member countries is whether and to what extent being granted the authority to share confidential information would make it more difficult for them to collect information. The source of concern, in general, are warnings by business groups that their members are less likely to co-operate with investigations if the information they provide may be shared with other law enforcement authorities. The Committee considers this risk to be less substantial than some may have thought, particularly if one focuses the potential effects of authorising a competition agency to share information in hard core cartel cases.

Canada's experience is particularly relevant on this issue. Canada has always relied to a great extent on voluntary submissions of information in its competition investigations. Because of its MLAT with the US, Canada already can share confidential information with the jurisdiction that *a)* has the severest sanctions and *b)* is important to many Canadian businesses. In these circumstances, Canada's continuing ability to obtain information on a voluntary basis is an indication, with respect to Canada and more generally, that authorising information-sharing in hard core cartel cases may not hinder competition authorities' ability to collect information. It is also noteworthy that neither Australia nor the US has reported any increased difficulty in obtaining information as a result of their mutual assistance legislation and agreement, and this has not been a significant issue either within the EC or in the international information programs that exist in other fields. Finally, the Nordic competition authorities have clearly concluded that any risks are outweighed by the benefits.

To some degree, assessing the likely impact of confidential information sharing on authorities' ability to collect information is a function of the risk, discussed above, that sharing information to a wider group inevitably increases the risk of improper disclosure or use to some extent. Since the available evidence suggests that in practice confidential information has been able to be shared and protected, the Committee believes that if Member countries incorporate confidentiality protections into an information sharing program, the theoretical increase in the risk of improper disclosure or use is generally unlikely to have a substantial impact on businesses' co-operation with competition authorities.

Moreover, the Committee notes that there has been a great deal of convergence with respect to hard core cartels, some of which is reflected in the Hard Core Cartel Recommendation itself. This convergence relates to competition laws' substantive and remedial provisions,<sup>26</sup> and it appears that the differences that do remain can be dealt by competition authorities on a case-by-case basis.<sup>27</sup> Under these circumstances, and given global integration that is increasing enterprises' multinational presence, the differences in Member countries' laws appear increasingly less likely to lead enterprises to resist co-operation with one authority because the information may be shared with another. However, to the extent that this risk is perceived as being a substantial barrier in any country that would otherwise desire to engage in deeper co-operation, it appears that there may be a simple way to eliminate this risk while making a significant step towards greater co-operation – retain the ban on sharing confidential information in its agency's files, but authorise the agency to use compulsory process on behalf of foreign competition authorities, provided that the agency gives prior notice of the purpose for which it is gathering the information.

#### *The Benefits and Costs of Authorising Agencies to Use Compulsory Process in Gathering Information on Behalf of a Foreign Competition Agency*

Especially in hard core cartel cases, compulsory process is a crucial investigative tool. Thus, there are substantial benefits to authorising the use of compulsory process to gather information on behalf of foreign competition authorities. Information gathering and sharing in this context is useful as a complement to sharing existing file information, and as suggested above it could be a "first step" or an alternative for any country that is particularly concerned that authorisation to share file information would significantly harm its competition agency's ability to collect information. The existing flat bans – by denying an agency the ability to use compulsory process on behalf of a foreign authority even when doing so would benefit both countries – impose costs on both the country with the ban and countries seeking assistance.

### *Future Work On Information Sharing*

Despite recent actions in some Member countries, there is no reason to expect a swift and universal end to bans on sharing non-confidential information, or to exchanging confidential information in appropriate circumstances. The Committee's future work will, to the extent possible, focus more closely on the benefits and costs of various alternatives. In the past, there has been a tendency in many quarters to discuss information sharing in bi-polar terms: should there or should there not be exchanges of confidential information? In fact, there are degrees of information sharing, degrees of confidentiality, and there are different ways to address the relevant issues. Since the Committee is focused on voluntary co-operation, **all of the possible models discussed below assume that confidential information cannot be shared unless there is some sort of finding that doing so is in the national interest.**

- **Comparable downstream protection.** Under this approach, a country authorises the sharing of confidential information with a foreign agency on the basis of a general finding that the requesting agency's country provides comparable protections to any shared information and a case-by-case finding that adequate protections exist for the particular information being sought. A binding mutual assistance agreement or treaty may be required to assure the adequacy of the protections. Australia and the US both took such an approach, and BIAC has suggested that this approach may be preferable from a business point of view because it does not depend on fine judgements made in characterising the confidentiality of information.
- **Violation-based co-operation.** Under this approach, a country might authorise the sharing of confidential information only in hard core cartel cases. Again, there would need to be a test for the adequacy of protections for confidential information, which could be the "downstream protection" test or a modification thereof. In effect, this would be similar to an MLAT but for non-criminal and criminal cases. Of course, competition authorities are generally interested in information sharing for their investigations of mergers and other conduct that does not constitute a hard core cartel, but a violation-based approach might be attractive to some countries as a moderate enhancement of co-operation.
- **Confidentiality-based co-operation.** Under this approach, a country would authorise exchanges of all but information that meets whatever standard of confidentiality it considers appropriate. Confidentiality risks and protections would be minimal. Of course, competition authorities are generally interested in receiving confidential information as well, but a confidentiality-based approach might be attractive as a modest enhancement of co-operation.

- **Common standards co-operation.** The downstream protection model requires that similar protections be available in both countries, but none of the foregoing approaches would require that countries adopt common standards with respect to what is confidential or the elements of a particular competition violation. An alternative would be to agree to share information in cases that met commonly defined standards or to share only information that meets a common definition of “sharable information”. However, agreeing to common standards could be very difficult, and the resulting system apparently be less flexible.

The Committee intends to give further consideration to these and any other options, and notes that even if a particular option seems impractical, discussion of the underlying issues may have value. For example, even if an OECD definition of “business or trade secrets” would not be useful in establishing an information sharing program, consideration of different countries’ confidentiality definitions and procedures could have educational value.

### **3.6. Conclusion**

The Committee intends to promote effective action against hard core cartels as vigorously as its resources permit. The Committee’s choice among particular projects will be made on a pragmatic basis in light of developments within and outside the Committee, and will seek to explore options that take into account Member countries’ differing levels of experience with anti-cartel activity and with international co-operation. The criterion for all such choices may sometimes be difficult to apply but is simple to articulate – what work by the Committee is most likely to provide the greatest benefits to promoting effective action to halt and deter hard core cartels?

## Notes

1. In its presentation to the International Competition Policy Advisory Committee that has been established to provide advice to USDOJ, the Department's Antitrust Division stated that since October 1996, the international cartels it had prosecuted affected well over US\$10 billion *in US commerce*, and that those cartels have cost US businesses and consumers many hundreds of millions of dollars annually.
2. *Id.* The \$1 billion overcharge figure reflects the US Department of Justice estimate that on average cartels produce a 10 per cent price increase for \$10 billion in affected commerce.
3. One roundtable examined exclusionary boycotts – agreements among competitors to refuse to deal with suppliers or customers if they do business with an existing or potential competitor of the parties. Such agreements are regarded by many as “hard core”, and while others prefer not to apply this characterisation, such agreements are generally treated as serious violations. Moreover, “boycotts” that reflect an agreement among competitors to refuse to deal except on commonly set price, quality, or quantity terms will often be treated as “hard core” price fixing or output restriction. The committee also held roundtables on the benefits and risks of gathering and exchanging confidential information, “positive comity” as a method of enforcement co-operation, and leniency programs as a means to discover and prove the existence of cartels.
4. The CLP's Interim Report on Convergence of Competition Policies [OCDE/GD(94)64] (“Convergence Report”), Annex para. 28.
5. When CLP work on a Recommendation concerning hard core cartels was initially proposed, the concept was to focus directly on the laws that so restrict the gathering and sharing of information. The purpose of the project was described as being to improve the effectiveness and efficiency of Members' law enforcement against hard core cartels by removing the legal restrictions that deny competition agencies the authorisation, granted in other fields, to provide effective investigative assistance to foreign competition agencies upon a finding that such assistance would not be inconsistent with their own countries' interests. The contemplated investigative assistance included using compulsory process on behalf of, and providing currently nondisclosable information to, foreign authorities. The concept of a Recommendation focusing directly on those laws was problematic for some Member countries, however, and rather than spend time seeking consensus on that point the CLP decided to make the Recommendation more general, and to provide information and analysis of those laws in CLP reports.
6. In 1998, for example, the Norwegian authority started a journal profiling competition policy, a *multilingual* home page containing substantial information, and a new series of reports on the authority's activities.

7. The Recommendation's definition of hard core cartel refers to four specific but undefined types of agreements and incorporates the law of each Member to whom it is addressed; thus, the definition varies along with differences in Members' laws and changes in each Member's law.
8. The Bundeskartellamt imposed DM 265 million in fines on 13 power cable manufacturers, two cable associations, and 23 individuals. The cartel allocated each firm a share of the overall market and quotas for specific customers. Using a complex system involving price fixing, rebates, and "steering" customers, the cartel ensured that each firm got its predetermined share. Five working groups of industry members made the decisions, a trade association organised the meetings, and a special joint venture did the necessary accounting. Though some people say that cartels are inherently unstable, this cartel lasted for decades.

In other cases shortly before the Hard Core Cartel Recommendation was adopted, the Italian competition authority's 1997 actions against hard core cartels included fines totaling almost 1.5 trillion lire for price fixing in the concrete industry, as well as fines of approximately 38 billion lire for fixing the price of glass containers for storing food. After establishing a Cartels Task Force with a 24-hour telephone/fax hotline, the UK Office of Fair Trading brought more cartel cases, including cases involving price fixing in protective polyester film for glazing, ready-mixed concrete, and hi-tech lab filters used by hospitals and by major chemicals and food and drink companies. In announcing the cases, the OFT emphasised that they demonstrate the need for new legislation to permit quick and forceful action against hard core cartels. A February 1998 penalty ordered by the Australian competition authority brought the total penalties in related price fixing cases in the concrete business to over A\$ 21 million.
9. The term "communication deficit" was used by OECD Secretary General Donald J. Johnston in a February 1998 speech that noted declining support for trade and investment liberalisation and challenged Member countries' officials to promote greater understanding of the relevant issues.
10. Committee work in this area might begin with consideration of the extent to which uncertainty in this area constitutes a serious problem and perhaps evolve into a report on how each country interprets each of the four violations. To clarify the differences among Members' competition authorities, the Secretariat could seek written responses from each authority as to how it would analyse each of perhaps ten or so hypotheticals. Such a report could consist only of summaries of each authority's approach or could be expanded to include some sort of "best practice" suggestions.
11. For a Member country to follow the Recommendation's urgings, it only needs to know the elements of a violation of its own laws. If an OECD "definition" sought to capture the differences among Members' laws, it would be less a definition than a compendium, and if it did not capture those differences it would have no operational utility and could be misleading.
12. As an example of changing law and policy, it is noteworthy that under Denmark's old law, the competition authority repeatedly ordered the opticians' association to halt a boycott against an optician that sold by mail, but despite repeated violations, no sanctions were ever ordered. Today, the Danish authority has greater powers and a willingness to use them.

13. The six countries with criminal sanctions for enterprises and individuals include Canada, Ireland, Japan, Korea, Norway, and the US. The three with criminal sanctions for individuals only are France, Greece, and Switzerland.
14. In the case of the United Kingdom, this lack of authority is partially compensated for by the Criminal Justice (International Co-operation) Act of 1990, which allows the Secretary of State to nominate a court to receive oral or written evidence. This procedure has not been used in competition enforcement cases.
15. In addition to the Committee's work, other studies have also noted the benefits of information sharing and have not regarded it as incompatible with protecting confidential information. In particular, the July 1995 Report of the Group of Experts to the European Commission ("Experts' Report") observed that "the ban on exchanging confidential information has created a major obstacle to close co-operation" between the EC and the US, and that bilateral agreements could lead to closer co-ordination "if the confidentiality constraint were lifted, even if only in part". Experts' Report at 7, 14. The Group considered that "co-operation should as a priority be taken further", offering the view that this "implies a commitment by the parties not to act unilaterally unless all the means provided by comity have been exhausted; it also implies, on a reciprocal basis, the elimination of current obstacles relating to confidentiality rules, applicable to exchanges of information". *Id.* at 14. Among other things, "there should be a deepening of bilateral Agreements (*i.e.* to include the possibility of exchanging confidential information and to strengthen the use of the positive comity instrument)". *Id.* at 21.  
 In 1994, a consultant's report to the Working Party noted the continuing inability of competition authorities to share the "most helpful" information because of confidentiality laws. The Secretariat concluded in 1995 that "[it] seems highly problematic that significantly enhanced co-operation could exist without the ability to share, with appropriate safeguards, confidential information". Another report stated that "[t]he main opportunities for gains [from co-operation] come from co-ordination of information requests and from agencies assisting each other to gather information, irrespective of how they go about doing so". Donald I. Baker, A. Neil Campbell, Michael J. Reynolds, J. William Rowley, *Harmonization of International Competition Law Enforcement*, Global Forum on Competition and Trade Policy (1995) ("Global Forum") at 17.
16. Competition Law Enforcement: International Co-operation in the Collection of Information, OECD, 1984 ("Information Collection Report"), para. 173.
17. Convergence Report, *supra* No. 4, para. 52.
18. *Id.* para. 53. The Committee noted that a "major element" of its future work would be continuing assessment of the potential for greater sharing of and assistance in obtaining confidential information, using as a point of reference the exchanges of sensitive information between governments which take place in such areas as taxation, securities law and money laundering...". *Id.* para. 14 (emphasis in original).
19. Letters rogatory and letters of request under the Hague Convention of 1970 provide additional options in some situations, but all have limited applicability and usefulness. *An unusual statutory provision in the United Kingdom is noted in No.15, supra.*
20. The safeguards in the Australia/US co-operation agreement begin in Article I, which defines the covered laws. In this agreement the definition is a broad one, but the definition of covered laws (or covered offenses) could be used by a Member to exclude a controversial legal provision from the agreement. Article III, Requests for Assistance, has two main requirements. First, there must be a general description of the subject matter

and nature of the investigation, with an identification of the persons being investigated and citations to the applicable laws; the description must be detailed enough to explain how the subject matter of the request relates to the violation. Second, there must be an explanation of the purpose for which the information is sought and its relevance to the investigation. A request by the US must state whether criminal proceedings are contemplated and, if not, provide written assurance that the information will not be used in criminal proceedings. The request must also provide a written assurance that there have been no significant modifications to the requesting party's confidentiality laws.

Additional safeguards are contained in Article IV, Limitations on Assistance, which provides for denial of assistance for public interest and other specified reasons, and Article VI, Confidentiality, which provides for confidential treatment of shared information. Article VII, Limitations on Use, is clearest if one begins with Paragraph B, which governs the use and disclosure of shared information for antitrust enforcement purposes. In antitrust cases, shared information may be used only in the investigation and for the purpose specified in the request, except with prior written consent to a different disclosure or use. Paragraph A states that shared information may be used or disclosed only for antitrust enforcement purposes, except as provided in Paragraphs C and D. Paragraph C provides that shared information may be used or disclosed to enforce other laws only if it is "essential to a significant law enforcement objective" and the requested party has provided prior written consent. Paragraph D covers evidence that is introduced at trial. There is also a provision, Article XI, that requires return of shared information after the conclusion of the investigation or case.

21. The IAEEA authorises US competition authorities to use compulsory process to collect information on behalf of, and share confidential information with, foreign authorities that can and do enter into binding and reciprocal agreements that meet statutory requirements protecting the legitimate interests of enterprises and of the US. The IAEEA flatly forbids any disclosure of information in violation of an IAEEA agreement, whereas the securities agency may be obliged to provide information in its possession to other government entities in some circumstances.
22. The argument was made in essentially these terms by the US Council *for International Business*. BIAC's Mexican affiliate, COPARMEX, also expressed concern about "opportunistic" cases by countries that suffered only "spillover" harm, suggesting that if action had been taken by the countries that had suffered greater harm, any additional fines or other penalties would be "excessive and rent-seeking".
23. The statement also raised a number of more technical suggestions dealing with issues of solicitor-client privilege and enforcement immunity, as well as a list of the information and assurances the requesting authority should be required to provide in its request. The identified issues are legitimate, and the recommended assurances are quite similar to rules in existing co-operation agreements, with the most significant difference being that the ICC recommended that competition authorities be denied authority to disclose shared information to anyone outside the receiving authority, even with the consent of the requested authority. Existing bilateral agreements usually take a more flexible approach, permitting disclosure outside the requesting agency with the consent of the requested agency.
24. The relevant issues are clearer, perhaps, in a somewhat similar suggestion the US Council recently made to the International Competition Policy Advisory Committee. The Council called for notice "in all cases except those involving a) certain types of cartel

behaviour, *b*) the national security of the United States, or *c*) other identified circumstances where the enforcement interests of the United States would be specifically and substantially compromised by notification". In discussing this suggestion, the Council suggested that notification should occur, for example, "when the existence and general nature of an investigation may be known to the company in question". Competition officials do not believe that such knowledge would necessarily mean notice would not jeopardise an investigation.

25. The lack of a notice requirement in MLATs is very relevant to analysis of whether there should be such a requirement in connection with the transmittal of information between two countries in non criminal investigations, but the lack of a notice requirement in the context of the EC and its Member States is less so.
26. As noted above, the Committee recognises that even the relatively small difference in Member countries' laws with respect to hard core cartels may create some uncertainty for firms, and if that uncertainty is truly a substantial problem it is one that the Committee could address directly. The US's treble damage remedy remains unique in form, but at least with respect to hard core cartels, which are so clearly harmful and so difficult to detect, other competition authorities accept the proposition that remedies must do more than compensate victims. Moreover, as noted above, the availability and use of criminal penalties has also been increasing.
27. Co-operation agreements traditionally permit denial of co-operation requests that impinge on national interests because of differential sanctions or any other reasons.

## Annex A

## Sanctions for Hard Core Cartels

Country	Sanctions
<b>Australia</b>	<ul style="list-style-type: none"> <li>• Pecuniary penalty (non-criminal) of A\$ 10 million for corporations (A\$ 750 000 for a secondary boycott offence) and A\$ 500 000 for individuals, per offence.</li> <li>• Injunctions.</li> <li>• Damages (may only be sought through private action in a Court by a person who has suffered loss as a result of a contravention).</li> <li>• Ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct (including specific performance and rescission and variation of contracts).</li> </ul>
<b>Austria</b>	<ul style="list-style-type: none"> <li>• Criminal liability for individuals.</li> <li>• For enterprises: additional fines up to 10 million ATS.</li> <li>• Civil law sanctions: <i>a</i>) voidness of the agreement; <i>b</i>) damages; <i>c</i>) remittance of illegally earned profits.</li> </ul>
<b>Canada</b>	<ul style="list-style-type: none"> <li>• Fine up to C\$ 10 million, jail term up to five years, or both.</li> </ul>
<b>Czech Republic</b>	<ul style="list-style-type: none"> <li>• Fine up to CSK 10 million or up to 10 per cent of the net turnover recorded over the last complete calendar year.</li> </ul>
<b>Denmark</b>	<ul style="list-style-type: none"> <li>• Fine, must be imposed by a Court, but the law does not provide for a maximum. The Authority is working with the prosecutor's office to develop ways to make applicable fines follow EU rules (fines proportionate to turnover).</li> </ul>
<b>EU</b>	<ul style="list-style-type: none"> <li>• Fine up to 10 per cent of previous year's turnover of the firms involved.</li> </ul>
<b>Finland</b>	<ul style="list-style-type: none"> <li>• Penalty payment (competition infringement fine) of FIM 5 000 to FIM 4 million; the fine may be higher, but no more than 10 per cent of the previous year's turnover of the firms involved.</li> </ul>
<b>France</b>	<ul style="list-style-type: none"> <li>• Pecuniary sanctions up to 5 per cent of the previous year's turnover realised in France, exclusive of tax (enterprises).</li> <li>• <i>Criminal sanctions (individuals only)</i>: fines up to FF 10 million.</li> </ul>

Country	Sanctions
<b>Germany</b>	<ul style="list-style-type: none"> <li>• Wilful or negligent violations: fine up to DM1million and, in addition, up to three times the additional proceeds obtained as a result of the violation (which may be estimated).</li> <li>• Agreements violating the law are void.</li> <li>• Damages arising from the violation.</li> <li>• Collusive tendering: up to five years imprisonment or a fine.</li> </ul>
<b>Hungary</b>	<ul style="list-style-type: none"> <li>• Fine, no maximum, amount depends on various factors including gravity of the violation, its duration, benefit gained, market positions of the violators and repeated violation (maximum to date is HUF 388 million, but it has not been collected).</li> </ul>
<b>Ireland</b>	<ul style="list-style-type: none"> <li>• Criminal conviction: fine of up to IR£ 3 million or 10 per cent of turnover, whichever is greater, for an undertaking; same level of fine, plus imprisonment for up to 2 years, for an individual.</li> <li>• Civil cases: declaratory and injunctive relief. Damages, including exemplary damages, may be sought by a person aggrieved by a contravention.</li> </ul>
<b>Italy</b>	<ul style="list-style-type: none"> <li>• Fine, amount depends on gravity and duration of the violation, no less than 1 per cent and no more than 10 per cent of the turnover of each undertaking or entity during the prior financial year from the products forming the subject matter of the agreement.</li> </ul>
<b>Japan</b>	<ul style="list-style-type: none"> <li>• Administrative surcharge, up to 6 per cent (in principle) of the cumulative sales of the goods and services forming the subject of the agreement for the duration of the agreement, except if the duration exceeds three years, the period for three years retro-active from the date on which the conduct ceased (entrepreneur).</li> <li>• Criminal fine up to ¥ 100 million (entrepreneur); imprisonment up to three years or fine up to ¥ 5 million (persons).</li> <li>• Damages (may be sought through private action in a Court by a person, a firm, or government agency that has suffered loss as a result of a contravention either under civil law or the Antimonopoly Act; under the AMA, a private suit may follow a decision by the JFTC finding a defendant to have violated the Act, and its decision becomes prima facie evidence of a violation in the private suit.</li> </ul>
<b>Korea</b>	<ul style="list-style-type: none"> <li>• Surcharge up to 5 per cent of the turnover set forth in the Presidential Decree; where there is no revenue, up to KRW 1 billion.</li> <li>• Criminal violation: imprisonment up to three years or fine up to KRW 200 million.</li> <li>• Order to cease and desist, a public announcement of the violation by the enterprise, or any other necessary corrective measure. Failure to comply with the corrective measure is punishable by imprisonment up to two years or a fine up to KRW 150 million.</li> </ul>

Country	Sanctions
<b>Mexico</b>	<ul style="list-style-type: none"> <li>• Fine for enterprises up to 375 000 times the minimum general wage prevailing in Mexico City, which in February 2000 amounts to approximately US\$1.5 million; for individuals, fine up to 7 500 times the minimum general wage prevailing in Mexico City (approx. US\$30 000).</li> <li>• Order the suspension, rectification or elimination of the practice.</li> </ul>
<b>Netherlands</b>	<ul style="list-style-type: none"> <li>• Administrative fine not to exceed the higher of NLG 1 million or 10 per cent of the turnover of the undertaking or, if the infringement is committed by an association of undertakings, of the combined turnover of the undertakings that are members of the association, in the financial year preceding that in which the fine is imposed.</li> <li>• Order sanctioned by (periodic) penalty payments – orders of up to two years may be issued to nullify the infringement or further infringements, or to prevent occurrence of the infringement.</li> <li>• Both of the above sanctions may be imposed in a single case.</li> </ul>
<b>New Zealand</b>	<ul style="list-style-type: none"> <li>• Pecuniary penalties up to NZ\$ 500 000 (individuals) or NZ\$ 5 000 000 (body corporate).</li> <li>• Injunction restraining a person from engaging in conduct that constitutes hard core cartel activity, or attempting to engage in such activity, or aiding or inducing any other person, or conspiring, or being knowingly concerned in hard core cartel activity.</li> <li>• Liability for damages for loss or damage caused by the person engaging in conduct as mentioned above</li> <li>• Where the court finds that a person has suffered, or is likely to suffer, loss or damage by the engagement of another person in hard core cartel activity, the court may make such orders as it thinks appropriate against the person who engages in the conduct.</li> </ul>
<b>Norway</b>	<ul style="list-style-type: none"> <li>• Criminal sanctions (for individuals): fines and imprisonment up to six years.</li> <li>• Penalty payments (for legal entities) can be imposed until the violation persists.</li> <li>• Writ to relinquish cartel gains (never used so far). Under the Criminal Code (Section 34) the Court can also order confiscation of the cartel gains.</li> </ul>
<b>Poland</b>	<ul style="list-style-type: none"> <li>• Order to relinquish practices violating the law.</li> <li>• Contracts concluded in violation of the law are null and void.</li> <li>• Order a price reduction for a specified period and (if illegal gains can be determined) the payment of the illegal gains plus an additional amount. In the event that undue and additional amounts are not specified, fine up to 1/12 of the entrepreneur's revenue; where there is no revenue (such as for trade associations), fine up to 50 times the average salary.</li> </ul>

Country	Sanctions
<b>Spain</b>	<ul style="list-style-type: none"> <li>• Fine up to ESP 150 million (economic agents, companies, associations, unions or groups), can be increased up to 10 per cent of total sales for the fiscal year preceding the Tribunal's decision.</li> <li>• If the offending party is a legal entity, then an additional fine up to ESP 5 million imposed on the legal representative or the persons constituting the administrative bodies that participated in the agreement.</li> <li>• Order to cease the prohibited conduct or remove the effects of an infringement; if not complied with, then coercive fines ESP 10 000 to ESP 500 000 can be imposed, renewed for the periods of time sufficient to comply with the order.</li> </ul>
<b>Sweden</b>	<ul style="list-style-type: none"> <li>• Intentional or negligent infringement by an undertaking, fine up to 10 per cent of the annual turnover of the undertaking.</li> <li>• Order to terminate the infringement, under penalty of a fine.</li> <li>• Remedies in civil law.</li> <li>• Specific clauses or whole agreement are void.</li> <li>• If an undertaking intentionally or negligently infringes, it is liable for damages to other undertakings for the financial injury incurred.</li> </ul>
<b>Switzerland</b>	<ul style="list-style-type: none"> <li>• Administrative sanctions (for undertakings): fines up to three times the illegal gain, or (if the latter cannot be determined) up to 10 per cent of the previous year's turnover realised in Switzerland (Art. 50 Acart).</li> <li>• Criminal sanctions (for individuals): fines up to CHF 100 000 (Art. 54 Acart). (Administrative and criminal sanctions are only applicable in case of non-compliance with an amicable settlement, a decision by the competition authorities).</li> <li>• Remedies in civil law: <i>a)</i> removal or cessation of the restriction; <i>b)</i> damages and reparations; <i>c)</i> remittance of illicitly earned profits (Art. 12 Acart).</li> </ul>
<b>Turkey</b>	<ul style="list-style-type: none"> <li>• Fines at least TRL 200 million (undertakings and associations of undertakings) and up to 10 per cent of the gross income in the prior fiscal year, as calculated by the Board (individuals or legal entities with the status of an enterprise and associations of undertakings and/or the members of those associations)</li> <li>• In cases where the fines stated above are imposed on the legal entity undertakings and associations of undertakings, a fine up to 10 per cent of that fine is imposed on the individuals personally who are in the management organs of these legal entities.</li> </ul>

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Country	Sanctions
<b>United-Kingdom</b>	<ul style="list-style-type: none"><li>• Failure to abide by an order constitutes contempt of court, as such punishable by fines or imprisonment.</li><li>• From 1 March 2000, fines up to 10 per cent of UK turnover (undertakings) for the duration of the infringement, up to a maximum of three years, and liability for damages claimed by third parties in the courts.</li></ul>
<b>United States</b>	<ul style="list-style-type: none"><li>• Criminal violations: fines up to the larger of <i>a</i>) US\$10 million (corporations) and US\$350 000 (others), or <i>b</i>) twice the amount gained from the violation or lost by the victim, and imprisonment up to three years.</li><li>• Private parties can make claims in court for injunctions, three times the damages suffered and reasonable attorney's fees; if a private suit follows a government action in which the defendant was found liable, the earlier judgement is <i>prima facie</i> evidence of a violation.</li></ul>

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*Annex B*

## **Nature of Co-operative Information Gathering and Sharing – Two Illustrative Co-operation Agreements**

The recent agreement between Australia and the United States contains a description of the contemplated assistance that is particularly relevant and important because it provides for all of the kinds of co-operation being considered by the Committee, though the agreement applies to all competition matters rather than just hard core cartels. Article II, Object and Scope of Assistance, expresses an intent to “co-operate on a reciprocal basis in providing or obtaining antitrust evidence”; contains conditional agreements to provide each other with “tips” about potentially illegal conduct and to keep each informed about the progress of investigations for which assistance has been provided; and recites that nothing in the agreement requires action inconsistent with the parties’ respective Mutual Assistance Legislation. Then, Paragraph E provides that:

Assistance contemplated by this Agreement includes but is not limited to:

1. Disclosing, providing, exchanging, or discussing antitrust evidence in the possession of an Antitrust Authority.
2. Obtaining antitrust evidence at the request of an Antitrust Authority of the other party, including:
  - a) taking the testimony or statements of persons or otherwise obtaining information from persons;
  - b) obtaining documents, records, or other forms of documentary evidence;
  - c) locating or identifying persons or things; and
  - d) executing searches and seizures;and disclosing, providing, exchanging, or discussing such evidence; and
3. Providing copies of publicly available records, including documents or information in any form, in the possession of government departments and agencies of the national government of the Requested Party.

Paragraph F further provides that “[a]ssistance may be provided whether or not the conduct underlying the request would constitute a violation of the antitrust laws of the Requested Party”. Article IX, Taking of Testimony and Production of Documents, contains some additional relevant provisions, including one conditionally providing for a representative of the Requesting Party to be present during the questioning of a witness and to question the witness, and another dealing with the procedures to be followed when a Requesting Party asks the Requested Party to “facilitate the appearance in the Requesting Party’s territory of a person located in the territory of the Requested Party for the purpose of being interviewed or giving testimony”.

As an example of a somewhat different approach, outside the competition area, the Memorandum of Understanding between the US Securities and Exchange Commission and Commodity Futures Trading Commission and the United Kingdom Department of Trade and Industry and Securities and Investments Board describes the anticipated assistance as including:

- a)* providing access to information in the files of the requested Authority;
- b)* questioning or taking the testimony of persons designated by the requesting Authority;
- c)* obtaining specified information and documents from persons;
- d)* conducting compliance inspections or examinations of Investment or Futures Businesses;
- e)* permitting the representatives of the requesting Authority to participate in the conduct of the enquiries made by the requested Authority...

The agreement also provides that “[s]uch assistance will be provided even where the subject matter of the request for assistance does not constitute a violation of the laws, regulations and requirements of the requested Authority”.

The above-quoted provisions are all articulated in terms of assistance by one party to another, but they are necessary and sufficient to provide for the kinds of exchanges that are needed in joint investigations.

## Recommendation of the Council Concerning Effective Action Against Hard Core Cartels

*(adopted by the Council at its 921st Session on 25 March 1998 [C/M(98)7/PROV])*

THE COUNCIL,

Having regard to Article 5*b*) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to previous Council Recommendations' recognition that "effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports" [C(86)65(Final)]; and that "anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries" [C(95)130/FINAL];

Having regard to the Council Recommendation that exemptions from competition laws should be no broader than necessary [C(79)155(Final)] and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways" [C/MIN(97)10];

Having regard to the Council's long-standing position that closer co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade, and its recommendation that when permitted by their laws and interests, Member countries should co-ordinate investigations of mutual concern and should comply with each other's requests to share information from their files and to obtain and share information obtained from third parties [C(95)130/FINAL];

Recognising that benefits have resulted from the ability of competition authorities of some Member countries to share confidential investigatory information with a foreign competition authority in cases of mutual interest, pursuant to multilateral

and bilateral treaties and agreements, and considering that most competition authorities are currently not authorised to share investigatory information with foreign competition authorities;

Recognising also that co-operation through the sharing of confidential information presupposes satisfactory protection against improper disclosure or use of shared information and may require resolution of other issues, including potential difficulties relating to differences in the territorial scope of competition law and in the nature of sanctions for competition law violations;

Considering that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others; and

Considering that effective action against hard core cartels is particularly important from an international perspective – because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive – and particularly dependent upon co-operation – because they generally operate in secret, and relevant evidence may be located in many different countries;

- I. RECOMMENDS as follows to Governments of Member countries:
  - A. CONVERGENCE AND EFFECTIVENESS OF LAWS PROHIBITING HARD CORE CARTELS
    1. Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:
      - a) effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and
      - b) enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.
    2. For purposes of this Recommendation:
      - a) a “hard core cartel” is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;
      - b) the hard core cartel category does not include agreements, concerted practices, or arrangements that *i*) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, *ii*) are excluded

directly or indirectly from the coverage of a Member country's own laws, or *iii*) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

## B. INTERNATIONAL CO-OPERATION AND COMITY IN ENFORCING LAWS PROHIBITING HARD CORE CARTELS

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anti-competitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests.

2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:

- a) the common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country's laws, regulations, and important interests;
- b) to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;
- c) a Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;
- d) Member countries should agree to engage in consultations over issues relating to co-operation.

In order to establish a framework for their co-operation in dealing with hard core cartels, Member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.

3. Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

4. The co-operation contemplated by this Recommendation is without prejudice to any other co-operation that may occur in accordance with prior Recommendations of the Council, pursuant to any applicable bilateral or multilateral agreements to which Member countries may be parties, or otherwise.

II. INSTRUCTS the Competition Law and Policy Committee:

1. To maintain a record of such exclusions and authorisations as are notified to the Organisation pursuant to Paragraph I. A 2*b*).

2. To serve, at the request of the Member countries involved, as a forum for consultations on the application of the Recommendation; and

3. To review Member countries' experience in implementing this Recommendation and report to the Council within two years on any further action needed to improve co-operation in the enforcement of competition law prohibitions of hard core cartels.

III. INVITES non-Member countries to associate themselves with this Recommendation and to implement it.

OECD PUBLICATIONS, 2, rue André-Pascal, 75775 PARIS CEDEX 16  
PRINTED IN FRANCE  
(00 2000 53 1 P) – No. 80759 2000