REPORTS

# Global Forum on Competition

## Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity

## 2004

## Introduction

This publication includes the documentation presented at the first three meetings of the Global Forum on Competition held in Paris (2001 to 2003).

## Overview

This report seeks to synthesise and place in context the important themes, facts, and insights that emerged in the first three meetings of the Global Forum on Competition. The GFC, which is part of the OECD's programme of dialogue and co-operation with non-OECD partner economies, has become an important vehicle for helping to strengthen the foundation for stronger competition cultures around the globe. The GFC is achieving this by: (i) facilitating dialogue at the global level on topical competition law enforcement and broader competition policy issues of interest to both developed and developing economies, (ii) providing a channel for the dissemination and discussion of OECD best practices, and (iii) helping to cultivate networks of government officials that span the five continents.

## Related Topics

Global Forum on Competition (2001, 2002, 2003, 2004, 2005 and 2006)
Peer Review of Chinese Taipei (2006)
Prosecuting Cartels without Direct Evidence of Agreement (2006)
Peer Review of Turkey (2005)
Peer Review of Russia (2004)
Peer Review of South Africa (2003)

# OECD Global Forum on Competition

## PREVENTING MARKET ABUSES AND PROMOTING ECONOMIC EFFICIENCY, GROWTH AND OPPORTUNITY

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Centre for Co-operation with Non-Members
Directorate for Financial and Enterprise Affairs

# ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- to contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and the Slovak Republic (14h December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

# OECD CENTRE FOR CO-OPERATION WITH NON-MEMBERS

The OECD Centre for Co-operation with Non-members (CCNM) promotes and co-ordinates OECD's policy dialogue and co-operation with economies outside the OECD area. The OECD currently maintains policy co-operation with approximately 70 non-member economies.

The essence of CCNM co-operative programmes with non-members is to make the rich and varied assets of the OECD available beyond its current membership to interested non-members. For example, the OECD's unique co-operative working methods that have been developed over many years; a stock of best practices across all areas of public policy experiences among members; on-going policy dialogue among senior representatives from capitals, reinforced by reciprocal peer pressure; and the capacity to address interdisciplinary issues. All of this is supported by a rich historical database and strong analytical capacity within the Secretariat. Likewise, member countries benefit from the exchange of experience with experts and officials from non-member economies.

The CCNM's programmes cover the major policy areas of OECD expertise that are of mutual interest to non-members. These include: economic monitoring, statistics, structural adjustment through sectoral policies, trade policy, international investment, financial sector reform, international taxation, environment, agriculture, labour market, education and social policy, as well as innovation and technological policy development ©

# *Foreword*

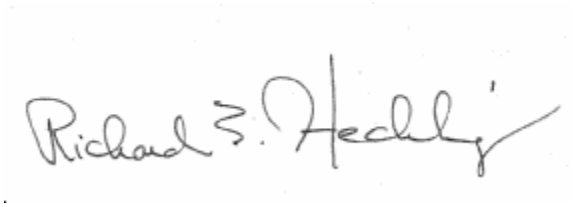
It is increasingly accepted that effective competition law and policy are critical to achieving greater levels of economic efficiency, growth, employment and living standards. Pro-competitive reform and sound competition law enforcement have delivered dramatic price reductions, a proliferation of new products, superior quality and service and enhanced innovation wherever they have been embraced. Perhaps more importantly, they have strong links with key pillars of economic growth and development such as investment, governance, the cultivation of an entrepreneurial class, privatisation and trade. Achieving a better appreciation and understanding of these benefits and links is essential to making continued progress in removing regulatory and private restraints to competition and impediments to economic efficiency in all parts of the world.

The Global Forum on Competition (GFC), which is part of the OECD's programme of dialogue and co-operation with non-OECD partner economies, has become an important vehicle for helping to strengthen the foundation for stronger competition cultures around the globe. The GFC is achieving this by (i) facilitating dialogue at the global level on topical competition law enforcement and broader competition policy issues of interest to both developed and developing economies, (ii) providing a channel for the dissemination and discussion of OECD best practices, and (iii) helping to cultivate networks of government officials that span the five continents. Over time, the GFC has assumed a stronger development dimension, for example, by exploring the potential role of competition law and policy in economic reform and development and by examining issues of particular relevance to developing economies, such as priority areas for capacity building and technical assistance.

This report provides an overview of the main themes discussed at GFC meetings in October 2001, February 2002 and February 2003, as well as a summary of the discussions and written contributions submitted by participants.

The GFC has been enriched by the active participation of international and regional organisations such as the World Bank, UNCTAD, WTO, the Inter-American Development Bank, the Common Market for Eastern and Southern Africa and the West African Economic and Monetary Union. We look forward to their continued involvement in the GFC.

Finally, on behalf of the OECD, I would like to thank Australia, Japan, Korea, Chinese Taipei and the United Kingdom for their support, and all GFC participants for their constructive dialogue and numerous written contributions.



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**Acknowledgements**

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## *What is the OECD?*

The OECD is an international organisation that provides its 30 Member countries a setting in which to discuss, develop, and strengthen economic and social policy. Its Members compare their experiences, seek answers to common problems and work to co-ordinate domestic and international policies with the aim of achieving international consistency or minimising inconsistencies. Their exchanges lead sometimes to recommendations or "best practice" guidelines and sometimes to treaties or other formal agreements – for example, by establishing a convention to combat bribery in international business transactions. All OECD instruments in the competition policy field are voluntary.

The OECD's membership consists of industrialised countries sharing a commitment to maintaining market economies, democracy, and respect for human rights. Its Member countries produce two-thirds of the world's goods and services, and are the source of over 80 percent of the world's foreign direct investment. Originally an organisation of West European and North American countries, it has seen its membership expand to include Japan, Australia, New Zealand, Finland, Mexico, the Czech Republic, Hungary, Poland, Korea and the Slovak Republic.

The OECD is not an exclusive club. Through its Centre for Co-operation with Non-Members (CCNM), it has initiated policy dialogue with the rest of the world through programmes with countries in Central and Eastern Europe, Asia, Latin America, and Africa. Some non-Members have become observers or participants in OECD Committees.

The OECD currently maintains policy co-operation with many non-Member economies. Reflecting the growing interdependence of the world economy, the CCNM Programmes provide platforms for the Organisation and non-Members from throughout the world to discuss their experiences in many areas, including competition policy.

# Competition Law and Policy: Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity

## I. INTRODUCTION

The last fifteen years have witnessed an explosion of activity in competition law and policy. Competition law enforcement in a growing number of jurisdictions has halted numerous international and domestic cartels whose clandestine operations have imposed USD billions of overcharges and other harm on governments, businesses, and individual consumers around the world. Competition law enforcement has also freed many international and domestic markets from abusive practices by monopolists and prevented mergers that would have enabled firms to raise or maintain prices above a competitive level. More important, increased use of a competition policy approach to regulatory reform in countries throughout the developed and developing world has saved governments and consumers many USD billions by creating an efficient and effective regulatory regime that supports the creation of competition where possible and provides more effective protection to consumers and businesses in those spheres where competition is not possible.

Today, nearly 100 countries have a competition law, the vast majority of which were enacted or substantially strengthened in the last fifteen years. Many other countries are developing a law, and still more are applying competition policy principles to regulatory issues.

**The most dramatic aspect of the growth of competition law and policy has been its adoption by many of the world's transition and developing economies.** The first manifestation of this trend was the embracing of competition law and policy by the former Soviet Union and other Central and Eastern European countries that formerly had centrally planned economies. In addition, as globalisation stimulated competition throughout the world, an increasing number of developing economies have

adopted competition laws and/or policies in an effort to become more competitive, attract investment, prevent abusive practices, and enable competition's benefits to be realised by society as a whole rather than appropriated by business and government elites.

Despite the importance of the rapid spread of competition law and policy in transition and developing economies, however, **the most economically significant benefits of the world's increased reliance on competition law and policy have been achieved in OECD countries.** This has been reflected in dramatic price reductions in many industries, a proliferation of new products, increased innovation, reduced unemployment and improved productivity. It is therefore not surprising that OECD countries that formerly had little or no interest in competition law are now actively pursuing hard core cartels, other anticompetitive conduct, and potentially anticompetitive mergers. Moreover, all OECD countries are increasingly benefiting from the application of the competition policy principles to government rules and other actions that restrict how firms can respond to consumer demand.

Increasingly competitive markets and increased use of competition law and policy have of course brought not only substantial benefits, but also major challenges, particularly in developing and transition economies. This fact underscores the importance of a consideration that is receiving increasing attention in the international community – the influence of a country's level of legal, institutional, educational, and economic development on its ability to apply and achieve the benefits of competition law and policy. A related point is the need for competition law and policy to reflect local traditions, culture and other circumstances.

**The expertise of the OECD Competition Committee and competition officials from OECD countries has enabled the OECD to play a major role in assisting competition officials and advocates around the world to develop competition laws and policies that are tailored to their countries' circumstance.** This assistance has been provided through a number of different programmes, which are co-ordinated by the OECD's Centre for Co-operation with Non-Members ("CCNM"). This work has been complemented by a significant amount of technical assistance offered on a bilateral basis by enforcement agencies in OECD countries. One of the most successful OECD outreach tools has been the Competition Division's "case study seminars" in which discussion of participants' own cases serves as a vehicle for sharing the experiences and discussing how the policies, practices and experiences of OECD countries can be applied or usefully adapted to developing and transition economies. In addition, the programmes have involved providing advice on legislative

issues, the regulation of infrastructure industries with natural monopoly element, and assistance in competition advocacy and "building a competition culture." (Additional information on the activities of the Competition Committee and OECD competition law and policy activities with non-Members is contained in Annex A.)

In recognition of the need for representatives of OECD countries to engage in greater dialogue with their counterparts in other parts of the world, the 1999 OECD Ministerial meeting was expanded to include a special dialogue with representatives from non-OECD countries. At that meeting, it was noted that competition law and policy is one of the framework policies that is central to the economic reform that so many transition and developing economies are seeking to implement. It was also noted that in a globalising world, the OECD could not appropriately take on its tasks without having a substantial dialogue with representatives of countries in the rest of the world.

Therefore, the OECD Council created a programme of eight "Global Forums" as the best way for the OECD to address "front-burner" global topics with respect to which the OECD has particular expertise. Despite their name, the Forums do not seek to replicate the universality of UNCTAD (the United Nations Conference on Trade and Development) or the WTO (World Trade Organisation), but rather to assemble interested officials from all regions of the world to engage in the kind of informal policy dialogue that has long been so effective in reducing conflict and creating co-operation among OECD countries. More specifically, it was anticipated that Global Forums would be an efficient mechanism for (a) disseminating OECD countries' experience and best practices, (b) obtaining information about the conditions and views in other parts of the world, (c) creating larger networks of government officials with mutual understanding and trust, and (d) generally promoting policy dialogue.

Thus, the GFC was created to help representatives from OECD and other countries **to develop the mutual trust** and understanding that is necessary if they are to co-operate and use competition law and policy effectively **to prevent abusive practices**, especially those which are transnational, and **to promote economic efficiency, growth, and opportunity**. From the outset, the GFC has addressed broad policy issues concerning the role of competition law and policy in economic reform in countries with different kinds of economies and levels of development. However, after reviewing basic principles relating to law enforcement, regulatory reform, and international co-operation, the GFC has taken on a stronger development dimension.

Consensus building is an important goal of the GFC, but like the OECD Competition Committee, it seeks **convergence but "not uniformity in competition policy, law and practice."**[1] Thus, part of the consensus it seeks is a greater understanding of why, when, and how different legal and cultural traditions, economic conditions, and levels of institutional development may call for different approaches in competition laws, enforcement policies and practices, and broader aspects of competition policy.

The GFC was launched in October 2001 and held its second and third meetings in February of 2002 and 2003. A major theme underlying all of these meetings has been the development and implementation of laws and policies that deal effectively with current and potential market abuses while using the economic forces underlying globalisation to promote economic efficiency, growth, and opportunity. Like all OECD programmes, the GFC is fundamentally a forum for discussion among participating governments, but it includes substantial opportunities for participation by other international organisations and representatives of business, consumers, and labour. The number of participants has steadily increased, reaching 70 economies and organisations (and over 200 individuals) at the third GFC meeting. The economies include those that are in transition from central planning and those that are in various stages of development; for simplicity, this report refers to all such economies as developing except where greater specificity is necessary.

To provide a basis for discussion at GFC meetings, GFC participants have made around 130 written contributions that addressed issues on the GFC meeting agenda. Together with material provided by the OECD Secretariat, these contributions have produced approximately 600 pages of documentation for each of the meetings. All of this documentation is on CD ROMs that may be obtained for free by government officials who contact the OECD's Competition Division (dafcomp.contact@oecd.org). The documentation is also available online - (http://oecd.org/competition/GlobalForum). Citations to OECD Council Recommendations, Competition Committee reports, and other OECD instruments and documents referred to in this report are contained in Annexes B-D of this report.

This report seeks to synthesise and place in context the important themes, facts, and insights that emerged in the GFC's first three meetings. It is important to emphasise that the GFC itself has deliberately avoided seeking to identify consensus "best practices" or policy conclusions. Instead, the GFC has focused on exchanging views and experiences as a means to promote a greater understanding of common issues and of the reasons why

differences in approach may be justified. Similarly, this report focuses on the views and experiences expressed during GFC meetings, supplemented by information contained in documents that were written for those meetings. The report has been prepared by the OECD Secretariat and published under the authority of the Secretary General, and its judgments on what is noteworthy, how observations interrelate, etc., should not be attributed to the GFC or any participating country, organisation, or individual.

The report is organised as follows. Part II contains an executive summary. Part III discusses the topics covered by the GFC in "chronological order," an approach that illustrates how certain themes developed and may also aide participants' memories and guide interested readers to the most relevant portions of the documentation. Parts IV-VIII take a thematic approach; even where the topics they cover correspond to specific GFC sessions, the discussion seeks to draw together relevant points made in presentations and written contributions made in connection with other sessions. Part IV has the broadest reach, covering points made in all three GFC meetings concerning the role of competition policy in promoting economic efficiency, growth and opportunity, with special focus on the applicability of competition law and policy to developing countries and the current and expected benefits of competition law and policy in all countries. Part V summarises the discussion that took place with respect to general modalities of co-operation, including capacity building. Part VI discusses matters relating to competition law enforcement with a focus on international co-operation relating to the fight against hard core cartels and the review of transborder mergers. Part VII addresses two related topics – the goals of competition laws and the design of competition law and policy institutions. Part VIII summarises the GFC's consideration of the special concerns of small and undeveloped economies. Annexes A-D provide additional material on the organisation and activities of the Competition Committee, the OECD's programme for co-operating with non-Members in the field of competition law and policy, relevant OECD publications, and other materials.

# II. EXECUTIVE SUMMARY

The topics, issues, and discussion of the first three GFC meetings do not lend themselves to easy summary even in the main body of this report. The most basic message that has emerged is two-fold. First, **competition law and policy is currently making important contributions to economic efficiency, growth, and opportunity** for developed and developing countries alike. Second, competition law and policy can make a greater contribution if OECD and non-OECD countries continue to develop and strengthen competition laws and policies. There is considerable consensus that **increased capacity building and technical assistance is needed to help developing countries to accomplish this goal.** After summarising the components of this overall message, this summary identifies key points that were made concerning particular competition law and policy topics that were considered at the GFC meetings.

## A. Increased use of competition law and policy is producing substantial benefits in developed and developing countries throughout the world, both by halting anticompetitive conduct by firms and by helping governments design regulatory policies that are more effective and less wasteful of society's resources.

- Empirical evidence from both developed and developing countries indicates that **competitive markets spur innovation and growth.** OECD research indicates that among OECD countries, competitive markets are associated with higher growth and lower unemployment. Other evidence presented to the GFC showed that competition also has benefits in developing countries.
- There are numerous examples from developed and developing countries of **competition law and policy being used to halt economic waste and promote increased consumer welfare** through, for example, substantially lower prices, better quality products, improved product variety, and higher levels of service.
  - With respect to OECD countries:
    - Competition Committee reports indicate that 16 hard core cartels operating in the 1990's affected more than

USD 55 billion in commerce and imposed **estimated overcharges and other economic harm of USD 8-11 billion**. The benefits of the many other recent actions against international and domestic cartels cannot be estimated but are surely substantial.

- The savings resulting from the application of competition policy principles to the review of regulatory systems is also impossible to estimate but is generally thought to be substantially larger than the savings from competition law enforcement. The GFC did not focus on the total savings from "regulatory reform," but there were many references to the value applying competition policy principles to government regulation.

- With respect to developing countries:

  - Developing countries benefit greatly from the competition enforcement of large OECD competition authorities. Based on a somewhat different list of international cartels than that in the OECD report noted above, a study presented to the GFC indicated that **developing countries imported an estimated USD 81.1 billion of products affected by 16 international cartels.** This very rough estimate would imply **overcharges and other harm to developing countries of USD 12-16.2 billion**. These imports were estimated to represent 6.7% of imports and 1.2% of GDP in developing countries. They represented an even larger fraction of trade for the poorest developing countries, for whom these sixteen products represented approximately 8.8% of imports.

  - Few developing countries have challenged international cartels, but many use competition law to **halt domestic cartels that harm economic efficiency and growth** in domestic (and sometimes international) markets.

  - Competition law enforcement in non-cartel cases is also providing benefits. Many countries use competition law to **halt abuse of dominance in potentially competitive markets and by regulated monopolists**. Some countries (including China and Russia) use competition law to **strike down anticompetitive regulations and conduct by government agencies and government officials**.

– The application of competition policy principles to government regulation (e.g., telecom regulation in Africa and Latin America) is also benefiting developing countries.

## B. Potential future benefits are even greater, particularly if more OECD and non-OECD countries:

- **Enact laws authorising competition agencies to co-operate by sharing confidential information with their foreign counterparts subject to appropriate safeguards.** Agencies that investigate other forms of illegal business activity often have such authorisation, but despite some recent reform (primarily in northern Europe), fewer than ten OECD countries and only one non-OECD country have laws that provide such authority to their competition authorities. Problems resulting from the absence of such information sharing laws were identified on many occasions.

- **Utilise "soft" co-operation that does not involve sharing confidential information,** including use of whatever authority they may have to share general inferences drawn from analysis of information they are barred from sharing.

- Adopt and apply sanctions that are strong enough to deter the formation of hard core cartels.

  – For financial sanctions against firms to deter cartels, it is estimated that fines and damage awards should be at least 2-3 times the harm to consumers or benefits to the conspirators resulting from such conduct. Even with recent increases, the **financial sanctions on international cartels do not even approach the level needed for effective deterrence**. For example, the graphite electrodes cartel appears to have been highly profitable despite enormous financial sanctions; the estimated USD 1.2 billion in sanctions is only about 60 percent of the estimated USD 2 billion in overcharges.

  – **Fines and other sanctions against individuals who participate in a cartel can also play an important role in deterring cartel conduct,** because fines against firms that are large enough to deter cartels may sometimes threaten to bankrupt firms and harm blameless shareholders. Currently, however, most OECD countries' laws do not permit sanctions

against individuals. Criminal sanctions and jail sentences have been effective tools in some countries but may not be optimal everywhere, particularly if the public does not appreciate that cartels involve deliberate and very harmful conduct that are increasingly seen as similar to fraud or theft.

- **More countries may need to sanction international cartels, even when the illegal conduct has ended because of successful law enforcement elsewhere or other reasons.** Large fines and other monetary sanctions or remedies cannot effectively deter international cartels if firms know that only a few jurisdictions will actually seek to impose fines or recover damages.

- **Adopt leniency programmes and/or other investigative tools.** Since cartels are so difficult to identify and prove, programmes that that provide incentives for individuals or firms to "blow the whistle" can be important.

- **Co-ordinate premerger notification systems and merger investigations**. There is great interest in exploring ways to facilitate coordination during the merger review process. It was also emphasised that the increasing proliferation of pre-merger notification regimes has given rise to the need for greater harmonisation to reduce inconsistencies and costs to both businesses and reviewing agencies.

- **Increase the use of competition policy principles to evaluate all forms of government regulation**. GFC participants observed that despite the progress made in the last twenty years, all economies would benefit from further reform in this area. The importance of competition advocacy for this purpose was a major theme. It was also noted that this can **benefit even small, poor countries that do not have competition laws** and for which competition law enforcement might not to be cost-beneficial as compared to other priorities such as better health care. Competition policy principles can sometimes be applied to government regulation at little cost, and the result can save governments money by, for example, identifying less expensive ways to improve health care.

**C. Developed countries with established competition law and policy regimes can assist developing economies,** while also serving their own interests**, by providing capacity building and technical assistance. Past assistance has been very valuable, though there have been instances when assistance programmes and providers have not taken into account the need to tailor laws and policies to local conditions. Providers and beneficiaries alike generally expressed the view that continued, and even increased, assistance is important to global efforts to promote economic efficiency, growth, and opportunity. Key themes include:**

- **There is a continuing need to dispel myths that hinder the adoption and implementation of competition law and policy.** The important messages include the following. First, **competition law and policy do not call for laissez-faire approaches or for "deregulation."** Instead, competition policy is essentially a tool for making government regulation more effective and less wasteful. Second, competition law and policy **do not inhibit domestic or foreign investment**. Third, although competition analysis may call into question the wisdom of industrial policies such as supporting "national champions," competition law and policy **do not limit a country's ability to pursue industrial policies**.

- **Fundamental competition law and policy principles apply to economies at all levels of development**, but differences in culture and in legal, economic, and institutional development can justify differences in priorities, mechanisms, rules of thumb, trade-offs, and remedies.

- Without some **background concerning local conditions** and the nature and extent of differences often found in developing countries, even experienced competition experts may have difficulty in providing sound advice because of unwarranted assumptions, misinterpreted questions, etc. There is normally less need for advance preparation when an expert participates in an event organised by individuals with experience in providing assistance.

- Because so many of the issues confronting new competition officials relate to the establishment of agencies and enforcement programmes, **current or former enforcement officials generally have the most relevant experience**. Nonetheless, many donors (including the largest ones) continue to use private contractors to

provide most of their assistance on competition policy issues, and do not necessarily include competition officials in the planning process.

- In general, **donor countries should ensure that their competition authorities play a significant role in their assistance programmes.** At a minimum, discussions to date have suggested that competition agencies could – at very low cost and with large potential benefits – become more involved in planning their countries' assistance activities in the competition field. There may also be ways to make better use of competition agencies' credibility and expertise in delivering assistance, and to do so without detracting from their enforcement tasks.

**D.** **Variations in countries' objectives for competition law and policy may be less substantial in practice than they are to be on paper.** The competition law and policy goals of most countries participating in the GFC include (a) promoting and protecting the competitive process, and (b) promoting economic efficiency. In addition to these "core" competition objectives, some countries have non-competition goals or political override provisions (often expressed in "public interest" terms), and many countries have "grey zone" goals (such as preserving firms' freedom to compete) that may promote rivalry but not economic efficiency.

- There is an emerging consensus that at least for countries that have reached a certain level of development, **it is not efficient to use competition law and policy to promote other goals**.
- **Both non-competition and grey zone goals create some risk of distorting competition and fostering inefficiency,** but in some cases, at least, such goals are in effect subordinated to competition goals.
- **There is no apparent correlation between countries' competition law and policy objectives and the institutional design of their competition authorities.**

## E. There is no single, optimal design for a competition agency.

- **The structural design of a competition agency is not key to its performance.** Independence from political influence of law enforcement is important, but may be achieved without structural independence. Proper funding levels and qualified personnel are crucial, as is the establishment of principles such as transparency and predictability.

- A significant number of competition agencies do not consider competition advocacy to be among their tasks, though the 1997 OECD Regulatory Reform Report recommends that countries authorise and fund such activity. Moreover, the importance of competition advocacy was a major theme at the GFC, suggesting that most non-OECD countries also consider it **important for competition agencies to have the power and responsibility to urge that government regulation not contain unnecessary restrictions on firms' ability to respond to consumer demand.**

- There is a wide variety of tasks assigned to competition authorities that go beyond these two core activities. The most common other tasks were consumer protection and sectoral regulation. Competition authorities generally feel that there are valuable synergies between the core competition policy area and these tasks.

## F. GFC participants viewed competition law and policy to be as (or more) important in small economies as in large ones.

Whether and how small economies should adopt different approaches depends on various factors, including the criteria by which they are judged to be small.

- **Large or small, each country should tailor its laws and policies to its own circumstances.** No matter what definition of "small" is used, there are wide differences in the economic, cultural, and institutional conditions of "small" economies. Those differences may often be more important than small size in determining a country's choice of laws and policies.

- Countries with small populations or GDP levels generally face some special enforcement problems (*e.g.*, small business and government elites) and relatively high enforcement costs (perhaps calling for combining competition enforcement with related tasks,

such as consumer protection), but they do not appear to require a special approach to substantive issues.

- Whenever domestic markets are too small to support competition among firms that are large enough to achieve economies of scale, countries face a trade-off between efficiency and a competitive market structure. As a general matter, countries that are small in the conventional sense are more likely to face this trade-off relatively frequently, and such countries may want to provide for special focus on economic efficiency.

- Whether they are large or small in a conventional sense, **developing countries with low levels of institutional and economic development may need to place less emphasis on efficiency and more on achieving a competitive market structure and the institutional foundation a market economy requires.**

# III. GFC THEMES AS THEY DEVELOPED -- AN OVERVIEW OF THE MEETINGS

## A. Topics and discussion at the first GFC meeting

After an opening session that included keynote speeches by OECD Deputy Secretary General Seiichi Kondo, UNCTAD Secretary General Rubens Ricupero, EC Commissioner Mario Monti, and United States Deputy Assistant Attorney General William Kolasky, the first GFC meeting turned to a discussion of **the role of competition policy in economic reform**. Frédéric Jenny of France, Chair of the OECD Competition Committee, chaired this session (and also served as the overall GFC chair).

This session began with remarks by or on behalf of ministerial representatives of three countries – India, Korea, and Russia – each with a history of quite different but strong state interference with or control of its economy.

- Arun Jaitley, India's Minister for Law, Justice, and Company Affairs, explained that India has increasingly recognised that its extensive regulatory system, and its (then) existing and former competition laws discouraged large size rather than focusing on market power – an approach that could harm efficiency while failing to protect against anticompetitive conduct. Noting that such conduct can undermine the benefits of market liberalisation, he went on to describe the government's work on a new competition law (which recently was enacted). Touching on what were to become themes in the GFC, he stated that trade and other national policies should recognise the importance of competition; that although public interest considerations should have primacy over consumers' interests in exceptional circumstances, public interests exceptions should be reviewed and should not be permitted to circumvent competition more than is necessary; and that competition law and policy should be implemented as an aid to economic development.

- Iliya Yuzhanov, Russia's Minister for Antimonopoly Policy and Support for Entrepreneurship, stated that the Ministry now focuses not only on halting illegal conduct, but also on removing the business conditions that are conducive to such conduct. Such

conditions, he explained, have been generated by market and government policy failures in various sectors of the economy. He emphasised the Ministry's work on natural monopolies, which includes both policy formation and law enforcement, and its work with the Ministry for Economic Development, which includes a major initiative to remove "red tape" and simplify the process for obtaining business licenses, etc. He also described an unusual feature of Russia's law – its direct applicability to not only business entities but also to executive bodies of government. Government agencies at the national, regional, and local level are all forbidden to adopt rules or agreements that distort competition (*e.g.*, restrictions on market access, unwarranted preferences to individual firms, and barriers to the free movement of goods).

- Speaking for Chairman Nam-kee Lee of Korea's Fair Trade Commission, Joseph Seon Hur pointed out that although Korea's export driven economic policies had created remarkable growth, the 1997 economic crisis had come about mainly because Korea had failed to establish an efficiently functioning market system and had continued to rely on government-dependent industrial policies. Therefore, in order to make competition policy a real priority in Korea, the KFTC has needed to reinforce its independence while at the same time playing a major economic policy role within the government. Korean law requires government agencies to consult with the KFTC prior to enacting or revising any laws or decrees that may restrain competition, and this mechanism has been used to "filter out" anticompetitive regulations. In addition, through Korea's Committee on Regulatory Reform and otherwise, the KFTC has been instrumental in obtaining the elimination of many existing anticompetitive rules. To accomplish this, the KFTC needed to develop a social consensus within Korea on the importance of competition policy, and to withstand opposition and resistance from interest groups and other ministries.

The meeting's second session considered **the roles and tools of competition authorities in implementing reform**. This session began with Canada's presentation of a "conformity continuum" that describes the range of educational, voluntary compliance, and law enforcement tools it uses. Thereafter, the new Indonesian authority described the difficulties of introducing competition law and policy in a country with no "competition culture" and a population of 220 million people who speak 300 languages and live on 6,000 islands. Chinese Taipei then described the steps it has taken in its very successful program to introduce competition law and policy. The Business and Industry Advisory Committee to the OECD

("BIAC") emphasised the importance of dialogue with the business community and suggested that new competition authorities focus on unambiguously harmful conduct. Consumers International commented that on the whole, the consumer movement accepts the paradigm that competitive markets with informed consumers are the best way to maximise consumer welfare. The World Bank described its competition policy work, and the International Bar Association explained some of its projects.

During the general discussion, Zambia discussed its difficulties in creating a competition culture, after which South Africa made one of the meeting's most-discussed observations. Contrary to the view expressed by many developing countries and some competition experts who advise them, South Africa maintained that merger control in developing countries is important and that the analysis should not differ significantly from that used in developed countries. Moreover – and most interestingly – South Africa opined that merger control is the best way for a new competition authority to establish credibility as a law enforcement agency. Whereas cartel investigations can last a long time and sometimes yield very little, merger proceedings can produce quick and publicly attractive results because the parties have no incentive to delay. Therefore, standing up to the proponents of anticompetitive mergers can bring concrete results and win respect. Subjecting mergers to a credible review process can also result in attracting substantial media coverage that can be a useful form of competition advocacy to other government circles and the public at large.

Thereafter, Brazil touched on an issue that was discussed again at the second and third GFC meetings. Brazil suggested that for it and perhaps other developing countries, competition law enforcement should focus on the single goal of promoting economic efficiency and consumer welfare. The rationale was that there is a real risk that powerful public and private interests would often be able to prevent the introduction of competition by asserting that other goals should always take precedence. During the third GFC meeting, representatives of various OECD countries took a similar position with respect to their own enforcement programmes, but it was generally agreed that competition law enforcement in developing economies should not focus only on efficiency. Creating or maintaining a competitive market structure also is important, and it was further suggested that such countries need to retain sufficient flexibility to accommodate other considerations in limited circumstances.

This discussion ended with comments from China, which has no comprehensive competition law but whose unfair competition law contains some competition law provisions. A noteworthy aspect of this law, which also was discussed in connection with issues considered at the third GFC

meeting, is that (like Russia's competition law) it forbids anticompetitive action by executive agencies of government and government officials (though this aspect of China's law has no real sanction). In 2000, China had 56 such cases, as well as 783 cases involving violations by public utilities.

The next session was primarily aimed at introducing developing countries to **OECD instruments of co-operation**. The Secretariat presented the basic concepts and provisions of the 1995 OECD Council Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, with Brazil providing comments and leading a brief discussion. It was stressed that the Recommendation provides for co-operation in two respects – conflict avoidance and enforcement co-operation. These two aspects of co-operation are interrelated, in that jurisdictional disputes are an obstacle to the kind of co-operation that can help avoid such disputes while improving enforcement effectiveness. It was also stressed that it is not necessary to have a bilateral co-operation agreement in order to engage in co-operation – that most OECD Members have few if any co-operation agreements, and most of the co-operation among them occurs pursuant to the Recommendation. Also, although some co-operation agreements among OECD Members are binding, the co-operation they provide for is to a large degree voluntary in that the agreements, like the Recommendation, permit countries to deny co-operation whenever compliance would be contrary to the requested country's national interests. Nevertheless, co-operation agreements can be very useful in promoting co-operation, because they provide an opportunity for the parties to set forth their position on such matters as when they want to be notified about each other's investigations, and what they consider their important interests to include. It was also noted that the Recommendation and what are usually called co-operation agreements are subject to countries' laws, including their laws against the sharing of investigatory information even when it is not commercially sensitive. The problems created by such laws were set aside for discussion at the second GFC meeting.

Thereafter, the meeting moved to a two-part discussion of **hard core cartels**, chaired by the United Kingdom. The first part concerned **the OECD anti-cartel programme**. The Secretariat presented its draft report on the nature and impact of cartels and sanctions in OECD countries. All GFC participants had an opportunity to offer comments. This marked the first time representatives from countries outside the OECD have had direct input into the Competition Committee's work. The Secretariat also presented its summary of the cartel cases that representatives of such countries had contributed. Much of the discussion focused on the pros and cons of criminal sanctions. There is **increasing consensus that cartel activity is comparable to economic crimes such as theft, securities fraud or**

**embezzlement**, and various OECD countries have adopted or are considering laws making cartel activity a crime. It was pointed out, however, that while criminal sanctions are beneficial because the prospect of jail time is so powerful and because they penalise the responsible individuals without harming the firm's shareholders, the case for criminal sanctions is not always clear cut. In countries where the general public does not yet understand how harmful cartel agreements are, it may be difficult if not impossible to find juries or judges willing to convict the perpetrators. In that situation, the preferred remedy may be the imposition of a large fine and corrective order by an expert agency or special court.

The second topic considered in this part of the discussion was **collusive tenders in government procurement**, though the discussion included collusive tenders in general. A large number of the price fixing cases that had been submitted by representatives from developing countries involved collusive tenders. Indonesia presided over this part of the programme and described a case in which it found colluding bidders in violation of the law, and also took the unusual step of finding the awarding authority in violation for having failed to take steps to prevent collusion. The discussion did not focus on this aspect of the case, which was apparently based on the competition authority's need to increase firms' awareness of competition issues. No sanctions were entered against any of the firms. Building on a point made earlier in the meeting by Slovenia, Latvia noted both the use of government procurement as a means of favouring national or local firms and the relationship of competition enforcement to anti-corruption enforcement.

The final substantive session in the first GFC meeting related to **merger enforcement programmes and co-operation in merger enforcement**. Mexico presented a paper describing how it had created its merger control programme and stated that its long failure to enforce a constitutional provision prohibiting anticompetitive conduct had harmed its economic progress. Rather than harming investment, Mexico considers merger control a means of preventing mergers that would inhibit new investment. More generally, Mexico cited research showing that "national champions" and monopolies do not tend to be dynamic; rather, their protection permits them to be lazy and thus stagnant.

During the discussion that followed, Mexico noted that like South Africa, it has found merger control important both substantively and for establishing credibility. The Mexican authority did encounter public concern when it blocked the merger of two Mexican banks that were then acquired by foreign banks. But Mexico emphasised that had it permitted the merger of the Mexican banks, there would have been a harmful domestic monopoly; moreover, there would have been no way to stop that monopoly from being

taken over by a foreign bank. Given the power of the private interests on the other side and the complexity of some merger analysis, Mexico stressed the need for competition leaders, including the international community, to be more active in promoting the basic principles of competition policy, including the nature and benefits of merger control.

The discussion also brought to light an interesting example of t**he need and the potential for international competition advocacy to combat the unexamined public support for monopolies in industries such as airlines.** Mexico's public apparently tends to think that if everyone else has an airline monopoly, "Why not Mexico?" Another country responded that if the Mexican public could see the problems caused by *its* airline monopoly, support for monopoly would collapse. There was no follow-up on this point, but it raises the question whether more could usefully be done to publicise the harm done by such monopolies. Roundtable discussions by the Competition Committee and its Working Party on Competition and Regulation are helpful in promoting a greater understanding of such problems (and some solutions), but while the resulting documents are useful for experts, they do not present problems or solutions in a manner that is accessible to policymakers or the general public. Competition advocates could benefit from simple and easy to read syntheses of these or other such materials.

Australia then presented a paper on **international co-operation in merger cases**. Despite the difficulties of such co-operation, which are sometimes exacerbated by merger partners that "play games" in sequencing the merger notification process, Australia is not despondent about being a "small, remote" country with little power to affect many of the global mergers. Most such mergers are not anticompetitive, the globally anticompetitive ones are likely to be appropriately addressed by the leading competition authorities, and there usually are means to protect Australia's interests when they are threatened by a merger likely to produce anti-competitive effects in Australia that have not been adequately addressed by competition authorities elsewhere in the world.

During the discussion, a number of developing countries also addressed problems relating to firms' sequencing of their pre-merger notification filing. One noted that merging parties tend not to regard its authority as important to notify early in the process, with the result that it gets notified after other countries have approved the transaction and then gets pressure to approve it quickly. Another developing country comment, which also relates to the "small economy" issues discussed at the third GFC meeting, was that parties tend to threaten that if the merger is not approved they will shut down their operation in the country.

During the evaluation session, there was considerable support for devoting more attention to the linkage between competition policy and growth-promoting policies, including those relating to foreign investment. A related suggestion was to discuss the way in which competition law and policy are and should be balanced against "public interest" considerations such as employment and the promotion of both exports and small business. It was also suggested that in addition to addressing matters of common concern, the GFC should address some issues that developed countries may have resolved but that continue to be significant problems in developing countries, including issues relating specifically to small economies.

## B. Topics and discussion at the second GFC meeting

The second GFC meeting was opened by Mr. Kondo, who expressed particular satisfaction that the GFC was giving such focus to issues that relate broadly to **international development and poverty reduction**. Noting the probability that few GFC participants considered themselves experts on these topics, he stated that the OECD participants were presumably unaware of how important their governments and the international community consider competition officials' expertise to be in the effort to promote economic efficiency, growth, and opportunity in the developing world.

The first session covered **competition law and policy and economic growth and development**, beginning with **special issues in developing markets.** The opening speaker was Mark Dutz, a World Bank economist then on leave working as an advisor to the Turkish Treasury and Ministry for Economic Affairs. His presentation noted the challenges of less mature markets, including inadequate physical and institutional infrastructure, high information asymmetries and "thin" and missing markets, and an insufficiently informed and organised civil society. He explained that in such markets, it is particularly important to complement trade liberalisation with competition policy because weak markets for corporate control do not provide incentives for efficiency. There are fewer distribution channels and fewer markets subject to import competition, and there are more public and private barriers. The presentation cited good evidence that competition spurs innovation and growth, but noted that there is less evidence that competition law and policy have this effect. He emphasised that **starting small – even with no competition law enforcement and only 1-2 people considering competition policy issues – is better than not starting at all**. He recommended that competition policy should stress the promotion of entrepreneurship and the need for appropriate legal frameworks, and that enforcement and advocacy should focus on eliminating barriers to essential

inputs (local real estate and banking, transport, distribution warehouses, and communications and professional business services) and on halting exclusionary practices (including exclusive distribution contracts and practices such as slashing the tyres of competitors).

Thereafter, three developing countries described the challenges they face, including the arguments they often hear against competition law and policy. Egypt presented a substantial paper on its debate over proposals for a competition law. The presentation mentioned some general topics, such as whether a developing country's law should have *per se* rules that would simplify enforcement but create some scope for erroneous results. However, for the most part, the presentation dealt mainly with the situation in Egypt, where the government has set prices and controlled monopolies, and competition has been seen as undesirable. One of the concerns being expressed in Egypt – that competition law may deter beneficial R&D – has been addressed in OECD countries in ways that might be equally effective in developing countries. Another concern that was noted – that Egypt's firms might be at a disadvantage in competing against firms from countries with more lenient laws – has in the past been expressed in OECD countries as well, but the prevailing view today in those countries is that domestic competition, policed by competition law, aids firms in competing in international market.

The two other country presentations provided were broadly consistent explanations of the evolution of competition law and policy. Indonesia's contribution was a "political economy" history of its recent shifts in economic policy. The policies of the past had involved government/industry connections that fostered tycoons and "crony capitalism," and there was no place for competition law and policy until the regime change in 1998. South Africa described the relationship between its political and economic reform, noting that populism can be a persuasive argument for competition in some contexts, and repeating the view expressed at the first GFC meeting that merger control is or can be more important than anti-cartel work.

In the discussion that followed, Chinese Taipei noted that its competition advocacy had created employment opportunities, while Malaysia expressed concern about how to develop a competition law and policy that reflects its own social and economic conditions. Zambia complained that some multinationals show total disregard for its laws.

BIAC disagreed with South Africa's comments about the relative importance of merger and anti-cartel work, reprising its position from the first meeting that developing countries should focus on unambiguously harmful conduct. This statement may reflect a general tendency by competition experts from OECD countries who have not worked with

developing countries to overestimate the relative importance of anti-cartel work in economies where, as South Africa later pointed out, markets are often dominated by firms that can exercise market power without needing to collude.

The Trade Union Advisory Committee to the OECD ("TUAC") then expressed concern that competition policy considered "private good, public bad" and noted that "pure deregulation" had failed in many respects. It was unclear whether the comment reflected the common misunderstanding that competition policy is equivalent to deregulation (an issue that was raised in each GFC meeting) or disagreement with what GFC participants were generally referring to as competition policy. Confusion over competition policy terminology later undermined the discussion of Kenya's important comments and questions on the prioritisation of competition law and policy in relation to other policy areas, such as health care.

The session then examined **evidence from OECD economies**, which began with a presentation by the OECD Economics Department (ECO) on the impact of competition on the overall performance of OECD Members' economies.[2] In general, ECO's studies have found that **anticompetitive product market regulations have a negative effect on productivity and on overall employment levels**. The negative effect on employment levels is quite sizeable. Anticompetitive product market regulation may account for up to 2 percentage points lower employment rate in some Southern European countries as compared with the OECD average. By contrast, the relatively procompetitive stance of regulation in the United States contributes some 3 percentage points to the excess of its employment rate over the OECD average. ECO's work on the relationship between anticompetitive regulation and innovation has yielded a less clear picture, essentially because different types of anticompetitive regulation seem to have somewhat diverging effects. However, among ECO's more clear-cut results was that **non-tariff trade barriers and various types of state control over firms seem to be bad for innovation** within individual industries and also seem to be associated with an industry specialisation towards less innovative industries. Notably, ECO found little evidence to support the notion that "excessively procompetitive" regulation was somehow bad for innovation.

ECO's report was followed by Mexico's presentation of a very substantial paper that made two main points. First, it argued that while a static approach to competition can make a useful contribution to one-time gains in social welfare, only a dynamic approach can contribute permanently to higher growth. Second, it reviewed recent empirical research on the causal relationship between competition, and more specifically competition

law and policy, and economic growth. In conclusion, the paper agreed with the work of Michael Porter indicating that **domestic competition is important for the development of clusters of internationally competitive firms**, and stated that competition authorities should take care to prevent the loss of competition in such industries.

One of the issues that arose in the ensuing discussion was the relative harm of public and private monopoly. The United States suggested that public monopoly is worse because it is more enduring, but Mexico took a different position, at least in the context of considering developing countries, because of the difficulty of bringing down private monopoly in such countries. Slovenia agreed with Mexico on this point.

The session then discussed **the impact of international cartels on developing economies**. The Competition Committee's 2000 report on the hard core cartel Recommendation had pointed out that such cartels often have particularly harmful effects on less developed countries. This observation stimulated further research, some of which was presented by Simon Evenett of the World Trade Institute, who highlighted evidence that developing countries had imported at least USD 81.1 billion of goods from 16 industries which had been the subject of a price-fixing conspiracy during the 1990s. These imports were estimated to represent 6.7% of imports and 1.2% of GDP in developing countries. They represented an even larger fraction of trade for the poorest developing countries, for whom these sixteen products represented approximately 8.8% of imports. Using the methodology of the 2003 Competition Committee report on hard core cartels, this very rough estimate would imply **overcharges and other harm to developing countries of USD 12-16.2 billion**.

The next session considered developing countries' **greatest needs for capacity building and technical assistance and the most effective means to deliver such assistance**. Having previously prepared an analysis of programmes offered by OECD countries, which addressed the kinds of assistance that have been provided, the recipients of the assistance, and "best practices" on providing assistance, the Secretariat surveyed developing countries on essentially the same topics, but seeking information from the perspective of assistance recipients. All of this information was set forth in Secretariat papers that were distributed to GFC participants. Also, in order to ensure that discussion of these issues reached the agencies whose assistance policies were implicated, the Secretariat co-ordinated this session with the Chairman of the OECD's Development Assistance Committee, whose members are Members' donor agencies.

After the Secretariat noted some of its findings, there were presentations by representatives from three donor countries – Australia, Korea, and the

United States – and three recipients – Russia, Estonia, and WAEMU (Western Africa Economic and Monetary Union). During the following discussion, it was noted that recipients regarded the key kinds of assistance as including help in the areas of case analysis, enforcement practices, investigative techniques, staff training, and the drafting of secondary regulations. While such assistance can be very helpful, however, recipients also noted some reservations, primarily:

- Although many countries provide assistance through private contractors – including law firms, academics, and international consulting firms or consortia – recipients expressed a general preference for assistance from individuals with experience in managing an enforcement authority and enforcement investigations.

- Recipients indicated that it is important for assistance programmes and providers to understand the need to take into account local cultural traditions and the level of economic, legal, and institutional development. Kenya's written contribution, in particular, stressed the need for assistance providers to understand local conditions, and Thailand noted an instance in which it viewed an assistance provider as being unable to take such conditions into account. It was noted that while knowledge of local conditions is preferable, assistance providers with experience in working with other developing countries are at least likely to be aware of the need to consider local differences and of the kinds of differences that are most likely to be important.

The next topic considered was **international co-operation in mergers**. The discussion built on the work of the first GFC meeting and on the results of a survey the Secretariat had sent to non-Members. The twelve responses that were provided identified 23 international co-operation agreements, not including the co-operation treaty among members of the Commonwealth of Independent States. The ability of most respondents to co-operate by sharing confidential information or collecting evidence on behalf of a foreign country is limited by the same sort of confidentiality laws that still exist in many OECD countries.

Seven of the responding jurisdictions reported investigations of international mergers in 2000-2001, and some reported significant activity in this area, notably Bulgaria (9), Israel (20), and Chinese Taipei (9). Only five jurisdictions reported any instances of international co-operation, and none identified more than two such instances. One reason for the relative lack of even informal co-operation may be that, as suggested by the attempt to create co-operation within the EC, it is often necessary to have face-to-face communication to build mutual confidence and understanding.

As with the first GFC meeting, there was mention of the problems created by the merger parties' strategic sequencing of their notifications. Israel announced an intent to include in its notification form a request for the identification of other jurisdictions in which a notification has been filed or is contemplated. Such a request was included in the "framework" for notification forms that was attached to the Competition Committee's 1999 Report on Notification of Transnational Mergers. BIAC did not object to this concept, but the precise nature of BIAC's position was unclear since its response was qualified by a general reference to its confidentiality concerns. BIAC generally articulates those concerns in terms of protecting "confidential information," but it has argued that the same restrictions on information sharing should apply to (a) trade secrets and other commercially sensitive information and (b) non-public information with no inherent confidentiality that becomes subject to confidentiality restrictions merely because a competition agency acquires it during an investigation.

The GFC then considered **information sharing in cartel cases**. The discussion was based on a Secretariat note that contained as attachments extensive materials that had been prepared in connection with previous Committee work, and also a written presentation by BIAC. The Competition Committee has taken the position that it is important to protect information that is actually confidential, and that **experience under the laws and treaties authorising information sharing subject to specified safeguards shows that such information can be both protected *and* shared**. BIAC supports information sharing so long as legitimate business interests are protected, but it argued in favour of restrictions that go beyond those in such laws and treaties. Competition officials expressed many questions – and some explicit disagreement – concerning BIAC's positions, and BIAC agreed to reassess some of them. (*Notably, constructive dialogue between the Competition Committee has continued, and it appears that BIAC's may in fact have modified certain positions.*)

There followed a continuation of the discussion of information sharing in cartel cases that was limited to representatives of governments and governmental international organisations, after which participants discussed future activities.

## C. Topics and discussion at the third GFC meeting

Mr. Kondo opened the meeting. He explained that the OECD is working to promote what it refers to as "policy coherence for development," which means promoting mutual reinforcement among a range of policies – including trade, investment, and competition – in the interest of enhancing the ability of developing countries to ensure that the benefits of globalisation

are shared by all. He expressed satisfaction that the developed world was forging an international development agenda that reflects input from the developing world. He also illustrated the importance of competition law and policy by noting that OECD's delegates to the Committee on Co-operation with Non-Members have consistently ranked this work very highly within the CCNM's overall programme, including strong recognition of the GFC contributions. He also emphasised that the GFC is a forum where representatives from OECD and other countries come together as equals.

The first topic was **the objectives of competition law and policy**. The discussion was based on a Secretariat note that analysed the contributions of 38 GFC participants (16 OECD countries and 22 other countries) who either responded to a questionnaire or otherwise provided relevant contributions. **Virtually all countries identified "promoting and protecting the competitive process" and/or "attaining greater economic efficiency" as goals**. There is a trend among OECD countries to eliminate broad "public interest goals" and political override mechanisms, but such provisions are quite common among developing countries. Public interest provisions, specific non-competition goals, and even the "grey zone" goals that are contained in the laws of many countries all create potential for decisions inconsistent with core goals**.**

Mexico chaired this session, and Italy and South Africa were the lead discussants. The discussion focused on the implications of broad public interest goals and of specific non-competition goals such as employment for the design of competition agencies within the broader government apparatus. Participants from countries with laws that contain such objectives, or that are sufficiently flexible to allow competition considerations to be over-ridden, reported that it is rare that these considerations are invoked to (a) allow an anti-competitive merger or other harmful conduct to go unchallenged, or (b) block a pro-competitive merger or conduct. Moreover, apparently non-competition goals in some laws are sometimes interpreted in ways that eliminate or minimise the potential conflict; thus, the inclusion of non-competition goals or ministerial overrides on public interest grounds may often reflect a political compromise or "safety valve" that is necessary to get the law passed but has little lasting importance. In sum, **differences in countries' official competition law policy goals do not necessarily reflect fundamentally different conceptions of the role of competition law and policy**. Moreover, the greater incidence of public interest and non-efficiency goals appearing in developing countries' laws is consistent with those countries' need for flexibility to deal with the different legal, institutional, and economic situations in such countries, at least in exceptional cases.

The discussion then turned to the subject of **the optimal design of a competition agency**. This topic had originally been proposed by Korea for discussion in the Competition Committee, but had been moved to the GFC in order to permit discussion by a larger and more diverse group of countries. Discussion was based primarily on a Secretariat note that described and analysed 37 responses to a questionnaire that covered such matters as the competition agency's position in the administrative structure, its tasks and powers, its relationship to other government entities, and its influence and independence.

This discussion was chaired by Germany, with lead discussants from Jamaica and Korea. The focus was on three aspects: (a) what tasks to assign to a competition agency, (b) how to allocate competition-related tasks to different entities, and (c) how to safeguard independence, transparent law enforcement, and effective advocacy. There was general agreement that institutional design is largely a function of domestic legal and cultural traditions and other local realities. There is no single optimal design for an agency. There was no explicit support for the suggestion that objectives should influence the design of the authority, although it was generally agreed that a high degree of independence is necessary to achieve the "core" objectives of competition law. Different ways of achieving independence were discussed, as was the issue of whether to combine or separate the investigation and adjudication functions.

The GFC then conducted **a peer review examination of the competition law and enforcement institutions of South Africa**. This was the first such review of the competition law and policy of a non-OECD country. It followed the procedure that has been developed in the reviews that the Competition Committee has done as part of the OECD's regulatory reform programme. The review was chaired by Mr. Jenny, and the examining countries were Slovenia and the United States.

The Chair opened by noting several **themes raised by the South Africa situation: multiple policy goals, an unusual focus on merger control for a developing country, the combination of a developing economy and a developed one, the challenge of earning judicial respect, and the uncertainty of the culture of competition.** The Secretariat summarised the report, noting that although South Africa had had a competition law since 1955, it had enacted a new law to respond to the new political situation after 1994. The new law created a Competition Commission and Competition Tribunal that have an unusual degree of independence, and the new political situation created support for using competition law and policy as important tools in reshaping South Africa. The law expresses some public interest goals, such as empowerment of historically disadvantaged persons, and it

requires that such goals be considered by the competition institutions, rather than (as often the case) by a Ministry. Such goals can present problems in achieving economic efficiency, but those problems have proven to be largely theoretical, and the competition institutions have in fact emphasised economic efficiency. Among the policy options suggested in the report were to increase the priority of non-merger matters and to use economic resources more effectively in advocacy settings.

In response, the South Africa delegation welcomed the report. They noted that the use of a peer review process to support best practices is being discussed in other contexts in Africa, so this exercise at the Global Forum may be a valuable demonstration.

Thereafter, the questions asked by the examining countries and the general discussion that followed focused on how South Africa considers non-competition goals, particularly employment; the treatment of efficiency as a defence rather than as an element of competition analysis; the benefits to a new competition authority of concentrating on mergers as a means of developing both skills and credibility as an enforcement agency; and aspects of institutional structure and operation. Discussion was lively, and this session and the one on "small economies" were later ranked by participants as the two most interesting sessions at this GFC meeting. The peer review has now been issued as a separate OECD publication.

The final topic was **competition policy in small economies**. The discussion was based on an experts' paper, a Secretariat note, and contributions from a large number of participants. It was chaired by Morocco, with Finland and two experts serving as lead discussants. No one argued that small size (however defined) meant that competition law was unnecessary, but there were many different views on what special issues may exist and what their implications are. The discussion was sometimes undermined by the use of differing and unstated definitions of "small," but a number of noteworthy points emerged.

- **Small size in the conventional sense (population, GDP levels)** is associated with increased enforcement costs and problems, but otherwise does not appear to have any general implications for the content of competition law and policy or how it should be applied.

- All countries have some **domestic markets that are too small to support competition among firms that are large enough to achieve economies of scale**. In such situations, there is a trade-off between efficiency and a competitive market structure. Countries that are small in the conventional sense may face this trade-off relatively frequently, and those that do have a greater interest in

ensuring that their competition regime is able to make the trade-off correctly.

- Whether they are large or small in a conventional sense, **developing countries with low levels of institutional and economic development may need to place less emphasis on efficiency and more on achieving a competitive market structure and the institutional foundation a market economy requires**.

# IV. THE BENEFITS OF COMPETITION LAW AND POLICY FOR DEVELOPED AND DEVELOPING COUNTRIES

The benefits of competitive markets and the ways in which they produce such benefits were discussed most explicitly during the "growth and development" session of the second GFC meeting, and were also a focus of the first meeting's session on "the role of competition policy" and the third meeting's sessions on competition policy's goals, competition policy in small economies, and the peer review of South Africa. Moreover, other GFC sessions, including those relating to specific law enforcement topics, provided examples of ways in which distortions of the marketplace can and do produce substantial harm to society. Part IV of this report synthesises those discussion and submissions.

Because this report is intended in part for the benefit of interested policymakers whose background is in economic development or in trade, investment, or other related fields, and because inconsistent usage of the terminology of competition law and policy causes some confusion even among competition experts and considerable misunderstanding among policymakers generally, Part IV begins by summarising why more competitive markets are desired by an increasing number of countries and how competition "law" and competition "policy" complement each other. (A more extensive discussion of the goals of competition law and policy is contained in Part VII.). Thereafter, it specifically addresses how those concepts apply in developing economies, noting the general applicability of fundamental principles and describing cultural, legal, economic, and institutional differences that can call for a different approach to some competition law and policy issues from that taken in highly developed economies. This discussion also notes obstacles faced by competition officials and advocates in developing countries, including misunderstandings of the nature of competition law and policy, as well as concern over the social cost of transition. Part IV concludes by pulling together information from the three GFC meetings relating to the present and anticipated benefits of competition law and policy for OECD members and non-Members.

## A. The benefits of competitive markets – in general

The first session of the second GFC meeting included presentations and written submissions dealing explicitly with the relationship between competitive markets and economic growth and efficiency. Presenters pointed out that there is substantial empirical evidence that competition contributes substantially to economic growth for both developed and developing countries. This evidence was not called into question, and participants did not express particular concern over statements that the complexity of testing the correlation of microeconomic reform with macroeconomic effects may preclude the development of solid empirical evidence that competition law and policy are associated with macroeconomic growth. It was noted that clear evidence along these lines would be useful, but should not be necessary since it is so clear that the private conduct and government regulation targeted by competition law and policy create economic inefficiency and waste, resulting in restrictions of output. One delegate observed that at some point one must have faith that halting inefficiency and waste in particular markets makes a positive contribution to overall economic growth.

In general, GFC meetings have touched upon economic benefits that fall into three categories.

First, **in competitive markets, competition stimulates increased efficiency in innovation, production, and resource use, which in turn leads to economic growth and increased aggregate welfare.**

- "Competitive markets" are often defined by economists in terms of an absence of "substantial impediments to entry or exit," "restrictions on price or output," or "market failures," but the GFC did not seek to define these terms or to specify *how* competition promotes economic efficiency. Rather, participants generally took a pragmatic approach, focusing on their own experience with the efficiency enhancing effects of competition law and policy.

- In considering the GFC discussion and submissions, it can be useful to think of "competition" as the process by which firms seek to discover and satisfy consumer demand, and a "competitive market" as one in which there are no unnecessary restrictions on (a) buyers' ability to efficiently decide and communicate what they want, or on (b) sellers' ability to respond as completely and efficiently as possible. In this context, competition law and policy promote economic efficiency and growth by preventing or eliminating the inefficiency that results from restrictions on buyers

and sellers that are not reasonably necessary to achieve other legitimate public interest objectives.

- The promotion of efficiency is generally regarded as the most fundamental goal of competition law and policy. In this context, "efficiency" includes not only the efficient use of firms' resources – what economists call "productive efficiency" – but also efficiency in using society's overall resources – "allocative efficiency" – and in developing new processes and products that create new resources – "dynamic efficiency." In less technical terms, competition law and policy is generally used to promote the overall economic welfare of society by preventing harmful distortions of the process by which consumer demand is expressed and satisfied.

Second, **competitive markets provide macroeconomic benefits.** Competition provides firms incentives to adjust to internal and external shocks, and these individual adjustments help reduce the cost of such shocks to the macroeconomic economy. These benefits are likely to be more important as the world becomes more characterised by highly mobile capital flows.

Third, GFC presentations noted that in countries with non-competitive economies, economic power is often concentrated in the hands of the few. When entry barriers such as policies favouring protected businesses are lowered, economic opportunity increases and formerly protected businesses are forced to compete on a more level paying field and to operate more efficiently. Similarly, it was observed that well-conceived privatisation programs can facilitate the transfer of assets into the hands of more people with the incentive and ability to expand companies through innovation and efficiency. **In a competitive economy, far more of a country's citizens have a real opportunity to contribute to, and benefit from, the resulting economic growth.**

## B. The general goals and roles of "competition law" and "competition policy"

To achieve these benefits, ***competition law*** **and** ***competition policy*** **each has distinct, but mutually reinforcing, goals and roles**, with the former usually focusing on private restraints on competition and the latter focusing on market distortions caused by government laws, regulations, or other actions. These goals and roles were examined in some detail during the third GFC meeting, but were also discussed in a general sense at points during all three meetings. In general, the discussion indicated the following.

*Competition law*. In general, **competition laws prohibit or provide a means to address conduct that is "anticompetitive"** – that is, conduct that does or is likely to restrict output and increase price, impede market expansion or new entry, reduce product or service quality, or stifle innovation. They also prohibit firms from obtaining market power by merger or by any means other than skill, foresight, and industry.

- As described in the 1998 OECD Cartel Recommendation, hard core cartels are anticompetitive agreements among competitors to fix price, restrict output, submit collusive tenders (bid rigging), or share (divide) markets. Such agreements, together with some forms of abuse of dominance, involve explicit decisions to restrict output, creating artificial shortages that permit supra-competitive pricing.

- Even in the absence of any explicit agreement or deliberate decision to restrict output and increase price, various agreements and practices can harm competition and consumers, for example by facilitating anti-competitive oligopolistic behaviour. Any lack of competition may permit firms to "live a quiet life" in which they do not face pressure to reduce price or develop new or improved products or services.

It is important to note that competition laws do not ban the mere possession of market power or its attainment by superior efficiency; only abuses of that power or its acquisition by merger or certain other agreements or practices are illegal. Market power is the ability to increase profits by restricting output and raising price above the competitive level. It also includes the ability to depress service levels or other non-price dimensions of competition below the level that would prevail in a competitive market. It is not a function of overall firm size, and can exist only with respect to a particular product or group of products ("relevant product market") and a geographic area ("geographic market"). Officials in developing countries who are not familiar with competition analysis sometimes believe that (a) the sole producer in a country is a monopolist, and (b) a firm cannot be a monopolist if it is one of several domestic producers. Neither proposition is correct. Geographic markets seldom correspond to national borders (unless national laws inhibit entry), and the categories in which production data are reported do not generally describe economically sound product markets because they seldom reflect the demand side of the market.

Competition policy. The term "competition policy" is used in many different ways, including as a synonym of competition law enforcement and as a set of policies of which competition law is a part. To avoid the confusion that this inconsistency in usage sometimes causes, this report uses the term "competition policy" to refer to a general approach to government

regulation – an alternative to central planning, laissez-faire, and command-and-control. More specifically, **competition policy is the application of competition principles to evaluate government policies and regulation to determine whether they harm society by imposing restrictions on efficient conduct that go beyond what is reasonably necessary to achieve legitimate public interest objectives**. Competition policy in this sense is complementary to but distinct from competition law, and all OECD countries use it in many areas as a matter of discretion. Some have formalised it, in particular Australia, whose explicit National Competition Policy provides that regulations should not restrict competition unless it can be shown that (a) the benefits of the restriction to the community as a whole outweigh the costs, and (b) the regulatory objectives can only be achieved by restricting competition. Although Australia's National Competition Policy contains various formal elements, including oversight by a National Competition Council, a government can make similar use of competition policy simply by declaring that it will follow this basic principle to the extent possible.

It is generally agreed that the inefficiency and waste caused by anticompetitive government regulation, including tariff and non-tariff barriers to international trade and similar barriers to competitive conduct by domestic firms, far exceed the harm from private restraints. Complementing trade and investment liberalisation, competition policy is the tool OECD countries have increasingly used over the last 25 years **to reduce that inefficiency and waste without sacrificing other policy goals**. The OECD Regulatory Reform Report, which was issued and endorsed by Ministers in 1997, states that **competition policy has a central role to play in all regulatory analysis**, and recommends that OECD countries should authorise and equip their competition authorities to play a central role in the process.

## C. Competition law and policy in developing countries

Part IV.C is the only sub-part of this report that relates exclusively to competition law and policy in developing countries. It seeks to bring together points from different sessions of all three GFC meetings that relate to how and why aspects of competition law and policy are or may sometimes be different in developing countries. Although comments at the GFC have stressed the need for some differences, Part IV.C begins by noting the context in which the discussion of differences took place – the apparent recognition that fundamental competition law and policy principles apply to all market economies. Thereafter, it reviews areas in which it was observed that differences in cultural traditions and economic, legal, and

institutional conditions may justify tailored approaches. Finally, it discusses myths and misunderstandings about the nature of competition law and policy that, as discussed on several occasions, are sometimes obstacles to their adoption and implementation in developing countries.

## *1. The benefits of applying fundamental competition law and policy principles*

Discussions at the GFC generally reflected acceptance of the **basic proposition that unnecessary restrictions on firms'** incentive or ability to discover and respond to consumer demand in an efficient manner i**mpose substantial costs on economies at all levels of development,** whether the restrictions result from private agreements, the practices of firms with market power, or government laws or regulations. It was also generally recognised that **the application of competition law and policy principles can benefit economies at different levels of development** because the principles recognise that allegedly harmful (or beneficial) practices must be assessed in their particular market context. Moreover, all four substantive sessions of the third GFC meeting confirmed the proposition that each country should have the latitude to test and refine alternative approaches to competition law and enforcement.

***Competition law.*** Except with respect to hard core cartels, which are banned outright in some countries, competition law generally provides that the legality of agreements and practices depends on their actual or likely impact on competition, which can be determined only by examining them in the market in which they occur. Thus, differences in economic and other conditions do not require differences in competition laws' basic standards. For example, exclusive distribution arrangements by an incumbent firm are more likely to have anticompetitive effects in transition and some developing countries than in developed market economies because of such factors as the differences in the markets for capital and land, and the scarcity of experienced entrepreneurs who can provide effective competition. As a practical matter, countries can and usually do apply essentially the same basic legal standard – whether the arrangement is likely to have anticompetitive effects or create or maintain market power – though discussion at the GFC noted that they may need to use different "rules of thumb" to predict the likely effects of most practices. Essentially the only type of conduct that is sometimes banned without regard proof of its market effects is a hard core cartel, which is usually defined in such a way that it will always or nearly always be anticompetitive in any market.

Although competition law enforcement can halt or prevent economically harmful conduct in countries at all stages of development, **the least**

**developed and poorest countries may not find that establishing a competition law enforcement regime is cost beneficial in comparison to other reforms.** GFC participants noted that the cost of a competition law enforcement regime can be reduced to some extent by assigning enforcement to an agency with complementary mandates, such as a consumer protection agency. Moreover, as in the European Union, regional competition authorities can be a means of minimising enforcement costs (and maximising consistency). Nonetheless, as was pointed out most clearly by Kenya, expenditures on (for example) health care may currently be more urgent and important in some countries. As noted below, an important insight of the second GFC meeting was that even countries that currently consider **competition law enforcement not cost-beneficial may be able to obtain substantial benefits from the use of competition policy.**

***Competition policy.*** As in the case of competition law, the application of competition policy to government regulation has different implications in different economic circumstances. Competition policy analysis of an issue concerning railroad regulation, for example, must take into account economic conditions in the area in question. In some situations, it may be desirable to separate ownership of the track from ownership of the railcars and have competition among owners of railcars that pay to use the track, but in other situations it may be desirable to have competition between vertically integrated firms who own both track and railcars. In situations such as this, competition analysis can be very complex, but there are other situations in which inefficient regulation can be quite easily identified. Many developing countries have a substantial number of laws or rules that contain unnecessary restrictions on entry or on efficient means of production or distribution whose elimination or relaxation would clearly promote efficiency and benefit consumers.

Government regulation that imposes entry barriers or other unnecessary restrictions on firms' ability to respond efficiently to consumer demand causes inefficiency and waste that are harmful to any market economy. **Particularly for the least developed countries, *competition policy* may be more likely to be net beneficial than *competition law*.** As noted by expert consultant Mark Dutz, competition policy (a) helps to prevent waste by identifying government rules and policies that impose unnecessary costs on the economy, and (b) although competition policy analysis of some issues can be complex, it is not necessarily costly for governments to require some inquiry into whether its rules and policies contain unnecessary restrictions. In addition, anticompetitive government rules and actions are easier to identify than private economic activity, and they can sometimes be prevented or halted by a small number of people. For example, Mr. Dutz noted a time when Albania had no competition law enforcement and the two

officials with some competition-related responsibilities successfully opposed an anticompetitive initiative of the Ministry of Economy by consulting briefly with the OECD Secretariat and then obtaining the support of the Central Bank.

### *2. Differences in priorities, mechanisms, rules of thumb, trade-offs, and remedies*

Although competition laws' basic standards are generally applicable to all countries, **differing cultural traditions and levels of economic, institutional, and legal development do and should lead to differences in countries' competition law enforcement priorities and approaches.** This basic point was made in different ways throughout the GFC discussions and submissions. Some participants, such as India and Malaysia, merely commented on the need to address local conditions, while others, such as Egypt, Indonesia, and most of the African countries, referred to specific local conditions that they must take into account.

In general, countries with competitive economies tend to focus on preventing cartels and mergers that would restrict competition. Enforcement priorities in transition countries apparently depend on the policies that were previously in place. In countries such as Russia, where government emphasis on scale economies created large monopolies, competition authorities devote attention to demonopolisation and anti-competitive activities by governments and agencies. In China, on the other hand, government planning emphasised local self-sufficiency, with the result that even though there may be many firms operating in a particular product market, many of the firms may have market power in their traditional geographic markets. Therefore, as China noted, a key enforcement priority is to break down those barriers. GFC presentations by developing countries expressed a wide variety of enforcement priorities. It was suggested that in general, developing countries' enforcement and advocacy efforts should focus on eliminating barriers to essential inputs (local real estate and banking, transport, distribution warehouses, and communications and professional business services) and on halting exclusionary practices.

In addition, **competition laws indeed must be tailored to reflect differences in the legal systems of which they are a part**. Differences in the design of competition authorities are discussed in more detail in Part VII, below.

Moreover, especially in connection with the third GFC meeting, presentations and submissions noted that **the economic and institutional situation in developing countries can call for different rules of thumb and justify taking into account factors that go beyond the generally**

**accepted core goals of protecting the competitive process and promoting economic efficiency.** After all, the efficiency goals of modern competition law and policy reflect a belief that the pursuit of greater economic efficiency will *in the long run* increase aggregate wealth in the economy and raise average living standards. **In developing countries, however, where market forces are weaker and more of the population lives in poverty, there are more situations in which governments (and competition authorities) may consider it necessary to intervene to prevent short-term hardship even though in some situations this may delay the transition to an efficient market economy.**

Among the points raised were the following:

- Whereas OECD competition authorities generally focus on maintaining competition, developing countries sometimes need to create even the potential for competition. Therefore, when possible to do so without imposing substantial inefficiency, Central and Eastern European countries have sometimes broken up firms beyond the level dictated by efficiency considerations in order to create more firms, entrepreneurs, and managers. Similarly, during the "small economy" discussion, it was emphasised that in developing economies, where there may at first be no constituency for competition law and policy, promoting a competitive market structure and emphasising the value of small business may be important to constituency-building as well as a good means of breaking down the non-competitive status quo. Moreover, equity considerations may weigh more heavily in such economies.

- As discussed in Part VII, it appears that one reason OECD countries are increasing their emphasis on efficiency and decreasing their use of competition law and policy to promote non-competition goals is that they have other policy mechanisms that are more effective to promote such goals. **Developing countries may not yet have alternative effective policy mechanisms for dealing with non-competition goals.** For example, zoning laws are sometimes used in OECD countries to achieve a politically acceptable compromise between supporters of mega-stores and supporters of small business. Such laws typically constitute a restriction on entry based at least in part on non-competition values. Incorporating such restrictions into zoning and other laws makes it easier for competition law enforcement to focus on efficiency, though such zoning laws may create inefficiency and weaken a country's overall competition policy. When such laws do not exist, there is greater pressure on competition authorities to consider not only efficiency,

but also other considerations, including factors not related to competition. The Indonesian competition authority faced this dilemma in a case that was presented to the GFC. The authority declined to hold the establishment of a mega-store in Jakarta to be illegal merely because it was hurting small retailers, but it suggested informally that such stores be located on the outskirts of towns so as to limit such harm.

- It was mentioned on several occasions that competition law and policy in developing countries often needs to **take into account the historic ties between industry and government**. Therefore, especially in transition economies, the competition law's ban on anticompetitive activity is sometimes applicable to both ministries and other government agencies and to government officials. This power, which is not contained in the competition laws of most OECD countries, has been very useful. For example, Russia's competition authority has issued orders against ministries for adopting anticompetitive rules and taking other anticompetitive actions. And both Russia and China have used competition law provisions to strike down attempts by regional and local officials to impose restrictions on trade between regions and localities.

- **The social costs of transition to a market economy, and particularly the potential for very high unemployment levels, were mentioned on various occasions as barriers to expeditious reform.** Several presentations noted the policy issues that arise when past government policies or other factors have led to the creation and continued existence of many firms whose costs are too high for them to operate in a competitive market. Protecting such firms from competition is very costly, but there can also be substantial costs to the high unemployment (and political unrest) that can occur if many such firms fail at the same time. A common compromise is to open markets gradually in order to provide local firms an opportunity to make necessary investments and other adjustments. Notably, no GFC participants suggested that it might be beneficial to delay the adoption of a competition law until after such an adjustment period. GFC participants, at least, appear to understand that such a delay is neither necessary nor sufficient to protect domestic firms during this period. Moreover, such a delay would reduce the firms' incentive to make needed investments and leave them free to exploit any existing market power, and to seek to preserve it by forestalling entry.

Some of the most telling comments on these issues were those made by **Cameroon**, **Ivory Coast**, **Morocco**, and **Tunisia** in connection with "small economies" session of the third GFC meeting. Cameroon, for example, mentions that it faces a situation in which financial markets have not been liberalised, the state continues to play a very interventionist role in the economy, there is no competition culture, there are no entrepreneurs, and there is a large informal market. Morocco emphasises market imperfections, "public sector grey zones," lack of transparency, and corruption. In such circumstances, it is easy to see why Ivory Coast states that competition law must be tailored to the situation at hand, and Cameroon observes that the government considers it important to protect smaller domestic firms. Tunisia's observation was that keeping unemployment at an acceptable level is worth a certain amount of inefficiency.

## *3. Myths and misunderstandings as obstacles to competition law and policy*

Myths and misunderstandings concerning the implications of competition law and policy, s**ometimes spread by government or business elites seeking to protect their own position**, are significant obstacles to its adoption and effective implementation, especially in developing countries. This general theme was introduced in Mr. Kondo's welcoming remarks at the first GFC meeting, which referred to the common concern that competition policy implies deregulation to the point where one reaches "the law of the jungle." Other misconceptions about the meaning of competition law and policy were noted during the meetings, often as explanations of the need for competition advocacy.

### *With respect to competition law*

GFC participants on various occasions made comments concerning "national champions" and other forms of "industrial policy." These matters were not pursued in depth, but there is clearly some confusion in some non-OECD countries over the relationship between competition law and competition policy, on the one hand, and industrial policy, on the other hand. Competition policy principles generally oppose the kind of government interventions involved in cultivating or maintaining national champions and other industrial policies, but as noted, for example, by Ireland, neither competition policy nor competition law preclude the use of such policies. (Whether a competition agreement at the WTO might preclude some such policies is beyond the scope of this report.)

A related concern, which arises particularly with respect to merger control, is a fear that competition law enforcement will deter foreign

investment. In fact, a mainstream competition law provides domestic and foreign investors some assurance that they will find a "level playing field," thereby encouraging investment in general. Mexico, for example, noted that only foreign investment that will create or maintain a situation of market dominance or other anticompetitive structure is prevented by competition law enforcement.

### *With respect to competition policy*

As noted by Mr. Kondo, the most common error, sometimes manifested even in OECD countries, is to associate competition policy with laissez-faire economics and complete deregulation. It is important to address this misunderstanding with competition advocacy stressing that competition policy does not seek to maximise competitive rivalry at any cost, but rather seeks to maximise societal economic welfare by permitting competition to operate to the extent consistent with other social goals. Thus, competition policy does not elevate rivalry above social policies such as ensuring a viable banking system, assisting vulnerable people or protecting the environment, but rather, as noted above, is a tool with which governments can determine whether the rules implementing other social policies could achieve their goals more completely and with a less adverse impact on competition and efficiency.

The experience in OECD and some non-OECD countries can be used to address this misunderstanding. There are many examples of how eliminating unwarranted entry barriers have improved the standard of living of average citizens. Moreover, by ensuring universal service without the inefficiency that results from state ownership or from monolithic public utilities, **competition policy can make it less expensive to provide for the needs of the poor or those living in rural areas**. OECD experience also demonstrates that with respect to government rules concerning health, safety, environmental, and other social policies, competition policy does not seek deregulation but rather asks whether regulatory goals could be realised at less cost by eliminating unnecessary restrictions or adopting a sounder regulatory framework.

### *Failing to distinguish between "competition policy" and "competition law"*

The practice of using the term "competition policy" as synonymous with "competition law" sometimes causes harmful confusion even at meetings of competition officials. For example, it was noted above that since competition law enforcement requires a country to create an enforcement authority and incur other costs, the relative priority of *competition law* and

(*e.g.*) health care spending is an issue that must be addressed. However, *competition policy* is a tool that helps reduce the cost of achieving other government priorities, and it does not need to impose significant costs. Therefore, **there is no conflict (or need to prioritise) between *competition policy* and government spending to meet other needs. Indeed, they are often complements, promoting one goal helping to achieve the other goal.** The failure to distinguish between competition law and competition policy obscures this distinction and tends to discourage the use of competition policy by developing countries that could clearly benefit from having some analysis of whether their laws and regulations impose unnecessary costs.

A country that does not want to create a competition law enforcement agency can introduce competition policy at very little cost. A government could do this merely by declaring that it will henceforth try to the extent possible to evaluate all existing and proposed laws and regulations to determine whether they restrict competition more than is necessary to achieve their objectives. The most important thing is to establish the guiding principle. In addition, to ensure that the principle is not ignored, it is useful to create a small office whose staff is directed to spread awareness of competition principles and to conduct evaluations of important regulatory systems or initiatives that appear to contain unnecessary restrictions on firms' ability to respond efficiently to consumer demand.

There is a great deal of documentation on the operation of competition policy programmes. The 1997 OECD Regulatory Reform Report is a useful source, and APEC (Asia Pacific Economic Co-operation) has also produced useful information, both on is own and as part of an APEC/OECD Co-operative Initiative on Regulatory Reform. Many of these materials describe competition policy interventions that involved highly technical areas and were quite costly, but the previously mentioned **example of Albania shows that there is much to be gained simply by assigning a few people to look out for examples of egregious over-regulation**.

### *Exploitation of myths and misunderstandings*

It was noted that myths and misunderstandings such as those described above are often exploited and spread by government and business elites that fear of losing political and economic power. When this is the case, **overcoming these myths and misunderstandings is a particularly important and difficult goal of competition advocacy.**

## *D. Current and expected benefits of competition law and policy in developed and developing countries*

The creation and success of the GFC reflect widespread recognition that competition law and policy is producing important benefits in developed and developing countries, and has the potential to produce far greater benefits as more developing countries adopt and refine both their competition laws and policies and their other "framework" policies. (Such policies include reducing corruption and increasing transparency, the enforceability of contracts, and the rule of law. At a policy level, the benefits of competition law and policy were addressed most directly during the session on "growth and development" but were also part of the discussion concerning, for example, the goals of competition law and policy. Concrete illustrations of these benefits were provided during those sessions and also in discussing the harm caused by hard core cartels.

### *1. Current benefits*

**Competition law enforcement and a competition policy approach to government regulation are currently providing significant benefits to many countries, both in the developed and in the developing world.**

**Empirical evidence from both developed and developing countries indicates that competitive markets spur innovation and growth.** As noted above, OECD research presented at the second GFC meeting indicates that among OECD countries, competitive markets are associated with higher growth and lower unemployment.[3] Other evidence that was presented showed benefits from competition for developed and developing countries (*e.g.*, Chilean long distance telephony, Mexican trucking), and a summary of additional research on this issue was presented to the GFC meeting in a Secretariat note. It is also noteworthy that the Asian economic crisis had a relatively minor impact on Australia because its competition law and policy made its economy more able to respond quickly and efficiently to macroeconomic shocks.

There is little econometric evidence that effective competition law and policy have in fact promoted economy-wide innovation and growth, and the number of variables makes it doubtful that such a correlation can be conclusively demonstrated. **There are, however, numerous examples from developed and developing countries of competition law and policy being used to halt economic waste and promote increased consumer welfare.** Those examples are evidence of the value of competition law and policy and will be discussed at the fourth GFC meeting in February 2004.

*With respect to OECD countries*

As noted above, Competition Committee reports show that the volume of commerce affected by 16 hard core cartels reported by authorities in OECD countries and operating in the 1990's exceeded USD 55 billion, and available data suggests that the illegal gains likely amounted to 15-20% of this amount, for a total of USD 8-11 billion. Since this estimate does not include the economic waste caused by the cartels, the actual harm may be significantly greater. The benefits of the many other recent actions against international and domestic cartels have not been estimated but are surely substantial.

The savings resulting from the application of competition policy principles to government regulation is also very difficult to estimate but is usually thought to be substantially larger than the savings from competition law enforcement. One area of regulation, the control of infrastructure firms with a natural monopoly element (such as electricity transmission lines), has been revolutionised by application of the basic competition policy principle that regulatory restrictions on firms' conduct should not be more extensive than necessary. Instead of permitting utility and other firms to monopolise potentially competitive markets, which leaves regulators with the almost impossible task of preventing monopoly pricing throughout an integrated enterprise, OECD countries are increasingly separating the natural monopoly and competitive activities so that price regulation is necessary only for the few markets that are true natural monopolies. A recent OECD Council Recommendation urges consideration of this approach and discusses factors to consider in determining whether it is appropriate in particular situations.[4]

*With respect to developing countries*

Developing countries receive significant benefits from the competition enforcement efforts of OECD competition authorities that actively pursue international cases. A study presented at the second GFC meeting indicated that developing countries imported USD 81.1 billion of products affected by 16 international cartels uncovered by OECD agencies in the 1990s. This volume of commerce implies overcharges to developing countries of approximately USD 12-16.2 billion, with additional harm stemming from the waste of economic resources generated by the cartels. Although this estimate probably overstates the harm these 16 cartels imposed on developing countries, it probably understates the amount of harm caused by all cartels.

GFC presentations and written contributions disclosed that few non-OECD countries have challenged international cartels, but some are using competition law to halt domestic cartels that are clearly a barrier to economic efficiency and growth in domestic (and sometimes international) markets. As a basis for discussion at the first GFC meeting, 13 such

countries contributed descriptions of recent anti-cartel cases, many of which are summarised in Annex E. Even China, which has not yet enacted a comprehensive competition law, has been challenging price fixing through use of its unfair competition law and its price law.

Developing countries are also benefiting from other aspects of competition law and policy. For example, transition countries noted their use of competition law enforcement to halt abuse of dominance both in potentially competitive markets and by regulated monopolists whose abuses are not covered by sectoral laws and/or are not challenged by sectoral regulators. In addition, the discussion of "growth and development" indicated that competition policy principles are often being applied with good results. Studies of telecom regulation in Africa and Latin America show that competition increases mainline penetration and connection capacity while lowering prices.

It was also noted that in many developing countries, competition law has far greater application to government agencies and officials than is usually the case in OECD countries. Competition law enforcement of this sort has also produced substantial benefits, both directly and as a contribution to respect for the rule of law and "good government." Chile reported using its competition law to prohibit the telecom regulator from allocating additional spectrum to firms it had chosen and to order the regulator to hold an auction instead. China reported competition cases striking down "internal trade barriers" created by regional and local governments, and Russian cases have done the same. (Mexico mentioned that its competition law can also be used in this way, and the competition provisions in the Treaty of Rome operate in a similar way against barriers to competition among European Member States.) Russian cases have also voided discrimination in favour of particular firms (such as unjustifiable exclusive licenses or contracts awarded without competitive bidding).

Finally, as indicated by Indonesia and Korea, a lack of competition was a significant factor in creating the Asian economic crisis. In competitive markets, high prices and profits generally signal good business and investment opportunities, but in some Asian countries these indicators to some extent reflected monopoly rents that had resulted from non-transparent and discriminatory policies, such as secret government-directed loans, monopoly grants to state-owned and private firms, import protection, and official or unofficial support for private cartels. In these circumstances, anticompetitive product markets helped create unrealistic levels of demand for investment; and neither financial regulations nor corporate governance rules provided the warnings to investors that would have protected against the eventual loss of investor confidence.

## *2. Expected future benefits can be even greater for developed and developing countries.*

While competition law and policy has already produced significant benefits, the anticipated future benefits are much greater, particularly in developing economies where competition law and policy has not been introduced or are very new.

*With respect to developed and developing countries*

**Anti-cartel and other competition law enforcement can provide significantly greater benefits when more countries modify their confidentiality laws to authorise competition agencies to share information with foreign agencies, subject to adequate safeguards.** Despite reforms in a number of OECD countries, reports prepared as part of the OECD anti-cartel programme point out that effective international anti-cartel enforcement continues to be frustrated by laws that prohibit competition agencies from sharing confidential information with their foreign counterparts, even when they find that doing so would be consistent with national interests and the information would be subject to adequate safeguards. As part of this programme, the second GFC meeting addressed the need to reform these laws both in an open session with representatives of the business community (BIAC) and others, and in a later, closed session. BIAC asserted that there should be limitations on information-sharing that go beyond those contained in existing information sharing laws and mutual legal assistance treaties, but various competition officials made clear their belief that such limitations are not necessary to protect business' legitimate interests and would interfere with international co-operation in law enforcement. So far, the OECD countries that have revised their information-sharing laws have not adopted the additional limitations sought by BIAC. Despite progress in this area, information submitted to the GFC indicates that such laws have been enacted by less than ten OECD countries and only one other country (Israel).

**Implementation of other reforms contained in existing OECD Recommendations and Competition Committee reports can also provide benefits.** The 1995 Recommendation on Co-operation and the 1998 Hard Core Cartel Recommendation were both discussed on several occasions, as were the Competition Committee reports on Positive Comity and on Notification of Transnational Mergers. It was noted, for example, that the "framework" for notification forms that was attached to the Competition Committee Report on Notification of Transnational Mergers could be a useful model for countries that are considering the creation or modification of their notification systems. The 2001 Recommendation

concerning Structural Separation in Regulated Industries has been distributed to GFC participants though not discussed at a GFC meeting.

*With respect to developing countries in particular*

**Competition law and policy's benefits are expected to increase as the work of competition enforcers and advocates is increasingly reinforced by other framework policies and the growth of a competition culture.** In developing economies, the actions of competition officials and advocates halt harmful practices and induce beneficial reforms. However, it was also noted that competition law and policy are only one of the framework policies – such as the enforceability of contracts, transparency in government, and the rule of law – that are needed for the operation of an efficient market economy. The overall benefit of reform in each of these areas is often undermined by deficiencies in other areas. By the same token, improvements in other framework policies can be expected to assist competition law and policy's contribution to the creation of an efficient market economy, which is in the end the real source of economic growth.

**Continued adoption and refinement of competition laws provides new and improved tools for promoting economic efficiency, growth, and opportunity.** The proposed competition law described by India in the first GFC meeting has recently been adopted. China, which is currently benefiting from enforcement of the few competition provisions in its unfair competition law, is expected to adopt its proposed competition law in the next year or two. And many smaller countries around the world are expected to strengthen their capacity to protect their consumers by enacting or improving competition laws.

**Competition law and policy can be expected to provide increased benefits as competition officials gain expertise and experience and competition agencies gain credibility, increased powers, and more independence.** Competition officials in developing countries typically face difficulties that are not encountered in OECD countries. During GFC discussions, it was noted that it is often difficult to find staff members with any relevant training or experience, and cases that should be successful are thwarted by unauthorised intervention by ministers, overturned by judges with little understanding of the law, or undone by post hoc legislation. Moreover, sceptical legislatures often fail to give agencies the powers and resources they need. Capacity building and technical assistance – discussed at the second GFC meeting – are important to overcome such problems.

# V. MODALITIES OF CO-OPERATION, INCLUDING CAPACITY BUILDING AND TECHNICAL ASSISTANCE

The term "voluntary co-operation" is a general one that can apply to the entire range of actions by which one or more jurisdictions may assist each other, including capacity building and technical assistance. The first GFC meeting considered the ways in which the co-operative activities of the Competition Committee replaced conflict with co-operation, promoted convergence, and helped to develop the competition analysis of government regulation that is central to the global regulatory reform movement. Different forms of international co-operation, including OECD Recommendations, bilateral and multilateral co-operation agreements, and peer review, were all discussed at various points throughout the three meetings. Another form of co-operation – capacity building and technical assistance – was discussed primarily during the second GFC meeting.

## A. Modalities of co-operation – in general

The two principal OECD Council Recommendations concerning competition law and policy – the 1995 version of a Recommendation on co-operation that was first issued in 1967, and the 1998 anti-cartel Recommendation – were both discussed. The Annex to the 1995 Recommendation was noted as providing useful examples of recommended practices; the 1998 Recommendation expands on some of its predecessor's provisions and refers to the kind of information-sharing legislation that is important for individual jurisdictions enforcement activities and international co-operation. It was suggested that interested participants review the 1999 *Report on Positive Comity*, which is the most complete analysis of OECD co-operation.

Two additional points were made concerning the Recommendation on co-operation. First, both OECD and non-OECD countries (including Estonia, Latvia, and Lithuania) have used it as a model for bilateral co-operation agreements. Second, **the Recommendation is far more than a model.** It is, in fact, an operation multinational agreement on voluntary co-operation that may be invoked by any Member and provides the basis for most OECD countries' co-operation with each other. Whereas many developing countries have the impression that all or most developed

countries have many co-operation agreements, most OECD countries have none and few have more than one or two. Thus, co-operation among most OECD countries is based solely on the Recommendation. Since the first GFC meetings have not touched on "trade and competition" issues, there was no discussion of whether this might be a useful model if there are negotiations over competition provisions in the WTO, but the issue was discussed at the May 2003 Joint Trade and Competition Global Forum on Trade and Competition.

It was emphasised that **OECD Recommendations encourage voluntary co-operation, which is the basis for virtually all co-operation in the competition field.** The Recommendations' voluntary nature stems not merely from the fact that they are nonbinding, but also from explicit provisions to the effect that **no country is expected to co-operate in situations where doing so would be contrary to its important interests.** Such general national interest exceptions are also contained in **all co-operation agreements, even those that are binding; thus, even binding co-operation agreements (such as that between Canada and the United States) provide sufficient flexibility that the decision whether to co-operate is to a large degree voluntary.** As discussed in the *Report on Positive Comity*, such flexibility is a standard means of providing for or clarifying the "voluntariness" that has been considered necessary to permit requested countries to protect their interests by, for example, declining requests when they lack the necessary resources or consider the requesting authority's investigation as fundamentally misguided.

The written GFC submissions of some small non-OECD countries, however, expressed concern that absent a binding commitment to honour *all* foreign "requests" to open and assist in investigations, the major international competition authorities will not give serious attention to their requests. This issue was not directly discussed during GFC meetings, but the submissions do set forth both the competing considerations and some concepts that might be useful in resolving this issue. The apparent considerations are that "mandatory co-operation" would eliminate what some consider important rights of requested countries, while others desire further assurance that their requests will in fact bring co-operation. Potentially useful concepts include reciprocity and "mutual benefit," which have helped provide such assurance under the OECD Recommendation. These concepts do not contemplate rigid, "tit-for-tat" co-operation, but do recognise that a competition authority's failure to provide co-operation can appropriately lead to others' declining to provide co-operation. In addition, the OECD Recommendation provides that when a country denies a co-operation request, it should be willing to discuss its decision in consultations with the requesting country. Building on this concept, it has been suggested

that co-operation agreements could provide some additional assurance without calling for mandatory co-operation if they provided for mandatory consultation in all cases when a requesting country believes that its request has been unreasonably denied.

Another form of OECD co-operation is peer review, which was mentioned at the first two meetings and engaged in during the third (and discussed in the Joint Global Forum on Trade and Competition in May 2003). The peer review system that yielded so much convergence in the OECD's first forty years (and is still used in many Committees) consists of questioning a country based on its own description of its laws and policies.[5] Under the current Competition Committee peer review system, the Secretariat or an independent consultant prepares a comprehensive report on a Member country's competition regime, and this report serves as the basis for questions by two other Members. This system has substantial benefits (*e.g.*, in terms of comprehensiveness and consistency), but is more time consuming and expensive.

The peer review of South Africa was successful in three ways. South Africa obtained its assessment pursuant to OECD standards. This involved recommendations that may assist it to advocate for pro-competitive changes back home. The discussion also provided valuable insights and lessons for other participants that face similar issues, and the description of South Africa's competition regime benefited all who do or may have bilateral dealings with South Africa. (The value of this form of peer review in international fora was reaffirmed in April 2003, when a peer review of Chile's competition law and policy regime was conducted in the first OECD/IABD Latin American Competition Forum.) Russia will be peer reviewed at the February 2004 GFC meeting, and Peru will be reviewed at the second meeting of the Latin American Competition Forum in June 2004.

## B. Capacity building and technical assistance

This second meeting of the GFC provided a unique opportunity for an informal exchange (a) among providers and beneficiaries of competition policy capacity building, (b) in the presence of representatives of the development assistance agencies that fund most such activity. The documentation for this discussion was extensive. The Secretariat had recently surveyed OECD countries asking for their **assistance activities by type and by beneficiary country for the period 1999-2000, and their assessment of both the necessary qualifications of assistance providers and the relative effectiveness of different means of delivering assistance**. Together with similar information from UNCTAD, the World Bank, and the WTO, this information was analysed in a Secretariat note for the

Competition Committee's Working Party on International Co-operation. That discussion had been considered useful, but except for the comments of a few Observers it reflected only the views of providers. The GFC was an opportunity to obtain a much broader perspective, and the Secretariat invited all developing country participants to describe the assistance they have received, identify their greatest needs and preferred methods, and contribute papers amplifying their views on any relevant issue. All of these materials were summarised and integrated into a new Secretariat note for the GFC.

### *Providers' assistance activities*

The most active providers were, predictably, the largest jurisdictions – the European Commission, Japan and the United States. The European Commission concentrates its work in Central and Eastern Europe, especially among candidates for accession to the EU. Japan's activities were concentrated in the APEC region. The U.S. spreads more of its assistance around the globe, working with countries in Europe, Asia, Latin America and Africa. Many other OECD countries also provided assistance, on a smaller scale in absolute terms and focusing more often on their immediate area or on countries with which they have some traditional relationship.

The number of beneficiary countries receiving some form of technical assistance during the two-year period was impressively large. **Seventy-one beneficiary countries were specifically identified, and more were reached through regional events** such as seminars for CARICOM (the Caribbean community), COMESA (Common Market for Eastern and Southern Africa) and APEC. Some countries received more assistance than others, of course. Among those receiving the most were Russia, other countries from Central and Eastern Europe, especially those who were candidates for EU membership, Brazil, India, Indonesia, Malaysia, Morocco, People's Republic of China, South Africa and Thailand.

**Many different types of assistance were provided.** There were many conferences and seminars, and such events reached more countries than any other method. Short term consultations and study visits were also numerous. Long term resident advisors and internships, which are the most expensive, were relatively few and offered mostly by the larger providers.

### *Recipients' needs, preferences, and assessments*

The information contributed by developing country participants covered three main topics – their greatest needs for assistance, the most effective kinds of assistance, and the most important skills and experience for assistance providers. In general terms, the responses suggest the following:

- *Needs for assistance.* Recipients believe that more assistance is needed, but their needs vary. Some need assistance on drafting or amending competition laws or other legal instruments. Those with competition laws generally emphasise the need for (a) assistance on practical, day-to-day matters relating to running a competition authority or investigations, and (b) staff training and analytical assistance. (Ivory Coast reported not receiving any assistance since 1994.)

- *Methods of delivering assistance.* Recipients did not indicate that any particular method of providing assistance is most useful, but the responses help identify the pros and cons of different methods. Seminars, conferences, and workshops provide less in-depth training for a larger number of officials, are more likely to reach high-level officials, and may promote beneficial networking. Long-term internships in which the intern works on cases provide very good training for the intern, but may have limited benefit for others. The usefulness of resident advisors is in part a function of the length of the assignment, the experience and adaptability of the advisor, and the way the receiving authority uses the adviser.

- *Skills and experience of providers.* Thailand and some others emphasised the need for assistance providers to be able to tailor assistance to local conditions. Because most needs relate to institutional and operational issues concerning running a competition authority, pursuing competition investigations, and engaging in competition advocacy, experienced current or former competition officials are generally considered to be more qualified to provide assistance than academics, private practitioners, or other contractors without such experience. In addition, assistance from current authorities can promote useful networking. Private consultants can also be useful, however, partly because they may present alternative points of view. Detailed knowledge about the beneficiary is often unnecessary, but it is always important that a provider have **a willingness to listen and an understanding that even the most basic competition policy principles can have different policy implications in economies with different levels of development and legal, cultural, and other traditions.**

### *Analysis of particular issues*

*Types of assistance.* Some provider countries thought that the most effective form of assistance for countries with new competition laws is country-to-country, long-term resident advisers. The understanding such

advisors acquire of local legal and economic conditions enables them more accurately to translate their OECD country experience into sound advice, and they can gain the confidence of their clients. Providing long-term resident advisors is very expensive, however, and it usually benefits only one country. Intern programmes are somewhat less expensive, and can be very valuable for the intern, particularly if confidentiality rules do not preclude work on actual cases. On the other hand, they only train a very small number of people, and it is unclear how often and how well interns share what they learn upon their return or how long they remain with the enforcement authority. The European Union's "twinning programmes" provide useful interagency consistency and opportunities for various forms of assistance.

Thus, respondents stated that there is an important role for seminars and workshops, which typically involve several beneficiary countries and require the expenditure of fewer resources by providers. Such events often involve a mixture of lectures and practical exercises, usually led by a panel of experts from provider countries. Case studies are often the principal teaching medium, but exercises employing carefully drawn hypothetical situations and role playing also have been effective. Seminars and workshops are usually organised on a regional basis, involving beneficiary countries from, say, Eastern Europe or Latin America. Countries from a single region share similar characteristics and are likely to face similar issues in implementing their competition policy. Regional events also facilitate valuable networking among neighbouring enforcement officials.

An important and sometimes overlooked element of assistance is the provision of written materials geared to developing countries. Such materials can be distributed widely and produce benefits over the long term. Several countries and international organisations, including the OECD, have prepared such materials. Among the OECD's contributions are the "background notes" it provides to participants in its Vienna case study seminars and a publication that it produced jointly with the World Bank, A Framework for the Design and Implementation of a Competition Law and Policy. In some countries, translating such materials adds substantially to their value and their cost.

Qualifications of technical assistance providers. Assistance providers and recipients agreed that individual providers should have first-hand **knowledge about law enforcement and experience in providing assistance to a country whose economy, culture and legal system is different from his or her own**. Competition experts without such experience (or access to someone who does) may give logical but incorrect interpretations of the laws, cases, statements and questions that they

encounter. One benefit of seminars organised by the OECD or others with staff members who have experience in providing assistance is that **the presence of experienced assistance providers can permit skilled and busy officials to share their experience without much study or much risk that their advice will be wrong.** An experienced member of a capacity building team can often serve as a kind of substantive interpreter for those providers who do not know, for example, that seminar participants use "dumping" to refer to predatory pricing, or that conduct (such as corruption or misleading advertising) that is not considered a competition problem in provider countries (since they are covered by laws enforced by other agencies) are in fact competition problems in countries where they are not effectively handled by any agency.

The role of competition agencies. There was considerable focus on the relative value of "private contractors" and "competition authorities" as assistance providers, and it was **generally agreed that competition agencies or those with substantial experience in such agencies are better positioned to provide substantive assistance.** Professors, lawyers, and economists without enforcement experience have knowledge that is useful in some circumstances, but most of the issues confronting new competition agencies relate to creating an institution and an enforcement programme, investigation techniques, and other matters with which only current or former officials have experience. And while private contractors can hire former officials in order to obtain an enforcement perspective, only a small number of experienced, high-level former officials have had experience in the full range of issues likely to arise. **Current enforcement officials, on the other hand, have the backing of their agencies and thus can obtain truly expert advice on subjects on which they lack personal knowledge and experience.** On the other hand, to take full advantage of their inherent advantages, competition authorities may need either to maintain a core of officials who are responsible for running an assistance programme and providing assistance, or to provide assistance through the OECD or another organisation with an ongoing programme,

Since the opportunity cost of using highly qualified current officials to deliver assistance is large, it was noted that donor countries must consider how best to leverage the experience and credibility of its competition agency. This requires analysis of both the design and monitoring of assistance programmes and the actual delivery of assistance. The following points emerged from the discussion and submissions.

- A key point – sometimes overlooked by competition officials – is that development assistance in competition law and policy is generally planned by officials with little or no background in

competition issues. Moreover, although direct assistance to foreign competition agencies is quite often provided by competition officials, much such advice – and the vast majority of other competition-related assistance – is provided by private contractors that generally have no experience in a competition authority. For example, a Secretariat note pointed out that although the United States Agency for International Development provides some funds to the US enforcement agencies, much more of its competition-related funding goes to private contractors. Moreover, except in connection with the accession process, the Competition Directorate of the EC apparently does not receive funding to provide assistance and has little influence on the design of assistance programmes, which tend to be awarded to consortia of private firms.

- Presentations and written contributions that addressed this issue generally expressed the view that competition authorities should at a minimum play a larger role in planning their countries' competition assistance activities. It was also noted that there may also be additional ways to make use of competition agencies' credibility and expertise, and to do so without detracting from their enforcement tasks. For example:

  – Grants or other payments by development assistance agencies to competition agencies could include enough financial resources to cover the costs of personnel dealing specifically with assistance. (A less-likely alternative would be for legislatures to shift some funds from assistance agencies to competition authorities.)

  – Competition authorities could be given a larger share of available funding, with discretion to provide assistance through its staff or to use their expertise to shape technical assistance projects and select qualified private subcontractors.

*International co-ordination of technical assistance.* The Secretariat's note indicated that international co-ordination in the provision of technical assistance is limited. Provider countries seldom attempt to co-ordinate their activities with other countries. There is co-ordination between provider countries and international organisations to the extent that national competition agencies often provide experts to serve on panels in conferences or seminars sponsored by international organisations. These experts are an indispensable part of many OECD events, for example. In other respects co-ordination between provider countries and international organisations seems to be minimal.

There has been somewhat greater (and increasing) co-ordination among global international organisations in this field, specifically among the OECD, UNCTAD, the World Bank, and the WTO. Experts from one organisation often participate in events sponsored by another. On occasion, organisations co-sponsor events. The OECD and the World Bank did so for two conferences in Latin America in recent years. As noted above, the World Bank and the OECD collaborated in writing the Framework document for developing and transitions countries.

Provider countries generally state that enhanced international co-ordination in this field would be beneficial, but there is no consensus on the sort of co-ordination that should be undertaken. Four types of activity could be envisioned.

1. A means of sharing up-to-date information on future projects, such as provider and beneficiary countries, dates and places, form of the project, and subject matter.

2. The "joint venture concept," whereby joint ventures among providers on specific projects in specific countries would be encouraged and facilitated, for example, creating a clearinghouse through which potential partners could be identified and joint ventures formed.

3. The "central co-ordination concept," whereby a central body would be created that would both provide for extensive information sharing about assistance projects and provide advice and assistance on how providers could best meet beneficiary countries' needs.

4. The "library concept," whereby a database of information on technical assistance in competition policy would be kept in one place. It could include, among other things, resource materials (or means of accessing them), information on past, current or future projects and a list of experts in the field.

The first three of these concepts are progressively more complex. The first might consist of a kind of electronic "bulletin board," probably with restricted access, on which providers could post their calendars of planned events. The second and third concepts would require increasing amounts of resources and central management, and the third would limit providers' control over their own assistance programmes. These two concepts, then, are more problematic. The "library concept" would almost certainly be highly useful, and could be implemented together with, or independent of, the others.

The beneficiary countries were also asked for their views on co-ordination. None of them reported any instances where lack of co-ordination led to a problem, and none stated that more co-ordination was desirable. A few, in fact, expressed concerns that efforts at co-ordination could result in more delays in what are sometimes lengthy procedures for applying for assistance. It is probably not surprising that provider countries are more concerned than beneficiaries in this area, as they strive to maximise returns from their limited technical assistance resources.

# VI. THE NEED FOR ANTI-CARTEL ENFORCEMENT AND MERGER CONTROL, FACILITATED BY INTERNATIONAL CO-OPERATION

In addition to devoting attention to general co-operation issues, the first two GFC meetings also discussed (a) the importance of anti-cartel enforcement and merger control, and (b) the need to improve international co-operation in order to protect global markets from abuse by cartels and monopolies.

## A. Co-operation agreements

In preparation for the second GFC meeting, the Secretariat collected information from developing country participants concerning their experiences with international co-operation in both cartel and merger cases. (In addition, all such participants were asked to submit copies of all of their international co-operation agreements.) OECD countries were asked about new international co-operation agreements entered into since 1 April 2000.

Developing country responses show that virtually all of them that are active in competition law enforcement have entered into co-operation agreements with one or more other jurisdictions. Like OECD countries, developing economies tend to enter into agreements with jurisdictions that are geographically close and/or that are close trading partners. The responses relating to confidentiality protections were not sufficient to permit generalisations about such laws. Assuming that most countries do have adequate protections for such information, it seems that the framework is in place for enhanced international co-operation involving OECD countries and those other jurisdictions whose competition enforcement regimes are relatively more developed. In general, co-operation agreements among developing countries appear to be based in large part on the OECD Council Recommendation on co-operation, and do not contemplate the sharing of confidential information except as permitted by national law.

Australia reported on a tripartite agreement between it, Canada and New Zealand. Canada reported on, in addition to that agreement, co-operation agreements with the European Union, Mexico, and Chile. In addition, Canada has entered into new Mutual Legal Assistance Treaties with several

jurisdictions, though most of these agreements have no immediate application to competition cases since the most or all of them do not classify cartel conduct as a crime. Denmark reported on its tripartite agreement with Norway and Iceland. The U.S. reported on a new agreement with Mexico.

## B. The primary barrier to co-operation – broad bans on information sharing

The Competition Committee's February 2000 Report to Council on implementation of the Hard Core Cartel Recommendation stated that **the main barrier to law enforcement co-operation are national laws that ban the sharing of "confidential information"** – a term that includes not only trade secrets and other commercially sensitive information, but also all other non-public information a competition agency gathers during an investigation. For example, with rare exceptions, if an agency's investigation collects information on who attended an alleged cartel meeting, the information cannot be shared with a foreign competition agency even though there is **nothing inherently confidential** about the information and even if the requesting agency has comparable confidentiality laws and a spotless record in complying with that law. This problem is not limited to cartel cases, though the laws' restrictions are more harmful (and are generally viewed by competition officials as more unwarranted) in such cases because of the secret nature of cartels, the willingness of firms to waive confidentiality protections in merger cases in order to encourage a swift resolution, and the fact that much of the evidence needed to prove conspiracy (*e.g.*, travel and telephone records) is not commercially sensitive in the way as the trade secrets, business plans, and other documents that are often reviewed in merger cases.[6]

The 2000 report expressed its conclusions as follows:

> **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.**

Since then, Canada, Denmark, France, Iceland, the Netherlands, and Norway have joined Australia and the United States in enacting such laws. Despite this progress, less than one-third of OECD countries – and apparently no other countries except Israel – are able to share confidential information even upon a finding that doing so would serve national interests and that adequate safeguards exist.

In light of the continuing legal barriers to sharing confidential information, almost all co-operation is of the "soft" variety except in those merger investigations in which firms waive their confidentiality protections in order to resolve the matter as quickly as possible. Thus, although they are sometimes able to assist each other by sharing the results of their analysis, **competition authorities are generally prevented from sharing actual evidence of illegal conduct as well as "leads" concerning such conduct.**

As noted above, the Competition Committee has taken the position that it is important to protect information that is actually confidential, and that past experience under existing laws and treaties demonstrates that such information can be both protected *and* shared. During the second GFC meeting, however, BIAC argued in favour of restrictions that go beyond those in such laws and treaties. Competition officials expressed questions and some explicit disagreement. For example, BIAC took the position that one country should not be able to assist another by sharing confidential information with another unless the conduct being investigated was a violation of the requested country's law. After questioning concerning the rationale for this, BIAC said it would consider this issue further.

There was also disagreement with BIAC's position that information sharing between or among countries should be authorised only if it is conducted within the framework of an international treaty or binding agreement. Recently enacted information sharing laws provide for the protection of confidential information without any such requirement, though it is widely believed that some sort of agreement may be useful in working out policies and procedures. BIAC also took the position that a competition agency that receives confidential information from a foreign agency should not be permitted use it in any investigation beyond what was described in its original request or to share it with any other domestic agencies. Asked whether this meant that an agency should need to make another formal request for the same information if its investigation uncovers evidence of a related cartel, BIAC acknowledged that it had not addressed that question. South Africa pointed out that under its laws, the agency may in some circumstances be required to hand over confidential information it has gathered to other agencies. It was unclear whether BIAC considered such an obligation (which exists as well in many other countries) to preclude a competition authority from ever receiving confidential information from another authority.

## C. Sharing non-confidential information – a partial, temporary solution?

Competition agencies in OECD and other countries have for years engaged in a certain amount of co-operation in which they share only information that is not subject to confidentiality restrictions. Such co-operation is often referred to as "informal" or "soft" co-operation. (The latter term may be preferable, and is used in this report, since the sharing of non-confidential information is often done pursuant to requests made pursuant to formal co-operation agreements or the OECD Recommendation.) **Survey responses and other information submitted by OECD and developing countries alike indicated that there has been a considerable amount of such "soft" co-operation.** For example:

- Australia referred to discussing details about investigations, exchanging of non-confidential (but not necessarily public) information, asking a foreign agency to contact witnesses, and discussing the relevance of investigations or information to each agency.

- Brazil's investigation of the vitamins cartel was apparently facing great difficulties until it received two "hints" from sources. For present purposes, the relevant hint was that the cartel operated like the lysine cartel, which the Brazilians interpreted to mean that a geographic market allocation scheme was involved. The hint may or may not have come from anyone subject to a confidentiality law, but it is important to assessing the potential utility of soft co-operation because it shows that sharing conclusions can be useful even without any factual details.

In discussing the sharing of non-confidential information, some participants mentioned the example of sharing their views on market definition – views that are usually based in large part on information from documents that could not be shared. **It thus appears that at some level of generality, at least some confidentiality laws permit the sharing of inferences or conclusions that are based on information that itself could not be shared.** However, there has been little or no rigorous analysis of where particular countries draw the line between what is a permissible inference and what is a forbidden disclosure of confidential information.

With an increasing need to co-operate and (for most countries) continuing bans on sharing any information that is deemed confidential, a Secretariat note for the second GFC meeting suggested that it is important to consider in greater detail what information competition authorities may

lawfully share under their own countries' existing laws. Thereafter, manifesting the usefulness of the GFC's work, this concept was included in the Competition Committee's 2003 Hard Core Cartel Report, which raised a number of illustrative questions.

- *Warnings of possible cartel activity.* One issue raised in the Cartel Report – perhaps the most dramatic example of this "inference" issue – concerns whether and when a competition agency in one jurisdiction is authorised to warn a foreign agency that a cartel may be operating within the latter's territory. For example, if a merger investigation by Country A produces documents evidencing a cartel operating in Country B, A would generally be forbidden to share the documents with B. The question is what, if anything, A can do to give B some sort of a tip about the possible existence of an ongoing cartel? Can A inform B that it has come across evidence suggesting that B might want to consider opening a cartel investigation in the relevant industry? Or does the confidentiality of the documents that contained the information prohibit even a general warning that would reveal none of the actual information in the documents?

- *Investigatory assistance in concurrent investigations.* The report noted that similar questions can be asked about the permissible scope of information exchanges when two or more competition agencies are investigating a cartel at the same time. For example, if one agency concludes (based on information it could not share) that the cartel includes firms X, Y, and Z, can it share the names of the firms?

## D. Effective sanctions against cartels

The second GFC meeting also considered information collected by the Secretariat concerning OECD countries' sanctions against cartels. One of the main elements of the anti-cartel Recommendation was that Members should ensure that their sanctions are adequate to deter hard core cartels, and it is usually estimated that when an enforcement regime relies entirely or largely on financial sanctions against firms, the sanctions must be at least 2-3 times the harm to the public or the illegal gain of the cartel.[7] In eleven large cases reported by OECD countries, the Secretariat was able to estimate the cartels' harm and the sanctions that were imposed. The proportion of sanctions to the gain ranged from 3 percent to 189 percent. In four of the eleven cases the sanctions equalled or exceeded the gain, but in none were they as large as two or three times the gain. Moreover, as noted above, the very large sanctions imposed in the graphite electrodes case were substantially less than the total harm – perhaps in the order of 60 percent.

The Korea Fair Trade Commission had made a more informed calculation of the harm that the cartel caused in Korea, and it appears that the penalties that were imposed there amounted to only about 6 percent of the harm.

It has been argued that fines sufficient to deter cartels may sometimes be too large for a firm to bear, causing bankruptcy and possible exit from the market, harming blameless shareholders and possibly diminishing competition. A Secretariat note described this as one of the main arguments in favour of imposing sanctions against natural persons. The laws of several OECD countries, but less than half, provide for the imposition of fines against natural persons for participating in cartels, and in a distinct minority of countries it is possible to impose the criminal sanction of imprisonment. The Competition Committee survey disclosed, however, that sanctions against natural persons have actually been applied in only a few countries. Only four, Australia, Canada, Germany and the United States, had imposed fines, and only two, Canada and the United States, had imposed jail sentences.

## E. Cartel cases in developing countries

Few developing countries have made any attempt to address international cartels, but Bulgaria, Ukraine, and many others provided examples of domestic cartel cases. Such cases can be very important, and they can have an impact on international competition. A sample of the cases submitted by non-OECD countries is contained in Annex E.

## F. Merger control and international co-operation

The GFC's work in the merger area began with a major presentation by Mexico on how it established its merger control programme and the benefits of that programme. The principal themes emerging from that presentation and the subsequent discussion were as follows.

- A lack of merger control programme can harm economic growth. It is often thought by the public, and by policymakers in some developing countries, that merger control may harm investment. In fact, however, the anticompetitive mergers prevented by a sound merger control programme would in the long run be likely to inhibit new investment.

- No GFC participant made the once-common argument that merger control is not necessary in developing economies. As a matter of resource allocation, some developing countries may find it beneficial to have a very limited or no premerger notification

system, but there appears to be a consensus that it is very important for competition authorities to be able to challenge anticompetitive mergers.

- GFC participants took substantial interest in South Africa's view that merger control is (or can be) the best way for a new competition authority to establish credibility as a law enforcer and to obtain experience in competition analysis.

- Powerful private interests often encourage or exploit the widespread failure to understand the benefits of merger control, and there is a need for competition leaders, including the international community, to be more active in promoting an improved understanding of the basic principles of competition policy and the benefits of merger control.

- "National champions" and monopolies do not tend to be dynamic; rather, their protection permits them to be lazy and thus stagnant.

- Although competition officials in developed economies often consider public monopoly more durable than private monopoly, the economic conditions and legal framework in developing economies can make private monopoly relatively more durable – and hence more problematic.

In general, however, the GFC's work in the merger area focused specifically on issues relating to international co-operation. For the first GFC meeting, the Secretariat prepared an issues paper and a somewhat revised version of its note and Members' submissions from a 2001 roundtable discussion in the Committee's Working Party No. 3. For second meeting, the Secretariat submitted a note analysing the submissions made by developing countries to a Secretariat questionnaire concerning such matters as the areas in which co-operation had been most useful (market definition, competitive effects, and remedies), and the increasingly common practice of obtaining waivers from the merging parties to permit sharing confidential information.

A majority of the respondents reported that they had reviewed one or more mergers that to their knowledge were also reviewed by other jurisdictions. Thus, as one would expect, developing countries are apparently more active in pursuing international mergers than international cartels. The questionnaire responses also indicated, however, that developing countries engage in international co-operation only rarely. Lithuania, Romania, and Russia provided examples of cases in which co-operation was used, or at least attempted, and those cases are set forth in Annex F.

The Committee's *Framework for Notification of Transnational Mergers* has been used as a model by some non-OECD countries. As noted above, the merger discussions at the second GFC meeting disclosed that developing countries believe that they are manipulated by firms in the premerger notification process. Some steps may help alleviate this problem, such as requiring that notifications identify other jurisdictions that have been or are likely to be notified, but it is probably inevitable that merging parties will try to get deals cleared first in what they regard as the key jurisdictions. Another difficulty developing countries face in conducting co-ordinated merger investigations is that they rarely if ever are beneficiaries of confidentiality waivers by the parties. By authorising the sharing of confidential information, such waivers greatly facilitate international co-operation, but the parties generally grant waivers only with respect to authorities that have a reputation for sound and fair merger control and for protection of confidential information. It is important for developing countries' competition agencies to ensure that their confidentiality laws, practices, and procedures in fact provide adequate safeguards.

# VII. THE GOALS OF COMPETITION LAW AND POLICY AND THE DESIGN OF COMPETITION LAW AND POLICY INSTITUTIONS

At the close of the second GFC meeting, the chair noted that Korea had proposed a Competition Committee roundtable discussion concerning the design of competition law and policy institutions, but that this might be an even better topic for consideration in the GFC. The United States then noted that the nature of a jurisdiction's competition law and policy institutions may depend on its competition law and policy goals, and it was eventually decided that the third GFC meeting would cover goals, institutional design, and the relationship between them. The Secretariat surveyed all GFC participants on all of these topics.

## A. Variations in the goals of competition law and policy

Virtually all GFC participants responding to the Secretariat's survey stated that the goals of their competition law and policy include **(a) promoting and protecting the competitive process, and/or (b) promoting economic efficiency**. These goals, which may simply be different ways of saying the same thing, may be considered the **"core" competition objectives**. Insofar as competition law and policy seeks other goals, realisation of the benefits contemplated by the "core" objectives – economic efficiency, competitive prices, and innovation – may be thwarted.

The survey also found that the competition laws of some OECD countries – and of virtually all other countries from places outside Central and Eastern Europe – either articulate specific non-competition goals or contain provisions that permit anticompetitive conduct to be authorised, or procompetitive practices to be forbidden, on public interest grounds. The former consist primarily of specific references to such objectives as the promotion of employment, regional development, national champions, national ownership, and economic stability. The latter are more often expressed simply in terms of "the public interest" or in provisions that allow a political decision maker to make the ultimate determination or to over-ride the determination of the competition authority. For simplicity, this report follows the practice in the Secretariat's note of referring to all such

objectives and provisions for "public interest overrides" as "public interest objectives."

GFC submissions and discussion agreed that **the potential adverse effect on competition of conflicting objectives is clear**, and is perhaps clearest when public interest grounds may be used to authorise an anticompetitive merger or to prohibit one that is procompetitive. Participants also noted a less obvious problem with public interest objectives – that their inherent ambiguity permits them to be **distorted by the politically strongest private interests to justify decisions that protect their interests at the expense of society as a whole**. Among OECD countries, there is a clear trend towards eliminating public interest as a goal or the basis for overriding competition considerations, and the provisions that still exist are seldom invoked. Such provisions appear to be invoked somewhat more frequently in other countries, but their invocation is not necessarily an indication that competition policy is being overridden. For example, Cameroon's competition law has no efficiency defence but can use the authorization process to permit merger that is expected to lead to lower prices in the long run. Among OECD countries, the public determination is usually made by a minister, whereas in other countries, the competition authority usually considers public interest objectives in the first instance (subject in most cases to review by a minister or other political decision-maker).

The competition laws and policies of many OECD and non-OECD countries also express other specific goals that are or may be somewhere in the "grey zone" between competition and public interest objectives. For example, some laws contain provisions expressing the goal of ensuring "fair" competition and/or preserving firms' "freedom" to compete. Participants' submissions and discussion recognised that **the application of grey zone goals presents a risk of distorting competition and fostering inefficiency (though the risk of protecting the strongest private interests may be smaller)**. Neither general competition policy concepts nor any country's competition law provides a principled basis to decide, for example, how much competitive harm to society as a whole is justified in order to preserve the autonomy of firms. The risk that grey zone goals will be applied strictly and end up harming consumers is very real, but there were also examples (*e.g.*, South Africa) where pragmatic decision-making has apparently prevented these provisions from presenting serious problems.

The Secretariat's survey disclosed a clear trend in OECD countries towards eliminating public interest considerations from competition decision-making. This trend was attributed to an emerging consensus that, **at least for countries that have reached a certain level of development, it is**

**not efficient to use competition law and policy to promote other goals.** Ireland, for example, explained that such countries have other policy mechanisms that are considered superior for achieving non-competition objectives. Although some non-OECD countries (Morocco and South Africa) made a similar point, there was no such trend in those countries away from inclusion of public interest goals. Indeed, the competition laws of both Morocco and South Africa contain such goals. Of course, most non-OECD countries have had less experience with competition law and policy, and the legal, economic, and institutional conditions in some such countries may limit the availability of alternative policy mechanisms.

Among countries whose laws permit public interest overrides, very few reported more than one or two cases per year on average in which this process was invoked to permit an anticompetitive merger or prevent one that is procompetitive. There is no data on the frequency with which grey zone goals are applied in a way that reduces economic efficiency, and there was no visible trend away from the use of such goals. Almost half of the survey respondents stated that they have sometimes been subjected to government influence to take industrial, social, or other non-competition policy considerations into account. It is not known to what extent the non-competition goals promoted by these interventions corresponded to goals mentioned in the competition law, how often the attempted influence was "soft" (please consider the impact on X) or "hard" (do not sue that firm), or what impact the attempted influence had on the competition agency.

Slightly more than one-half of the survey respondents reported that their competition law and policy objectives had influenced the institutional design of their competition authority. However, this influence manifested itself in such a wide variety of ways that **there is no apparent correlation between objectives and institutional design.** For example, among those jurisdictions that promote or retain the possibility of using their competition laws to promote public interest objectives, some (New Zealand, Romania, South Africa, and apparently Australia and Switzerland) have made a conscious decision to structure their competition authority as legally independent from and outside the executive branch government, others (Germany, Jamaica, the Netherlands, Norway, Chinese Taipei, and Ukraine) have attempted to create a legally independent or quasi-independent agency within the executive branch of government (such as within a ministry or accountable directly to the president), and one country (Russia) has structured its competition authority as a ministry, headed by a minister. Likewise, among those countries that do not promote or retain the possibility of promoting public interest objectives through their competition laws, but reported that the competition law and policy objectives had influenced the design of the competition authority, some (Italy and Lithuania) structured their

competition authority as legally independent from and outside the executive branch government, while others (Mexico and Spain) created a legally independent administrative agency that is incorporated into a ministry.

The most frequently mentioned way in which objectives were said to influence design was the desire to achieve independence, but this response was made by jurisdictions having a wide variety of competition law and policy objectives and institutional structures. Similarly, the notion that the need for independence is an important factor in institutional design is called into question by the fact that competition authorities of widely differing institutional structures reported that they consider themselves totally or highly independent. And even when jurisdictions share a goal such as minimizing political pressure, they sometimes select different ways of achieving it. For example, while two respondents (Germany and Switzerland) said that they reserved public interest determinations to a political decision-maker in order to insulate the competition authority from political pressure, at least one other (South Africa) thought it better to confine assessment of public interest considerations to the competition authority and autonomous judicial bodies. This variation in approaches, particularly when considered in the context of the additional variations that exist in countries that did not respond to the questionnaire, indicates that even with respect to "institutional objectives" such as independence, there is no best institutional design. More generally, it appears that the relative importance of particular **design attributes depends more on such factors as domestic legal and institutional traditions and levels of development than on the goals of competition law and policy.**

In sum, the GFC submissions and discussion indicates that participants' competition laws and policies contain a variety of stated objectives, but those differences appear to be greater on paper than in practice. Most jurisdictions have similar core objectives, and the potential conflicts created by public interest and grey zone objectives are often avoided. Individually, jurisdictions appear to take their objectives into account in designing their competition authorities, but even jurisdictions pursuing the same objectives choose differing institutional designs. Thus, GFC participants' analysis of competition law and policy objectives, like their analysis of institutional designs, appears to indicate that **there is no optimal design for a competition authority for any particular objective of competition law, including the "core" objectives described above**.

## B. The lack of any single optimal design of a competition agency

The Secretariat's survey also sought information concerning the various positions of competition authorities within their countries' administrative structure, as well as responsibilities and structure of the authorities themselves. The Secretariat's note pointed out that it was particularly difficult to describe and compare competition authorities' position within their respective countries' administrative structure because of the difference in countries' structure and different terminology. In structural terms, about one third of competition authorities consider themselves independent of Government, but there are many different measures of independence, and GFC participants agreed that **the important issue is the authority's freedom to act free from political interference,** which is not necessarily determined by administrative structure. In general, competition agencies said that they perceive themselves as having greater independence with respect to particular law enforcement cases than with respect to competition advocacy. Once a government has decided its position on a legislative matter, an agency that is part of the government may be precluded from expressing a different position. Agencies with criminal enforcement responsibilities are generally part of the government structure, but in some if not all jurisdictions the competition authority is quite independent in its prosecutorial decision-making.

It appears from participants' survey responses and the GFC discussion that almost all competition authorities conduct investigations, make decisions of some sort in individual cases, and engage in general sector investigations or economic studies. **Close to 15 percent did not list competition advocacy as being among their tasks**, but the discussion did not clarify whether those competition authorities are precluded from such activity by law or simply regard themselves as powerless because of custom or the unwillingness of other governmental institutions' to consider competition issues. The legislative basis for competition advocacy by some agencies with active advocacy programmes is sometimes derived from vague and general language, and it may be that some competition authorities without advocacy programmes could begin them without needing a new grant of legal authority.

Participants reported that, with rare exceptions, their competition agencies are in a position to influence current or proposed legislation through more or less formalised procedures, though they seldom have a right to be consulted on such matters. Most are also able to consult with other regulatory agencies, and compulsory consultation is sometimes provided for in this situation.

Several participants have a seat in their country's central bodies of government. It was noted that such a seat provides greater opportunities to influence government decisions, but it may also limit or eliminate an authority's ability to disagree publicly with those decisions, and may also make the agency more subject to political pressure in law enforcement cases.

Survey responses indicated that other than competition law enforcement and advocacy, no single task is performed by more than one third of all competition agencies. The most common other tasks were, in descending order, consumer protection, sectoral regulation, price control, state aid control (by European countries), and public procurement responsibilities going beyond preventing bid rigging (collusive tenders). In that regard, it was noted during the GFC's "small economy" session that in countries where the cost of creating a competition agency is a substantial barrier to introducing competition law enforcement, some scale economies can be realised by assigning competition enforcement activity to agencies in fields such as these.

Close to 40 percent of competition authorities share competition law or competition policy responsibilities with other agencies at the same level of government in specific areas or with respect to specific sectors. The authority of such other agencies may be exclusive or parallel. Approximately one third of competition authorities stated that they are the sole agencies in their country entrusted with tasks in the competition policy area, but that figure may be overstated if one takes a broad view of what constitutes competition policy.

In sum, there are many ways to design a competition agency. Knowledge of institutional designs in other countries can be useful to those creating a new institution or strengthening an existing one. **The discussion in this session was consistent with the discussion concerning "objectives" in suggesting that there is no optimal design for a competition authority.** Domestic legal traditions probably are the key factor in different countries' differing views on whether to combine or separate the investigation and adjudication functions, for example.

# VIII. SPECIAL ISSUES RELATING TO "SMALL" ECONOMIES

The GFC also considered whether and to what extent an economy's "small" size implies a need for a competition law enforcement regime that has substantive or institutional differences from those of "larger" economies. The answers to these questions clearly depend on how one defines "small." It should be emphasised, however, that no GFC participant made the argument that small, open economies have no need for a general competition law. (Malta's contribution stated that certain large economy approaches are or may be undesirable in a small economy, but in context it appears that it was really emphasising that that market differences must be considered, not that a different approach is necessary.) The relative importance of competition law enforcement and other goals was discussed, but desirability of a law was generally accepted.

It was noted that while special issues may arise with respect to *competition law*, there is no reason for consideration of special approaches to *competition policy* analysis of regulatory issues. Specific regulatory policies are by definition economy-specific, even though some generalizations are possible. And competition policy in its broadest sense does not call for uniform or particular regulatory policies, but rather is a general approach to regulation (now often called "regulatory reform") in which governments include in their assessment of existing and proposed laws and regulations an analysis of whether they contain restrictions on competition and consumer choice that are unnecessary to achieve regulatory goals. The value of competition policy in this general sense does not vary with the size of an economy (or other reasons); indeed, it is a tool by which economies with differing characteristics can develop regulatory policies that take those differences into account.

Some of the arguments about how a country's size might affect its optimal competition law enforcement regime raise conceptual issues. However, the main reason these issues are difficult to analyse is that "the small economies issue" can involve from one to three different implicit definitions of "smallness" (two of which are not measures of size in any conventional sense), each of which is used to discuss a different policy issue. Since there was confusion even during the GFC meeting, it is useful to describe these different definitions and the associated policy concerns.

First, some use the term "small" in its conventional sense as referring to population size or GDP. This "small country" definition is not usually used as grounds for suggesting that competition law enforcement policies should differ, but rather to point out that small countries do face special problems. The small size of the business elite may make explicit collusion easier to hide, and tacit collusion may simply be easier. The closeness of the political and business elites is also a complicating factor. Moreover, enforcement resources are more limited, and large multinational firms may threaten to leave the country if they do not get their way on competition (or other) issues. In addition, below a certain size, it may not be cost-beneficial to have a separate competition agency, in which case countries may try to cut costs by combining competition enforcement with a related field, such as consumer protection. Alternatively, small countries may also seek to reduce costs and increase "clout" by joining a regional law enforcement body.

Second, some use the term "small" when they are really referring to developing countries. Those who take this "developing country" perspective make two basic points. The less developed and poorer countries in this category face the same kind of cost and prioritisation issues as a small country even though their populations and GDP may be larger. And many of the more developed countries in this category are often like transition countries in that they (i) lack the legal and institutional infrastructure necessary for an efficient market economy, and (ii) need to create competitive markets rather than emulate the efficiency approach taken by the most developed countries.[8] Thus, they may find it beneficial to give greater emphasis to structural than efficiency issues.

Third, some apply the term "small" to countries whose economies (or markets) cannot support enough firms of minimum efficient scale ("MES") to have a competitive market structure. Of course, even the largest countries (by any measure) have markets that are small in this sense, but some experts believe that certain countries face this situation – and the resulting efficiency/competition trade-off – so frequently that they should adopt a special approach. A presentation at the GFC meeting argued that this situation calls for even more focus on efficiency than in large, developed countries, but some experts disagree, and many other experts and officials question the practical importance of this subject.[9]

The implications of the GFC submissions and discussion may be summarised as follows. A small country has a special need to hold down costs and seek "clout," but it can apply standard competition law analysis unless one of two conditions exists. If the small country is also a developing country, it should probably place greater emphasis on creating a competitive market structure than on efficiency. On the other hand, if it has many

markets that are small in relation to MES considerations, some would suggest putting even more emphasis on economic efficiency than is done in large countries. There was little explicit discussion of the appropriate policy for a developing country that was small in MES terms, but the experience of transition countries and more anecdotal evidence from some developing countries suggests that the reasons for emphasising a competitive market structure and consideration of equity issues outweigh the largely theoretical case for emphasising economic efficiency.

Finally, it is important to bear in mind that no matter how "small" is defined, there will be many significant differences among the economies classified as small. Some of those differences (*e.g.*, levels of economic and institutional development, and openness to foreign competition) may be far more important than "smallness" on the preferred approach to competition policy.

# IX. CONCLUSION

The principal substantive theme of the first three GFC meetings – that competition law and policy are currently providing substantial benefit to developed and developing countries – was discussed in Part II of this report. Neither the elements of that theme nor the GFC's messages on narrower point of competition law and policy will be repeated here. Rather, this conclusion focuses on issues concerning the operation of the GFC itself.

First, the GFC clearly is achieving its paramount objective of promoting dialogue and an enhanced understanding on competition issues of interest and relevance to developed and developing countries from around the world. This conclusion is supported by objective data, such the increasing participation by non-OECD economies from throughout the world and comments in the evaluation forms submitted by participants. Among other things, GFC participants responded very favourably to all questions in these forms regarding the relevance of the GFC for the institutions they represent, their economies, themselves as individuals and their understanding of approaches in other jurisdictions. The substantial majority of participants also found the meeting topics to be of high or near-high interest. Other indicators of the success of the GFC in achieving its objectives include the quality of written submissions and dialogue, and the perceived enthusiasm of participants. An important aspect of the GFC's success is that representatives from OECD and other countries come together as peers to engage in candid, non-political discussion of issues of mutual concern.

More specifically, the GFC has, as intended, served as a vehicle for disseminating the work of the Competition Committee and for candid policy dialogue that includes information and analysis of the policies, practices, and concerns of economies from around the developing world.

- GFC dissemination of OECD work has focused on the two areas that are addressed by recent OECD Recommendations – (a) the nature and harm of hard core cartels, and (b) the importance and means of international co-operation in dealing with both cartels and mergers. Although few developing countries have challenged *international* cartels, many of them are in fact using competition law to halt *domestic* cartels that have been creating inefficiency, waste, artificial shortages, and monopoly prices in their economies. And while case specific co-operation between OECD and other

economies remains relatively infrequent, an increasing number of economies have co-operation agreements, and even more are developing the kind of mutual understanding that is necessary for effective co-operation. The GFC has also helped disseminate information about what the Committee has described as the most serious obstacle to effective co-operation – national laws that prevent most competition agencies from sharing both (a) inherently confidential information (such as trade secrets or planning documents), and (b) all non-public (but not inherently confidential) information they collect during investigations. Work on this issue is continuing, since at this point few OECD jurisdictions and only one other jurisdiction have enacted laws that authorise such information to be shared, subject to adequate safeguards.

- As a forum for policy dialogue that includes the views of non-OECD countries, the GFC has operated on two levels. Ongoing Competition Committee work on cartel, merger, and co-operation issues has been informed by discussions at GFC meetings, and one proposed element of Competition Committee work – consideration of the goals of competition policy and the institutional design of competition authorities – was moved to the GFC in order to obtain a broader perspective. The GFC's increasing focus on issues relating to competition policy and economic development is an even clearer example of its contribution to global policy dialogue.

Second, the GFC has become an important forum for discussion of important issues concerning the relationship between competition policy and economic development. The first meeting touched on these issues, the second addressed them specifically, and the third explored them from different perspectives (including competition policy's goals and the special situation of small economies). These discussions have clarified how competition policy operates in relatively developed countries (thus dispelling myths that are obstacles to reform in some countries), while also exploring ways in which the economic, legal, and institutional conditions in less developed countries can justify somewhat differing approaches to competition law and policy. The links between competition and economic growth and development will be further explored in the fourth meeting of the GFC, in February 2004.

Finally, the GFC has not only considered the need for and preferred means of providing capacity building and technical assistance to developing countries, it also has highlighted the need for increased activity in this area. It also has demonstrated that OECD-style "peer review" can be a useful means for providing such assistance. The third meeting's peer review of

South Africa benefited South Africa most directly, but it also was a useful exercise for other participants from the developing world (as well as providing useful information about South Africa to all participating countries. Since then, there has been a similar review of competition policy in Chile (at the IADB/OECD Latin American Forum), and Russia has volunteered to be reviewed at the fourth GFC meeting.

# Notes

1. Interim Report on Convergence of Competition Policies (OECD), 1994, at para. 6.

2. Annex D contains citations to both the Economics Department materials circulated at the GFC meeting and to other relevant analysis by the Economics Department, including analysis done since February 2002.

3. See the materials referred to in note 2 and accompanying text.

4. *Recommendation of the Council concerning Structural Separation in Regulated Industries*, (OECD) 26 April 2001.

5. Until the early 1990's, the Competition Committee peer review system was that every Member drafted and presented an annual report, and other Members could ask any questions they wanted. Because this process was mostly limited to the issues raised by the reporting country, a so-called "in-depth examination" system was adopted. Under this system, two countries were examined at each meeting, again on the basis of a report prepared by the country itself, but the examination was done by two countries chosen in advance for their particular interest and knowledge of the competition law and policy of the reviewed country. The examiners prepared themselves in advance, in order to be able to ask questions about ambiguities or possible weaknesses of the competition law and policy of the reviewed country.

6. In many if not most situations, a competition authority is authorised to share "confidential" information if the provider or the owner of the information waives its confidentiality rights. This option has little value in the investigative phase of cartel cases, when competition authorities are generally unwilling to take any action that would disclose the fact of their investigation and thus create a serious risk that the parties will seek to obstruct the investigation by agreeing to a common "story" and/or destroying evidentiary material. On the other hand, waivers are now common in merger investigations (though new competition authorities are often unable to obtain the benefit of the waivers). Waiver situations can arise even in cartel matters when an applicant for immunity or other co-

operating party is willing to let enforcement agencies in multiple jurisdictions exchange information and evaluate the comprehensiveness of the co-operation being provided.

7. See, e.g., *Fighting Hard Core Cartels: Harm, Effective Sanctions, and Leniency Programmes,* OECD (2002).

8. Beatriz Boza, former Head of Peru's competition authority, was the principal proponent of this view, which is consistent with the view that has emerged from the Secretariat's experience in co-operating with developing countries.

9. Professor Michal Gal of the Haifa University School of Law, who participated in the GFC discussions and made written contributions as well, recently published a book entitled *Competition Policy for Small Market Economies* (Harvard University Press, 2003). The book is the first to directly take on this topic, and it offers some useful insights and recommendations. It should be noted, however, that the experts' background note for the GFC meeting was apparently incorrect in saying that the book had provided a definition of "small economy" that is sound for competition analysis – one that "can support only a small number of competitors in most of its industries." Although "industries" have no necessary relevance in competition analysis, the GFC background note stated that the definition was intended to incorporate a full process of product and geographic market analysis (including supply-side substitution) done from the perspective of buyers within the political borders of the economy. Later, it came to light that the book contemplates measuring concentration in "markets" whose product and geographic parameters are based on studies of aggregate concentration or estimates by local officials. Competition analysis would not accept such studies and estimates as a basis for market definition.

*Annex A*

# OECD COMPETITION ACTIVITIES

The Competition Committee's work identifies many ways in which competition law and policy can become more beneficial domestically and internationally.

- The Committee holds "roundtable" discussions of key competition issues, participates in planning GFC meetings, and oversees the operation of two subsidiary bodies mentioned below. It also conducts "peer reviews" of Members' competition law and policy. Peer review has from the outset been an important factor in identifying desirable reforms, and under the OECD regulatory reform programme the peer review system has been made more rigorous and thorough by basing it upon substantial reports prepared by the Secretariat. The Committee is in the process of reviewing how OECD countries have done in implementing the recommendations from the OECD reviews of both their competition law enforcement regimes and their application of competition principles to various regulated sectors. This review will involve an assessment of the extent to which the experience with following up on recommendations in peer review reports gives rise to a need to revisit the content of the OECD's 1997 Policy Recommendations on Regulatory Reform. Part of this "stocktaking" exercise will be conducted in the February 2004 GFC.

- The Committee's Working Party on International Co-operation focuses on law enforcement issues and has produced Recommendations adopted by the OECD Council and Committee reports that address such matters as the harm caused by hard core cartels, techniques for finding and halting such cartels and for co-operating in cartel and other competition investigations, and the potential for making premerger notification procedures less burdensome and more useful.

- The Working Party on Competition and Regulation considers the application of competition principles to government regulation, particularly the regulation of sectors that may have a natural monopoly element or some other market failure. Its most recent work includes a report and a Recommendation on restructuring public utilities so that the monopoly element can be more effectively regulated while market forces can operate in relation to activities that could be competitive.

- The Committee has also joined with the OECD Trade Committee to create the Joint Group on Trade and Competition, which explores the inter-relationship of these two policy areas and contributes to the "trade and competition" debate concerning possible competition rules at the WTO. The work of this Joint Group was discussed at a special Joint Global Forum on Trade and Competition, and disseminated in a publication entitled "From Doha to Cancun", to assist countries to prepare for the WTO ministerial meeting held on 10-14 September 2003 in Cancun, Mexico.

During the period covered by this report, the Committee's management structure was as follows:

| | |
|---|---|
| Chairman: | Mr. F. Jenny (France) |
| Vice-Chairmen: | Ms. M. Bloom (UK) |
| | Mr. Böge (Germany) |
| | Mr. Hur (Korea) |
| | Mr. Ueno (Japan) |
| | Mr. Purasjoki (Finland) |
| | Mr. Schaub (EC) |
| | Mr. Kolasky (US) |
| Ex officio: | Mr Fels (Australia), co-chair, Joint Group on Trade and Competition |
| | Mr. Heimler (Italy), Chairman of WP2 |
| | Mr. von Finckenstein (Canada), Chairman of WP3 |
| | Mr. Souty, UNCTAD co-ordinator |

OECD co-operation with developing economies assists the Competition Committee in its "core" work, helps to disseminate that work, and assists developing economies to build capacity in the field of competition policy and competition law enforcement.

- Some developing and transition economies regularly participate as "Observers" in Competition Committee meetings, providing valuable input to Members and benefiting from information obtained in Committee meetings. For example, before they became OECD Members, the Czech Republic, Hungary, Poland, and the Slovak Republic were observers to the Committee. The current Observers are Argentina, Brazil, Israel, Lithuania, Russia, and Chinese Taipei.

- Since 1990 the OECD has also worked with developing economies in separate, regional activities that are now co-ordinated by the OECD's Centre for Co-operation with Non-Members ("CCNM") and supported by OECD competition authorities. This programme originally focused on the Czech Republic, Hungary, Poland, and the Slovak Republic, quickly expanded to include the former Soviet Union and Central and Eastern European transition countries, and has now expanded to include economies in Southern Africa, Asia, and Latin America. Seminars, workshops, conferences, and other events with countries in these areas has both increased awareness and understanding of developing countries' difficulties and helped to build capacity in developing economies.

- The OECD Recommendation on Effective Action against Hard Core Cartels specifically invites non-OECD economies to associate themselves with it and to implement its provisions. Both the Recommendation and the Committee's Framework for Premerger Notification have assisted competition law enforcement in non-OECD economies, and the OECD has frequently been asked to share its Members' experiences in applying competition principles to government regulation.

- By meeting back-to-back with Competition Committee meetings, the GFC has integrated the Committee and CCNM activities and helped ensure that developing economies are able to meet with a large number of high level OECD competition officials.

*Annex B*

# OECD COMPETITION LAW AND POLICY PUBLICATIONS

## 1. Council Recommendations Related to Competition Law and Policy

Concerning Structural Separation in Regulated Industries (2001)
Concerning Effective Action against Hard Core Cartels (1998)
Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade (1995)
Concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements (1989)
For Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies (1986)

## 2. Competition Committee Reports

The Regulation of Access Services (2003)
Hard Core Cartels (2003)
Fighting Hard Core Cartels: Harm, Effective Sanctions, and Leniency Programmes (2002)
Pro-competitive Restructuring of Public Utility Industries (2001)
Hard Core Cartels (2000)
Positive Comity (1999)
Notification of Transnational Mergers (1999)

## 3. The OECD Journal of Competition Law and Policy

The OECD Journal of Competition Law and Policy is published four times annually by the OECD Secretariat, and contains copies of a variety of OECD reports, papers, etc. concerning competition law and policy.

## 4. Competition Committee Round Tables

### *2003*

Substantive Criteria Used in the Assessment of Mergers
Communication by Competition Authorities
Loyalty and Fidelity Discounts and Rebates
Merger Review in Emerging High Innovation Markets

### *2002*

Competition and Regulation Issues in Telecommunications
Portfolio Effects in Conglomerate Mergers

### *2001*

Competition Policy in Subsidies and State Aid
Price Transparency
Competition Issues in Road Transport
Competition in the Pharmaceutical Industry
Competition Issues in Electronic Commerce

### *2000*

Competition Issues in Joint Ventures
Competition in Pharmaceutical Industry
Competition Issues in Electronic Commerce
Promoting Competition in the Natural Gas Industry
Mergers in Financial Services
Competition in Local Services: Solid Waste Management
Competition in Professional Services
Airline Mergers and Alliances

### *1999*

Oligopoly
Promoting Competition in Postal Services
Buying Power of Multiproduct Retailers
Relations between Regulators and Competition Authorities
Competition Policy and Procurement Markets
Competition and Regulation in Broadcasting in the light of Convergence

### *1998*

Competition and Related Regulation Issues in the Insurance Industry
Competition Policy and Intellectual Property Rights
Enhancing the Role of Competition in the Regulation of Banks
Competition Policy and International Airport Services
Railways: Structure, Regulation and Competition Policy

### *1997*

Resale Price Maintenance
Judicial Enforcement of Competition Law
Application of Competition Policy to the Electricity Sector
Competition Issues related to Sports
General Cartel Bans: Criteria for Exemption for Small and Medium-Sized Enterprises
Application of Competition Policy to High Tech Markets

### *1996*

Abuse of Dominance and Monopolisation
The Reform of International Satellite Organisations
Competition in Telecommunications
Developments in Telecommunications: An Update (1997)
The Essential Facilities Concept
Efficiency Claims in Mergers and Other Horizontal Agreements
Competition Policy and Film Distribution
Failing Firm Defence
Competition Policy and Environment

## 5. OECD Reviews of National Competition Frameworks

### *Canada*

The Role of Competition Policy in Regulatory Reform

### *Czech Republic*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in Electricity, Gas, Road and Rail Freight

### *Chile*

Competition Law and Policy in Chile

### *Denmark*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in the Electricity Sector

### *Greece*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in Electricity, Domestic Ferries and Trucking

### *Hungary*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in the Electricity Industry

### *Ireland*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in Electricity, Gas, Pharmacies and
Legal Services

### *Italy*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in Electricity, Gas and Railroads

### *Japan*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in the Electricity Sector of Japan

### *Korea*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in the Electricity Industry

### *Mexico*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in the Telecommunications Industry

### *Netherlands*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in the Electricity Industry

### *Poland*

The Role of Competition Policy in Regulatory Reform
The Postal and Energy Sectors

### *South Africa*

Competition Law and Policy in South Africa

### *Spain*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in the Electricity Sector

### *Turkey*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in Electricity, Gas and Rail Freight Transport

### *United Kingdom*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in Gas and Electricity and the Professions

### *United States*

The Role of Competition Policy in Regulatory Reform
Regulatory Reform in the Electricity Industry

*Reviews to be published:*

- Germany
- Finland
- France
- Norway

## 6. Other recent OECD Materials

*Trade and Competition: From Doha to Cancún*, OECD (2003).

This publication contains a brief summary of the discussion at the 2003 Joint Global Forum on Trade and Competition, as well as the principal background note for that meeting,

 

"Issues for Trade and Competition in the Global Context: A Synthesis", by John Clark (OECD) 2003. Other materials from that meeting are available on the website.

Synthesis Report on Parallel Imports (2002).

Remedies Available to Private Parties under Competition Laws (2000).

Competition and Trade Effects of Abuse of Dominance (2000).

"Regulatory Reform, Demonopolisation, and Privatisation: How to Ensure Consistency with Competition Policy", by Joanna Shelton, OECD Journal of Competition Law and Policy, Vol. 1, No. 3 (1999).

"Liberalisation, Regulation and Growth – The OECD Experience, by Seiichi Kondo, OECD Journal of Competition Law and Policy, Vol. 2, No. 1 (2000).

Report on Regulatory Reform (1997).

*Annex C*

# MATERIALS FROM OR ABOUT OECD COMPETITION LAW AND POLICY ACTIVITIES WITH DEVELOPING ECONOMIES

All GFC materials may be found at *http://oecd.org/competition/GlobalForum*.

The website also contains a link to the IADB/OECD Latin American Competition Forum, as well as other potentially useful links.

*Competition Law and Policy in South Africa*, by Michael Wise, OECD (2003).

"Competition Law and Policy in Southeast Europe", by Lennart Goranson and Janos Volkai, OECD Journal of Competition Law and Policy, Vol. 5, No. 2 (2003).

"The Role of Competition Policy," by Terry Winslow and Sally van Siclen, Chapter 12 of China in the World Economy: The Domestic Policy Challenges, OECD (2002).

"Capacity Building for Effective Competition Policy in Developing and Transitioning Economies", OECD Journal of Competition Law and Policy, Vol. 4, No. 4 (2002).

Reforming Russian Infrastructure for Competition and Efficiency, by Darryl Biggar and Sally van Siclen, OECD (2001).

*Competition Policy and Economic Adjustment*, The World Bank (Washington, DC) and OECD (Paris) (2001).

"OECD Competition Policy Recommendations, Developing Countries, and Possible WTO Rules", by Terry Winslow, OECD Journal of Competition Law and Policy, Vol. 3, No. 1 (2001).

"The OECD's Global Forum on Competition and Other Activities", by Terry Winslow, Antitrust Magazine, Vol. 16, No. 1 (2001).

"OECD Programmes for International Responses to Global Competition Issues", by Terry Winslow, International and Comparative Competition Law and Policies, Kluwer Law International (The Hague) (2001).

"Competition Law and Policy Developments in Brazil", by John Clark, OECD Journal of Competition Law and Policy, Vol. 2, No. 3 (2000).

*A Framework for the Design and Implementation of Competition Law and Policy*, The World Bank (Washington, DC) and OECD (Paris) (1999).

"The Asian and Russian Economic Crises: The Role of Corruption, Cronyism, Discrimination, and Distorted Incentives; The Role for Competition Policy," OECD Journal of Competition Law and Policy, Vol. 1, No. 2, Introduction by Terry Winslow, "Competition Policy and the Asian Economic Crisis" by Frédéric Jenny, "Addressing Russia's Economic Crisis" by Sarah J. Reynolds (1999).

*Competition Law and Policy in the Baltic Countries*, by John Clark, OECD (1999).

"Competition Law and Policy in the Russian Federation," Annex VII, OECD Economic Surveys, Russian Federation, OECD (1997).

*Annex D*

# OTHER RELEVANT OECD PUBLICATIONS

## 1. Economics Department studies

"The cross-market effects of product and labour market policies", OECD Economic Outlook, No. 70 (2001), Chapter VI (distributed as background at the GFC in February 2002).

*The Sources of Economic Growth in OECD Countries*, OECD ( 2003).

"Policy influences on foreign direct investment", OECD Economic Outlook, No. 73 (2003), Chapter VIII.

"The economy-wide effects of product market policies", by G. Nicoletti, in *Quantifying the Benefits of Liberalising Trade and Services*, (2003).

"Regulation, productivity and growth", by G. Nicoletti and S. Scarpetta, Economic Policy, No. 36 (2003)(also available as OECD Economics Department Working Paper No. 347).

"Regulation and investment", by A. Alesina, S. Ardagna, G. Nicoletti and F. Schiantarelli, NBER Working Paper No. 9560 (2003)(also available as OECD Economics Department Working Paper No. 352).

"Product market competition and economic performance," OECD Economic Outlook, No. 72 (2002), Chapter VI.

"Productivity and innovation: the impact of product and labour market policies," OECD Economic Outlook, No. 71 (2002), Chapter VII.

"Productivity and convergence in a panel of OECD industries: do regulations and institutions matter?" by S. Scarpetta and T. Tressel, OECD Economics Department Working Paper No. 342 (2002).

"Product and labour market interactions in OECD countries", by G. Nicoletti, et al., OECD Economics Department Working Paper No. 312 (2001).

 

## 2. Other OECD materials

*Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences*, OECD (2004)

"Globalisation in Developing Countries: The Role of Transaction Costs in Explaining Economic Performance in India", OECD Development Centre, by Maurizio Bussalo and John Whalley (2003).

"Public Procurement: Lessons from Kenya, Tanzania and Uganda", Oby Walter Odhiambo and Paul Kamau, OECD Development Centre (2003).

*Annex E*

# ILLUSTRATIVE CARTEL CASES BY NON-OECD JURISDICTIONS

- **Bulgaria** mentioned two particularly interesting cases. One involved the public transportation sector, which in Sophia consists of fixed route bus service, regular taxi service, and an intermediate service in which the beginning and end points are fixed but the vehicles may vary their routes between these points. During a meeting in a café, firms providing this intermediate service agreed to raise price simultaneously and by an identical amount. It appears that a substantial fine was imposed.

  In another case, two companies were prosecuted for their participation in a price fixing conspiracy relating to sales of phone cards. The agreement was reached and monitored during regular meetings of the companies, which had a common shareholder who acted as an intermediary in the price co-ordination. The duration of the agreement was one year. Both companies were fined.

- **China's** cartel cases all involved collusive tenders (bid rigging). (China's unfair competition law has some competition provisions, including a ban on bid rigging, but does not apply to other forms of price fixing.). In one case, five groups of companies were convicted of participating in a bid rigging conspiracy affecting the operation of a brickyard plant in Zhejiang Province. Representatives of the groups met and determined the bid winner, the winning price, and the amount the bid winner would pay to the other four groups as compensation. The bid was invalidated and the respondents were fined.

  In another case, ten construction companies were prosecuted for bid rigging on a contract for the construction of a school building. The ten companies agreed that No.2 Construction Company would get

 

the contract in exchange for payments to the other companies, and assigned one of the companies to calculate the bidding prices of all candidates. The bid was invalidated and the illegal gains were confiscated.

- **Estonia** reported one hard core price fixing case and one case involving an anticompetitive exchange of pricing information. The cartel case prosecuted three taxi companies for fixing the price of taxi services in the city of Parnu. The companies had 40% of the market. The Competition Board ordered the three companies to cease the practice and submitted the case to the court, which imposed fines.

  In the other case, there was a meeting of four leading milk processors and ten wholesalers of milk products in Estonia. The purpose of the meeting was to agree on reduction of sell-off and purchasing prices of milk products. Although no agreement was concluded during the meeting, the exchange of information about sell-off prices of milk products and deduction rates influenced the processors and wholesalers to act similarly with their competitors. It is unclear how this case was resolved.

- **Indonesia** reported the only cartel case its new authority had encountered, which involved bid rigging with respect to the supply of pipe and pipe processing services. Three pipe processors were found to have exchanged their prices with each other before the bids were submitted. An unusual feature of the case is that in addition to the three processors, the oil company that had announced a tender was also held responsible – for failing to ensure fair bidding. No fines or other sanctions were imposed. Instead, the competition authority ordered that the contract be dissolved and that entire tender process be redone.

- **Latvia's** most interesting case involved the prosecution of two companies for their participation in a conspiracy relating to international air transportation. A Latvian airline and a Russian airline agreed that except for the flights provided in the agreement, neither would operate regular flights between Latvia and Russia. In addition, the Latvian firm agreed to make payments to the Russian airline if the latter agreed not to offer any other regular transportation to/from Latvia or inside Latvia. The term of the agreement was 10 years, but it was in force for less than one year. The Competition Council was empowered to impose fines only on the Latvian firm.

- **Peru** submitted voluminous information on its well-known "chicken cartel" case and also summarised two other cases. In one of them, three companies were convicted of bid rigging on a contract for the construction of secondary electricity net in Puerto Maldonado City. The three bidders' documents contained the same redaction and the same format, and they also presented the same orthographic errors, the same time of construction, and almost the same price bid. The competition authority ordered the three companies to cease the practice and imposed fines of each of them.

  The other case involved price fixing of transportation services in Lima. Local bus companies agreed to fix prices and informed city officials about the agreement. The local authorities accused the companies of competition restricting practices and submitted direct evidence to the competition authority. The case was resolved on the basis of a signed document in which the companies committed themselves to cease the restrictive practices. One company, which refused to sign the document, was fined.

- **Romania** described two cases. One involved a price fixing conspiracy relating to the bottling of mineral water in Romania. The Competition Council imposed fines on all participants.

  The other reported case was against members of the Pharmacists Association, who had agreed to divide among themselves all sales of drugs and to take steps to prevent future entry. The fine imposed was calculated as a percentage of profit of the Pharmacists Association.

- **Slovenia** described a case in which five major producers of electric energy were convicted of participating in a price fixing conspiracy relating to the provision of electric energy in Slovenia. The conspirators agreed on a joint offer to eligible customers that specified the terms of sales including a set price. One of the conspirators was chosen as a co-ordinator of actions among the companies. There was direct evidence of the collusion. The cartel was prohibited by the Office.

- **Chinese Taipei** reported on three cases. In one of them, the Flour Association was convicted of organising a buyers' cartel involving wheat products. The Association instituted a total quantity control and quota system among 32 flour producers by means of, among other things, "purchase allocation meetings". It improperly intervened in each member's inventory management and obstructed

 

fair competition among enterprises. The Fair Trade Commission issued a decision to cease these practices and imposed a fine.

Six companies were prosecuted for bid rigging on a contract for the procurement of truck-mounted mobile cranes. Knowingly, and through mutual communications, the firms apportioned the number, suppliers, and amounts of the winning bids before the bid opening. The Commission ordered them to cease the concerted practices. The awarding authority was found to have violated the law by improperly restricting the eligibility to bid on its contract.

Numerous companies were convicted of fixing the price of liquefied petroleum gas (LPG). The agreement was operated through continued meetings to set fees and agreements to divide customers. The firms involved in this case accounted for 97% of the total volume sold in one area and over 80% of the volume sold in another. The respondents all were fined.

- **Ukraine** contributed a case involving three companies prosecuted for price fixing in connection with the provision of technical services for electronic cash-machines in the city of Donetsk region. Two companies forced their lower-priced competitor not to compete on prices, and then all three agreed to a so-called "sole" tariff for the services. The respondents were fined, and prices fell again.

*Annex F*

# MERGER CO-OPERATION INVOLVING NON-OECD ECONOMIES

Although co-operation involving non-OECD economies is rare, there have been instances when it has been used or tried. The following cases are useful examples.

- **Lithuania** described two cases. The first involved a beer merger that affected markets in several countries, including Denmark, Finland, Norway, Sweden and others, in addition to Lithuania. The Lithuanian and Swedish competition agencies had communications in which general information regarding market definition and remedy was exchanged. Confidentiality restrictions limited the exchanges, however.

  The second case involved a bank merger in Sweden that was reviewed by the European Commission's DGCOMP. The merger, which was ultimately abandoned by the parties, had potential anticompetitive effects in Lithuania and Estonia, as well as Sweden. The Lithuanian Competition Council consulted with both Sweden and DGCOMP in the period before the merger was abandoned.

- **Romania** described an interesting case involving a merger of two Romanian cement companies, one of which was owned by a Hungarian firm and the other by a German firm. The Romanian competition agency engaged in discussions with the Hungarian agency regarding the cement market in Hungary. The information was useful to the Romanian agency, which permitted the merger after imposing certain conditions upon the acquiring company.

- **Russia** provided the only description of attempted co-operation that was denied. The Rostov Territorial Office of the Ministry for Antimonopoly Policy was reviewing a merger in the metals sector,

 

and sought information from the Donetzk Regional Office of the Ukrainian Antimonopoly Committee regarding holdings of the stock in one of the parties by Ukrainian interests. Ukraine denied the request on the ground that the requested information was confidential and could not be disclosed.