

Hard Core Cartels

Third Report on the Implementation
of the 1998 Recommendation



HARD CORE CARTELS

THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 RECOMMENDATION

-- 2005 --

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 Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

© OECD 2006

Permission to reproduce a portion of this work for non-commercial purposes or classroom use should be obtained through the Centre français d'exploitation du droit de copie (CFC), 20, rue des Grands-Augustins, 75006 Paris, France, Tel. (33-1) 44 07 47 70, Fax (33-1) 46 34 67 19, for every country except the United States. In the United States permission should be obtained through the Copyright Clearance Center, Customer Service, (508)750-8400, 222 Rosewood Drive, Danvers, MA 01923 USA, or CCC Online: <http://www.copyright.com/>. All other applications for permission to reproduce or translate all or part of this book should be made to OECD Publications, 2, rue André-Pascal, 75775 Paris Cedex 16, France.

FOREWORD

In 1998 the OECD initiated an anti-cartel programme with the adoption of the Council Recommendation Concerning Effective Action against Hard Core Cartels. This publication is the third comprehensive report by the OECD Competition Committee about the ongoing fight against cartels. Earlier reports were published in 2000 and 2003.

The 2005 report focuses on four topics, including progress in member countries and observer countries in fighting cartels; public awareness of the harm caused by cartels; effective sanctions against cartel conduct, in particular sanctions against individuals; and international cooperation in cartel cases.

The report finds that efforts to detect, investigate, and prosecute domestic and international cartels have continued in OECD member and observer jurisdictions at very high levels. More competition authorities have focused efforts and resources on the prosecution of cartels. Severe sanctions are being imposed against cartels. Cooperation among competition authorities in investigations of cartels has reached unprecedented levels and exchanges of cartel enforcement know-how have intensified. While this represents significant progress, much remains to be done. The Report concludes that more countries should expand their awareness programmes, and work more extensively with procurement officials in an effort to fight bid rigging more effectively. Countries should seek opportunities to further increase corporate fines, and should consider introducing and imposing sanctions against individuals, including criminal sanctions. The report also identifies opportunities to enhance international cooperation in cartel investigations, highlighting in particular the Committee's Best Practices for formal information exchange in cartel investigations. The report concludes with an outline of the Competition Committee's future work related to the fight against cartels.

TABLE OF CONTENTS

Introduction	7
1. Trends in Anti-Cartel Enforcement	8
1.1 <i>Developments in Member Countries and Observers</i>	9
1.2 <i>Illustrative Examples of Recent Cartel Investigations</i>	12
1.3 <i>Work of International Bodies Related to Cartels</i>	17
2. Raising Public Awareness of the Harm Caused by Cartels	17
2.1 <i>Bid Rigging - Raising Procurement Officials’ Awareness of Cartels</i>	20
3. Harm and Sanctions	25
3.1 <i>Estimates of Harm Caused by Cartels</i>	25
3.2 <i>Sanctions, in Particular Sanctions Against Individuals</i>	26
4. International Cooperation, Including Exchange of Information in Cartel Investigations	29
4.1 <i>Enforcement Cooperation</i>	30
4.2 <i>Best Practices for the Formal Exchange of Information</i>	33
4.3 <i>The Interface Between Public and Private Enforcement in International Cartel Cases</i>	35
4.4 <i>International Agreements</i>	37
5. Conclusions	38
5.1 <i>Raising Public Awareness</i>	39
5.2 <i>Sanctions</i>	39
5.3 <i>International Cooperation</i>	40
5.4 <i>Next Steps</i>	40

<i>Annex 1.</i>	Recommendation of the Council concerning effective action against hard core cartels	47
<i>Annex 2.</i>	Best Practices by the Competition Committee for the formal exchange of information between competition authorities in hard core cartel investigations.....	53

Introduction

On 25 March 1998 the Council adopted its Recommendation concerning Effective Action Against Hard Core Cartels.¹ The Recommendation condemns hard core cartels as the most egregious violations of competition law. It calls upon member countries to ensure that their laws adequately prohibit such cartels and that they provide for effective sanctions, enforcement procedures, and investigative tools with which to combat them. Further, the Recommendation urges member countries to cooperate with one another in prosecuting hard core cartel conduct.

Since the adoption of the Council Recommendation, the Competition Committee has considered the anti-cartel effort as one of its top priorities, as documented in the Committee's reports to the Council on the implementation of the Recommendation. In 2000, the Competition Committee submitted the first report to the Council on the implementation of the Council Recommendation (the "First Report").² The First Report noted that in the two years since the Recommendation there had been progress in raising the public consciousness about the harmfulness of cartels and in prosecuting them. The First Report explored in depth the topics of international co-operation in cartel investigations and the obstacles to more effective co-operation.

In 2002, the Competition Committee submitted the second report on the implementation of the Council Recommendation (the "Second Report"), which focused on the harm caused by cartels, investigative tools, sanctions, and international cooperation. The Second Report included a review of the estimated harm caused by cartels, and concluded that "the total harm from cartels is significant indeed, surely amounting to many billions of dollars each year."³ The Second Report also compared estimates of unlawful gains from cartels in a number of cases with the financial sanctions imposed in the same cases, and found that in virtually all of the examined cases the fines imposed were below the level of fines that would be considered an optimal deterrent, and in most cases were substantially below that level. The Second Report concluded a summary of anti-cartel enforcement actions as follows:

In sum, cartels are unambiguously bad. They cause harm amounting to many billions of dollars each year. They interfere with competitive markets and with international trade. They affect both developed and developing countries, and their effect in the latter may be especially pernicious. Their participants operate in secret, knowing that their conduct is unlawful. Their detection and prosecution should be a top priority of governments everywhere.⁴

The Second Report received a great deal of public attention and played an important role in member countries' reviews of their anti-cartel regimes.⁵ For example, a Government-established Commission in *Australia* that examined reforms of Australian competition laws recommended the introduction of criminal sanctions for hard-core cartels, referring, among other sources, to the findings of the Second Report concerning the harm caused by cartels and its comparison between harm and financial sanctions.⁶ *Japan* is another country that used the findings of the Second Report in its review of cartel enforcement.

This is the third report by the Competition Committee on the implementation of the Council Recommendation and the progress of member countries in the fight against hard core cartels, and the last in the series of reports since the adoption of the Recommendation. It summarises recent Committee activities, which focused on efforts to raise public awareness of the harm caused by cartels, sanctions against individuals, and international cooperation. The Report also provides an overview of major developments in member countries' anti-cartel efforts. It concludes with an overview of topics that the Competition Committee intends to address in the future in its ongoing anti-cartel work.

By way of overall conclusions, this report demonstrates that efforts to detect, investigate, and prosecute domestic and international cartels have continued in OECD member countries at very high levels. More countries are catching up and improving their enforcement regimes in line with developments in the most advanced jurisdictions. As a result, more competition authorities have focused efforts and resources on the prosecution of cartels, frequently aided by new laws and regulations that provide for greater enforcement powers. Severe sanctions are being imposed against cartels. Cooperation among authorities in investigations of cartels has reached unprecedented levels. However, as competition authorities intensify their anti-cartel efforts and compare their experiences, it also becomes evident that more should be done to strengthen laws and prosecute cartels, in order to combat more aggressively what has recently been called the "*supreme evil of antitrust*."⁷

1. Trends in Anti-Cartel Enforcement

The previous two reports covered a period of record fines and individual sanctions for several competition authorities. A survey for this Report showed that some member countries, especially those that had prosecuted the vitamins and lysine cartels during previous reporting periods, have seen a moderate decline in the number of decisions and in total fines. However, the survey demonstrated aggressive enforcement efforts at very high levels in many

countries, and competition authorities in more countries than ever bring important cases that resulted in significant sanctions. For example:

- In *Germany*, the Cartel Office imposed total fines of more than € 700 million on a cartel in the cement industry;
- In 2002, the *European Commission* imposed a fine of € 249.6 million on Lafarge for participation in a plasterboard cartel, the highest fine ever imposed on a company with regard to a single cartel infringement;
- The *United States* reported the second highest fine total in FY 2004 (\$359.8 million); the 10,501 total jail days imposed in FY 2002 were the highest number of jail days imposed in Division history;
- *Hungary* imposed total fines of HUF 8,375 million on cartels in 2004, more than ten times the amount of total fines imposed in the previous year.

The following section highlights some of the major developments in several OECD member countries and non-Member observers to the Competition Committee, focusing on legislative and regulatory changes, as well as changes in enforcement policy.⁸ Clearly, there has been significant progress in terms of focusing public opinion on the fight against hard core cartels and winning the support of lawmakers to strengthen enforcement tools and statutory fines. This overview is followed by examples of successful enforcement action against some major cartels discovered in recent years.

1.1 Developments in Member Countries and Observers

Australia: Proposed new legislation that would substantially strengthen anti-cartel enforcement; proposed reforms include: criminalisation of cartels, increased corporate fines, the possibility of barring individuals from office as directors or managers in public corporations, and a prohibition against indemnifying individuals for sanctions imposed on them;

Austria: Proposed new legislation that would introduce a modern antitrust regime as well as a leniency programme.

Brazil: Creation of an intelligence centre for cartel investigation by one of the antitrust agencies, which started to work closely with the federal police and prosecutors and to use new investigatory techniques in cartel

investigations, including dawn raids and wiretapping, and received first leniency applications;

Canada: Review of legislation was initiated to consider introducing a per-se prohibition of hard core cartels; immunity programme is being reviewed to improve and clarify the program;

France: Implemented legislation that created a leniency programme and a new procedure that provides for the imposition of lesser sanctions on companies that do not contest the accuracy of the charges brought against them; introduced a new system of fines, with maximum fines of up to 10 percent of annual revenues.

Germany: Proposed amendments to the Cartel Act that would allow for improved cooperation with competition authorities in and outside Europe, provide for new decision making powers, change the method of calculating the maximum fine to a turnover-based approach, expand powers to skim off unlawful gains, and improve possibilities of private enforcement; imposed record fines in 2003 totalling € 717 million, and more than € 3 million against individuals;

Hungary: Created a cartel unit within the competition authority which has been very successful in investigating cartels; adopted a notice on fines which contributed to greater transparency and the imposition of substantially increased fines; adopted a leniency programme which has already triggered leniency applications;

Israel: Introduced a leniency program; obtained criminal convictions of individuals in numerous cases, including the first case in which executives had to serve jail time for their participation in a cartel;

Korea: Imposed record fines in cartel cases. 2004 amendments to the competition act increased maximum fines, introduced a new leniency programme to increase predictability and incentives for applicants, and a reward system for cartel informants; initiated a programme to better detect suspected cases of bid rigging;

Japan: Adopted new legislation in 2002 that increased the maximum amount of fines from ¥ 100 million to ¥ 500 million. New legislation has been adopted in 2005 that increases surcharge rates and introduces a leniency program;

Mexico: Proposed amendments to the competition law that would strengthen the competition authority's investigatory powers, substantially increase maximum fines, and introduce a leniency program;

The Netherlands: Introduced a leniency programme which has triggered numerous leniency applications; substantially increased fines for failure to cooperate with competition authority in investigations; proposed legislation that would introduce financial sanctions against individuals;

Portugal: Introduced a new competition law that provides for maximum fines of 10 percent of annual revenues, and the possibility of sanctions against individuals;

Turkey: A 2003 amendment to the Competition Act strengthened the competition authority's investigative powers and facilitated to collection of fines; further amendments are planned that would increase fines, and introduce a leniency programme as well as a commitment mechanism;

United Kingdom: Introduced criminal sanctions for individuals participating in cartels with a maximum jail sentence of five years. Expanded investigatory powers for the OFT;

United States: In 2004, the Antitrust Criminal Penalty Enforcement and Reform Act increased maximum corporate fines from \$10 million to \$100 million; the maximum individual fine from \$350,000 to \$1 million, and the maximum jail time from 3 to ten years. The Act also strengthened the Antitrust Division's Amnesty Program by limiting a corporate amnesty applicant's private damages exposure to the damages actually inflicted by the applicant's conduct, provided the applicant cooperates with private plaintiffs in their damage actions against remaining cartel members.

European Union: Since May 1, 2004, the enforcement of EC antitrust rules is governed by Regulation 1/2003, which allows both the Commission and the national competition authorities to better focus their resources on the fight against hard core cartels by means of more effective sharing of enforcement tasks and increased cooperation. For this purpose, the Commission and national competition authorities have established the European Competition Network (ECN). The system created for case allocation, mutual information exchanges and consultations, as well as the extension of assistance in investigations to include cooperation between the national competition authorities, facilitates the investigation of cartels.

Regulation 1/2003 also strengthened the investigation powers of the European Commission by introducing the rights to seal any business premises and books or records, inspect other than business premises (for instance private homes), interview any person who may be in possession of useful information and record the answers, as well as by extending the right to ask oral questions during an inspection to a right to question any member of staff. The Commission adopted in February 2002 a new leniency policy, and has adopted a practice of taking oral statements in leniency applications. Options to strengthen private enforcement are also being considered, which could further increase deterrence against cartels.

1.2 Illustrative Examples of Recent Cartel Investigations

Combating international cartels remains a high priority for OECD members and observers. International cartels are especially difficult to detect as they use the most sophisticated measures to conceal their activities, the amount of commerce affected by these cartels is disproportionately large, and they are widely considered the most harmful type of cartel because of the magnitude of the harm that they inflict on businesses and consumers. There have been large international cartels that were discovered during the reporting period. Two of these investigations are described below.

While competition authorities from the most experienced competition regimes typically have been leading investigations of international cartels, other countries are getting involved as well. For example, *Mexico* opened an investigation into the citric acid cartel, following a guilty plea by Archer Daniels Midland and other companies before the US Department of Justice for participating in a price fixing agreement in the citric acid market. The Mexican competition authority imposed fines on Archer Daniels Midland as well as on Haarmann & Reimer Corp. and F. Hoffmann-La Roche, Ltd.

Korea also contributed to the prosecution of international cartels. In what was the first case of extra-territorial application of Korean competition law to an international cartel, the Korean Fair Trade Commission in 2002 imposed surcharges of about 11.2 billion won (approximately US \$8.5 million), along with a corrective order, on 6 graphite electrodes manufacturers, including four Japanese companies (Showa Denko, Nippon Carbon, Tokai Carbon, SEC), one German company (SGL Carbon) and one US company (UCAR International). *Korea* estimated that Korean purchasers of graphite electrodes, who purchased 90 percent of their total demand from cartel participants, had suffered damages of approximately 183.7 billion won (approximately US \$139 million) as a result of the global cartel.

Recent Examples of International Cartels

Rubber Chemicals

In Canada, the Competition Bureau discovered that several producers of rubber chemicals had conspired to fix prices and share customers. Their cartel involved regular meetings, communications with other producers, agreements to coordinate the timing and amounts of price increases for certain rubber chemicals and to share customers and sales volumes, and the exchange of sales data and customer information on a periodic basis in order to monitor and enforce adherence to the agreement. Crompton Corporation admitted that it participated with other rubber chemical suppliers in an international conspiracy to increase the price of certain rubber chemicals and was sentenced to a fine of \$9 million for its part in the international price fixing conspiracy.

In the United States, the Antitrust Division has obtained over \$100 million in fines after investigating the same cartel. Crompton pled guilty and was sentenced to pay a \$50 million criminal fine. Bayer AG, a German manufacturer of rubber chemicals, pled guilty and was sentenced in December 2004 to pay a \$66 million fine for its participation in the cartel. Two Crompton executives were charged with participating in the cartel. In November 2004, a Bayer executive was also charged with participating in the rubber chemicals cartel. All three have agreed to plead guilty and cooperate with the continuing investigation. The Bayer executive has since then agreed to serve a four month prison term, and pay a US \$50,000 fine. The Crompton executives' sentencings have been postponed pending completion of their cooperation.

The European Commission's investigation of the cartel continues.

DRAM Cartel

In September 2004, the Antitrust Division charged Infineon Technologies AG (Infineon), a German manufacturer of dynamic random access memory (DRAM), with participating in an international cartel to fix the price of DRAM sold to computer manufacturers. DRAM is the most commonly used semiconductor memory product, providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunication, and consumer electronic products. Infineon pled guilty and was sentenced to pay a \$160 million fine, at that time the third largest fine in the history of the Antitrust Division. In December 2004, four executives of Infineon and its subsidiary, Infineon Technologies North America Corporation, were charged with participating in the international conspiracy to fix prices in the DRAM market. The executives, three German citizens and a US citizen, pled guilty and were each sentenced to pay a \$250,000 criminal fine and serve prison terms in the US ranging from four to six months for their participation in the DRAM conspiracy. Since then, the Korean company Hynix has been sentenced to pay a fine of US \$185 million, which currently ranks as the third largest fine in the history of the Antitrust Division. Several Hynix executives face the possibility of criminal charges.

German Cement Cartel

Shortly after the adoption of a leniency programme and the creation of the Special Unit for Combating Cartels, the German Cartel Office received information from the construction industry about suspected cartel activity among cement producers. Evidence seized during a nation-wide search of 30 cement companies in July 2002, and during further searches of several small and medium-sized cement manufacturers in 2003, confirmed that the investigated cement producers had operated anti-competitive market allocation and quota agreements, some of them since the 1970s, and continued to do so until 2002, in four regional cement markets in eastern Germany, Westphalia, northern Germany and southern Germany.

The Cartel Office first imposed fines totalling approx. € 660 million in cartel proceedings against the six largest German manufacturers, including Alsen AG, Dyckerhoff AG, HeidelbergCement AG, Lafarge Cement GmbH, Readymix AG, and Schwenk Zement KG. Further fines of € 41 million were imposed on six medium-sized cement manufacturers and dealers in 2003, bringing the total fines imposed in the cement cartel to more than € 700 million.⁹

Israeli Floor Tile Cartel

In 2002, the Israeli competition authority successfully concluded the prosecution of a nation-wide floor tiles cartel and obtained criminal convictions of several tile manufacturers and their executives, including for the first time the imposition of unconditional jail sentences on several individuals. The investigation had revealed that all the major manufacturers of floor tiles in Israel had participated in a cartel for 14 years, which allocated markets, set quotas and fixed prices. A special economic advisor was responsible for enforcing the cartel. He kept all the records of the cartel agreements, ensured that the cartel participants did not "cheat" by violating the terms of the cartel, arbitrated disputes among floor tiles companies that complained about breaches of the cartel, sanctioned companies that violated the cartel arrangements, and even sent private investigators to ensure that no manufacturer exceeded its quota.

The Dutch Construction Industry Cartel

Starting in 2002, the Netherlands competition authority investigated companies in the construction industry and uncovered evidence of large-scale collusive activities. In early 2004, as the investigation progressed, the Director-General of the competition authority as well as the Dutch Minister of Economic Affairs called upon construction companies to come forward and notify the competition authority of their practices. Almost 500 construction companies, including all major construction companies in the Netherlands, notified the authority of their cartel activities. The notifications and ongoing investigations documented an industry-wide culture of collusive behaviour. For many years, many companies had been involved in regular consultations prior to tenders to allocate "entitlements" to upcoming construction projects, and had used a system of "entitlements" and obligations to allocate future construction contracts. Many of these practices had continued despite a prohibition decision of the European Commission in the early 1990s.

The scale of the cartel prompted the competition authority to offer companies involved in the cartel an accelerated sanctions procedure: Companies which agreed to be collectively represented by a single person before the authority, rather than individually defending their cases, were offered some reduction in fines; companies that did not participate in the accelerated procedures remain subject to individual procedures. Under the accelerated procedure, the competition authority already imposed total fines exceeding € 100 million on participants in cartels in the infrastructure and civil engineering sector, with individual fines of up to € 18.8 million. Investigations into other sectors of the construction industry continue.

The involvement of a greater number of countries in the prosecution of international cartels is of great significance. A larger number of prosecuting jurisdictions can increase the exposure of cartel participants to fines and thus contribute to greater deterrence of international cartels. This will require, of course, that in a greater number of jurisdictions fines reach levels at which they can be considered an effective deterrent.

Much of the attention concerning anti-cartel enforcement is directed at large, international cartels, given the significant harm they cause. There is no doubt, however, that the harm caused by domestic cartels also is very great, in light of the large number of these agreements. In addition, even a purely domestic cartel can cause substantial harm. Moreover, while international cartels frequently are found to devise the most sophisticated regimes to operate their cartels, there are also examples of domestic conspiracies that set up highly effective schemes to support cartels of significant duration. The German cement cartel, the Israeli floor tile cartel, and the Dutch construction industry cartel illustrate these concerns.

A significant portion of domestic cartels that member countries described in the survey for this Report concerned bid rigging in procurement procedures. This observation, although not based on a comprehensive survey, supports the conclusion that bid rigging cartels are a pervasive phenomenon that deserves greater attention. The Committee recently had a roundtable discussion on bid rigging cartels and competition authorities' efforts to reach out to procurement officials. The results of this discussion are summarised further below.¹⁰

During the reporting period, competition authorities discovered ample evidence of the well-known fact that cartel participants are not honest business people who inadvertently became involved in unlawful conduct, but that cartel participants are fully aware of the unlawful and harmful nature of their conduct, devise sophisticated regimes to operate their cartels, and sometimes go to great lengths to hide the existence of their agreements. This point was already illustrated by the above description of the floor tile cartel in *Israel*, and below are additional illustrative examples:

The Peroxide Cartel

In 2003, the European Commission imposed cartel fines totalling nearly € 70 million on Atofina, Peroxid Chemie, Laporte (now known as Degussa UK Holdings), Perorsa, and AC Treuhand AG for operating a European-wide cartel in organic peroxide chemicals.¹¹ The cartel was remarkable in several respects: First, the cartel was active for almost thirty years. Cartel activities had begun in 1971 and lasted until the end of 1999 which makes it the longest-lasting cartel ever uncovered by the Commission. Second, the cartel had a particularly sophisticated and orderly setup: Back in 1971, the producers agreed to a written contract, spelling out in considerable detail the functioning of the cartel. The producers asked a Swiss consultancy called AC Treuhand to help organise the cartel. Its role was to organise the cartel, to mediate between the parties, and also to collect and audit statistics. AC Treuhand and the other parties to the agreement met regularly, often in Zurich. The incriminating documents were printed on pink paper and stored in Zurich. The producers were allowed only to consult these documents in the premises of AC Treuhand, but not to take the original documents home. The pink colour of the paper ensured that sensitive documents were not intentionally or inadvertently taken. Other documents were faxed to the private homes of some collaborators. Travel reimbursements were made directly from Switzerland to the participants attending the cartel meetings, so no trace could have been found in the offices.¹²

Copper Plumbing Tubes Cartel

In 2004, the Commission imposed a total of € 222.3 million in fines on participants in a cartel concerning copper plumbing tubes. The Commission discovered that the companies operated a well-structured, classic cartel with codenames, meetings in anonymous airport lounges, with the clear objective of avoiding competition through the allocation of production volumes and market shares, the setting of price targets and increases as well as other commercial terms for plain copper plumbing tubes. During the first European-wide meeting in Zurich, one of the participants noted “*The objective is to keep the prices in the high price level countries high – if possible to increase even more.*”

Carbon Brushes Cartel

An investigation by the United States Department of Justice uncovered not only price fixing in the carbon brush industry, but also egregious acts of obstruction of justice. The Antitrust Division uncovered an elaborate plot to obstruct not only its price-fixing investigation, but also a potential investigation by the European Commission. The Morgan Crucible Company plc, headquartered in the UK, gave the Division false information in an attempt to convince it that their price-fixing meetings with competitors were legitimate business meetings. They provided their co-conspirator company with a written “script” containing this false information, requested that it follow the script when questioned by the Division, and warned its co-conspirator that if the US investigation proceeded, the price-fixing investigation would spread to the EU. Officials associated with Morgan Crucible also destroyed documents relevant to the price-fixing investigation, even going so far as to create a document destruction task

force. The Antitrust Division charged Morgan Crucible with obstruction of justice arising from witness tampering and document destruction. Morgan Crucible pled guilty to the obstruction charges and its US subsidiary, Morganite, Inc., pled guilty to price fixing. The companies were fined a total of \$11 million. Also, three Morgan personnel have pled guilty to obstruction offences, served prison sentences in a US prison and each paid a \$20,000 fine. The former Chairman of the Carbon Division and CEO of Morgan Crucible was indicted in 2004 for price fixing of carbon brushes, carbon current collectors, and mechanical carbon products, conspiracy to obstruct justice, witness tampering, and corruptly persuading others to destroy documents. The Division is seeking his extradition from the UK on all counts of his indictment.

In 2004, Morgan Crucible also pled guilty to obstruction of justice charges in Canada for wilfully providing false and incomplete evidence to Competition Bureau Investigators.

1.3 Work of International Bodies Related to Cartels

The topic of anti-cartel enforcement continues to be a key topic at competition policy events sponsored by governments and educational and private sector organisations. International organisations such as the *United Nations Conference on Trade and Development* continue to discuss the effects of cartels on trade and the appropriate response to this threat.

The *International Competition Network* ("ICN") also started to address cartel enforcement issues. In 2004, the ICN created a Cartel Working Group which addresses legal and conceptual challenges of anti-cartel enforcement, as well as enforcement techniques. Annual meetings of enforcement officials to discuss in particular the latest developments in enforcement techniques against cartels, which began in 1999, continue under the umbrella of the ICN. The latest of these conferences were held, respectively, in Brussels, *Belgium* and Sydney, *Australia*. These conferences and the ICN's work product on cartels give in particular non-OECD member countries a valuable opportunity to benefit from the expertise and knowhow in anti-cartel enforcement of the most experienced jurisdictions, thus strengthening worldwide efforts to combat cartels.¹³

2. Raising Public Awareness of the Harm Caused by Cartels

Making the public aware of the harm caused by cartels is an important part of a country's overall effort to combat cartels. Where the general public and in particular lawmakers are educated about the harm cartels cause to economies and the benefits of robust anti-cartel enforcement, they are more likely to

support competition authorities and provide them with the necessary enforcement tools, including the ability to impose significant sanctions that can effectively deter cartels. Moreover, the more the business community and their counsel are aware of anti-cartel efforts, sanctions that can be imposed, and leniency programmes, the more likely it is that businesses will comply with the law or, where cartels have been formed, inform the competition authority about them. Recognising the importance of raising awareness of the harm caused by cartels, the Committee recently organised a roundtable discussion on this topic, the results of which are summarised below.

There are various methods countries can use to educate the public about cartels, including outreach to stakeholders, speeches, publications, websites, and pro-active media relations, and most importantly aggressive anti-cartel enforcement that receives good press coverage and public attention. Member countries with greater resources and experience in anti-cartel enforcement tend to have more comprehensive outreach programmes. The programmes developed in *Canada* and the *United States* are good examples of what competition authorities can do to educate the public about cartels.

The *United States* has developed one of the most comprehensive programmes to reach out to various constituents. The Antitrust Division found it useful to adapt presentations about its criminal enforcement programme according to target groups it intends to reach, distinguishing among presentations to other agencies involved in the investigation of cartels; purchasing officials; business executives; members of the antitrust bar; the general public; and lawmakers. Presentations to investigative agents tend to be fairly basic, focusing on crime, harm, investigative techniques, and prosecution statistics. Presentations to purchasing officials focus on harm and on signs of bid rigging, and are designed to give purchasing agents some tools to detect suspicious conduct. Programmes for business executives focus on the status of the Antitrust Division's enforcement program, on compliance programmes, and on methods to detect cartel activity within companies. Presentations to members of bar associations tend to be more detailed and technical, in particular with respect to leniency programmes, plea bargaining, and prosecution issues. A periodically updated status report on developments in the criminal enforcement programme is provided to business executives and bar members in connection with speeches given by Division officials. Additional materials to increase awareness of cartels are available on the Antitrust Division's website,¹⁴ where speeches announcing and explaining the Antitrust Division's policy with respect to the prosecution of cartels also can be found.¹⁵

A strong media relations programme can be an important part of a country's efforts to educate the public about cartels. *Canada* is a member country that has a particularly well-developed and active media programme aimed to inform the public about the Competition Bureau's work and to deter businesses from engaging in cartel activity. As part of its media strategy, the Competition Bureau's new releases emphasise the harm caused by cartels for consumers as well as the penalties involved. News releases and media interviews also are used to highlight the Bureau's immunity programme. Bureau spokespersons are encouraged to explain bid rigging to reporters who call looking for information. A recent media analysis showed the positive result of this active strategy as the number of media reports dealing annually with criminal enforcement activities is substantial and increasing. In addition, the Competition Bureau's media relations programme also targets lawmakers and governments to highlight the Bureau's work, and to demonstrate that the Bureau is using its resources effectively.

While presentations to core constituents as well as active media relations programmes are important components of programmes to raise public awareness of cartels, active cartel enforcement, in particular successful cases against cartels that have a direct impact on consumers' pockets, is the most important and effective tool. Several members reported that cases in which significant fines were imposed on cartel participants received great attention by the media and the general public. One example is a case brought by *Israel* against an insurance cartel which was considered a major breakthrough in anti-cartel enforcement because the prosecution of distinguished and reputable executives in the business community substantially contributed to greater public awareness of cartels and the severity of the offence.

The nature or size of fines, and the volume of affected commerce, however, are not necessary ingredients of a good case. There are examples of cases that significantly contributed to greater public awareness where the affected commerce was limited and the total harm was relatively small, compared to some global cartels, but where consumers were directly affected and experienced the benefits of anti-cartel enforcement. Two of these cases are described below.

Examples of cases that were particularly effective in raising public awareness

The UK Football Replica Kit Cartel

An OFT investigation unearthed evidence of several agreements or concerted practices to set a minimum price for certain football replica kits, including top-selling England and Manchester United shirts. The agreements, which were intended to cover key selling periods such as the Euro 2000 tournament, were policed through informal meetings and monitoring retail customers, some of whom were threatened with stock cancellations if they failed to stick to agreed prices. Ten suppliers were fined a total of £18.6 million in August 2003 for engaging in unlawful price-fixing, including JJB Sports (£8.373m), Umbro (£6.641m), Manchester United (£1.652m), and Allsports (£1.35m).

At the time the OFT detected the cartel, the kits were sold at approximately £45 per kit. Following enforcement action, prices fell by 30 percent or more, and remained at those lower levels. The football replica kit cartel was a good case because, even though the product involved was not important for the economy as a whole, individuals and families could directly experience the harm caused by cartels and the benefits of anti-cartel enforcement.

Korean Apartment Price Cartel

In 2003, following increases in apartment prices that were mainly attributed to increases of the price at which construction companies sold apartments to individuals before actual construction, and after observing that construction companies had set their prices almost uniformly in two areas in Korea, the Korean Fair Trade Commission carried out on-spot investigations and uncovered two cartels involving 16 construction companies which had uniformly set prices for apartments. The KFTC estimated that the two cartels had raised prices by a total of almost 500 billion won (approximately US \$380 million), harming the final purchasers of these apartments by the same amount. In addition, given the fact that the higher apartment prices in the two areas under investigation had had an impact on prices in other areas, the actual damage caused by the cartels was presumed to be much greater. The KFTC imposed surcharges of more than 25 billion won (approximately US \$20 million) on cartel participants. The case attracted great public attention and national press coverage because ownership of houses and apartments has become an increasingly important goal for Koreans.

2.1 *Bid Rigging - Raising Procurement Officials' Awareness of Cartels*

Member countries also discussed efforts to raise cartel awareness among procurement officials and procurement authorities. Bid rigging continues to be a great concern in virtually every jurisdiction. Every year, annual reports of enforcement activities in member countries and observers to the Committee

reveal cases of bid rigging.¹⁶ Frequently, the best placed authority to detect signs of unlawful bidding arrangements is the procurement authority as it has good knowledge of the relevant industry sector, and can observe patterns in bidding processes that could indicate unlawful collusive activity. Moreover, procurement authorities can to some extent influence how bidding procedures are organised to make the formation of cartels more difficult. Yet, the roundtable discussion demonstrated that programmes to systematically educate procurement officials exist only in a few member countries, while some other countries have more recently started to develop their own, more limited programmes. This suggests that in many countries procurement authorities and officials are not yet sufficiently aware of the danger of cartels among companies participating in bidding procedures and of the important role they can play in preventing and detecting cartels.

Canada and the *United States* belong to the jurisdictions with the most comprehensive programmes for procurement officials. The competition authorities in both countries organise seminars, speeches, and other educational programmes to reach out to the procurement community. The *United States* has published a checklist of suspicious behaviour and suspicious statements that should help procurement officials to detect signs of possible collusion, in addition to brochures that inform procurement officials of the danger of cartels.¹⁷ In *Canada*, the Competition Bureau has developed a multimedia presentation about how to identify signs of bid rigging, provide information to the Bureau, and prevent bid rigging from occurring. The programme is available on CD ROM and on the Competition Bureau's website.¹⁸ The Canadian efforts also specifically emphasise possible reforms to the procurement process, and educate procurement officials about ways to adjust the process to safeguard against bid rigging.

In certain circumstances, a competition authority may decide that advising procurement officials alone is not sufficient, at least not in certain sectors. In *Korea*, for example, the competition authority directly monitors the procurement process of government authorities in several sectors, including electricity, defence, and highway construction, recognising that these areas could be particularly vulnerable to bid rigging.

In several countries, efforts to involve procurement authorities in discovering and preventing cartels are more recent. Some of these more recent initiatives, however, already show positive results. Once procurement officials get the message about bid rigging cartels, especially if that message is reinforced through successful enforcement action that results in lower prices, there is great interest in the work of the competition authority and willingness to support the fight against cartels. A case in point is *Sweden*. There, the

increased interest in bid rigging was triggered by a case brought against a cartel among asphalt producers that had targeted road building projects by the Swedish Road Building Association as well as by local governments. The case is described in greater detail below. Media reports highlighted the losses for taxpayers caused by the cartel, as well as the beneficial effects of the enforcement action as prices dropped by approximately 20 percent after the competition authority uncovered the cartel. Since then, the competition authority has launched a new programme against bid rigging cartels. The programme has been presented to and adopted by, for example, the association of local governments which are responsible for procurement contracts.

The Swedish example is important in two aspects: First, it confirms that good cases, especially if they receive good media coverage, can significantly contribute to greater awareness about cartels. In this respect, working with procurement officials is no different from educating the general public. Second, in its effort to strengthen the awareness of cartels among procurement officials, the Swedish competition authority provided them with a checklist for the detection of signs of bid rigging, which closely follows the above mentioned checklist developed by the *United States*. In at least one case a Swedish local authority relied on the checklist to provide information about suspicious activity during a bidding process, and prompted the competition authority to open a case. This was only a small step in the more effective fight against bid rigging, but it demonstrates that competition authorities can benefit from the experiences of others and programmes that already exist in order to more effectively reach out to public procurement officials.

The role of procurement officials in the combat against bid rigging cartels should not be limited to the detection of cartels once they have occurred. Competition authorities can advise procurement authorities of several measures to make bid rigging less likely. This includes adjustments to procurement procedures that make the formation of cartels more difficult and/or more costly.¹⁹ For example, as a small number of competitors and greater similarities among competitors increase the likelihood of collusion, procurement authorities should seek a larger number and a better mix of competitors. Second, the frequency of interaction among participants in procurement procedures increases the potential of collusion. Varying the scope of tenders can help, as it might ensure that the same parties were not always participating in tender procedures. Third, stability of demand, such as contracts of a similar size that come up for bids at regular intervals, facilitates bid rigging cartels. Again, procurement authorities can adjust procedures to reduce the risk of collusion.

There are other ways in which procurement rules can be strengthened to prevent bid-rigging from occurring. For example, the *United States* considers

the threat of debarment from future government contracts of companies convicted of bid rigging offences an effective tool to deter cartels and achieve greater compliance with the law. Many companies regularly participating in public procurement consider possible debarment from future government contracts as a serious risk. Quite often procurement officials are willing to suspend debarment pending the implementation of a rigorous compliance program, combined with the right to conduct surprise inspections of books and bidding processes, thus ensuring greater compliance rates in the future. More countries could adopt this sanction. EU public procurement rules, for example, authorise national authorities of EU member states to exclude bidders that have been found guilty of bid rigging, provided the authorities are authorised to do so under their respective national procurement laws. However, it appears that few, if any, EU member states provide for debarring as a possible sanction in bid rigging cases.

In some countries, every participant in a procurement procedure is required to sign a written statement of compliance or a statement of independent bid determination. Such statements are considered another effective measure that procurement officials can adopt to reduce instances of bid rigging cartels. They can deter bid rigging by requiring disclosure of all material facts about any communications and arrangements they have entered into with competitors regarding the tender call, or by requiring bidders to certify that there were no consultations, communications or agreements with competitors relating to pricing or intent to submit an offer.

Examples of Bid Rigging Cartels

Hungarian Motorway Construction Cartel

In 2003, the Hungarian competition authority (“GVH”) launched an investigation into suspected bid rigging in connection with a tender for a motorway construction project, and later extended the investigation to another tender procedure. Evidence discovered by the GVH established that several major construction firms, including subsidiaries of foreign companies, had agreed among them about the identity of the winning bidders for the construction works contracts. They also agreed that the winning bidder would subcontract parts of the construction works to the other cartel participants. The total fines amounted to HUF 7,04 billion (approximately € 28 million), by far the largest fine ever imposed in the history of Hungarian anti-cartel enforcement.

Portuguese Cartel for Blood Glucose Monitoring Reagents

The Portuguese Competition Authority opened an investigation into a suspected bid rigging cartel for blood glucose monitoring reagent strips, following a complaint from a hospital in Coimbra. The hospital had launched a public invitation to tender for Blood Glucose Monitoring Reagent packages. Bids were submitted by five companies, but the hospital decided not to award the contract when all five bidders submitted bids with a uniform price (€ 20), which constituted a sharp increase from the prices charged for the same product a year earlier (between € 11.37 and € 14.96). Following an investigation of the suspicious bids, the competition authority determined that the alignment of the prices could not have occurred without a cartel agreement. The authority imposed a fine of approximately € 660,000 on each of the five defendant companies (Abbot Laboratórios, Bayer Diagnósticos Europe, Johnson & Johnson, Menarini Diagnósticos, and Roche Farmacêutica Química) for a total fine of almost € 3.2 million.

Swedish Asphalt Cartel

The Swedish competition authority investigated the asphalt industry which was suspected of rigging bids for many road construction projects. The main target of the suspected cartel was the Swedish National Road Administration, but many local municipalities were also affected. A subsidiary of the National Road Administration is suspected of participating in the cartel as well, which, if proven, would make the National Road Administration at the same time a perpetrator and a target of unlawful cartel activity. The Competition authority is seeking a court judgment imposing fines of SEK 1.6 billion (approximately US \$225 million) on the cartel participants.

While the case is still pending before a Swedish court, the competition authority's enforcement action already has had significant benefits: The case received extensive media coverage, with several reports highlighting the losses for taxpayers caused by the cartel. The beneficial effects of the enforcement action have been very apparent as procurement officials observed that prices dropped by approximately 20 percent. As a result of the greater awareness among procurement officials of the harm cartels can cause, the competition authority launched a new programme against bid rigging cartels in 2004, following an initiative of the association of local governments. The programme gives the competition authority the opportunity to inform procurement officials about how to detect signs of bid rigging, and encourage them to report suspicious activity.

3. Harm and Sanctions

3.1 *Estimates of Harm Caused by Cartels*

A major contribution of the Second Report was its survey of cartel cases where the harm caused by cartels could be estimated and compared with sanctions that were imposed in the same cases. With respect to those cases, the Second Report demonstrated that financial sanctions imposed on cartels remained significantly below the level at which they could be considered an optimal deterrent.²⁰

The Competition Committee did not engage in a similar exercise in preparation of this Report. However, the anecdotal evidence that some member countries were able to provide re-affirms the findings of the Second Report. As regards overcharges, for example, *Japan* has estimated that recent cartels raised prices on average by 16.5 percent. In *Sweden* and *Finland*, competition authorities observed price declines of 20 percent-25 percent following enforcement action against asphalt cartels, suggesting unlawful mark-ups of a similar magnitude. Along the same lines, in the above mentioned football replica kits case in the *United Kingdom*, long-term price reductions in the order of 30 percent were observed following the OFT's enforcement action. In *Israel*, the competition authority observed that prices declined by approximately 40 percent-60 percent after it uncovered a bid rigging cartel among envelope producers. And estimates in the *United States* suggest that some hard core cartels can result in prices increases of up to 60 percent or 70 percent.

Recent research on overcharges in cartel cases, based on a review of a large number of cartels, estimated that the average overcharge is somewhere in the 20 percent - 30 percent range, with higher overcharges for international cartels than for domestic cartels.²¹

As regards the level of financial sanctions, anecdotal evidence gathered for this Report confirms the conclusions reached in the Second Report. For example, data from several cartels in *Japan* suggested that fines remained substantially below the harm that the cartels were estimated to have caused. At these levels, financial sanctions cannot be considered an optimal deterrent, especially considering that not all cartels are discovered and financial sanctions therefore should substantially exceed the harm caused by a cartel. The Second Report suggested, for example, that based on conservative estimates a fine would have to be three times the actual gain realised by the cartel to be an effective deterrent.²²

3.2 *Sanctions, in Particular Sanctions Against Individuals*

After examining the level of financial sanctions imposed in cartel cases, the Second Report observed with respect to sanctions against individuals:

Whether or not it is legally possible to impose an optimal organisational fine and practically possible to calculate it in a given case, actually imposing it might present problems. The optimal fine could simply be too large for the entity to bear, causing bankruptcy and possible exit from the market, which itself could diminish competition. *Thus, there is a place for sanctions against natural persons, placing them at risk individually for their conduct.* Such sanctions can complement organisational fines and provide an enhancement to deterrence. The laws of several OECD countries, but less than half, permit the imposition of administrative fines on natural persons for cartel conduct. In a distinct minority of countries cartel conduct is a crime, punishable by imprisonment, as well as by fines. The prospect of spending time in jail can be a powerful deterrent for businesspeople considering entering into a cartel agreement. Not all countries consider that criminalising cartel conduct is appropriate, however. Such a step may conflict with existing social or legal norms in a jurisdiction. It also has the effect of imposing a higher burden of proof on the prosecutor and it may make it more difficult to acquire evidence in certain circumstances, as additional procedural safeguards apply in criminal investigations.²³

Following the adoption of the Second Report, the Committee examined more closely the role of sanctions against individuals, including criminal sanctions, in anti-cartel enforcement, but also the challenges that the introduction of such sanctions can create. The results of this discussion are summarised below.²⁴

The Case for Sanctions Against Individuals

An analysis of financial sanctions imposed on cartels strongly supports the case for sanctions against individuals: It is widely believed that corporate sanctions in the form of fines are almost never sufficiently high to be an optimal deterrent, and that the threat of individual sanctions can be an important complement to corporate, financial sanctions. Individual sanctions can strengthen the incentive of directors and employees to resist corporate pressure to engage in unlawful activity, and thus enhance the level of deterrence. In addition, sanctions against individuals also can increase the effectiveness of leniency programmes as they are a powerful incentive for individuals to reveal information about existing cartels and to cooperate in investigations. They can

thus create a greater likelihood that someone will defect from a cartel arrangement and offer information and co-operation and make leniency programmes more effective. In addition, even after a cartel has been disclosed, the threat of sanctions against individuals, and the possibility to avoid them through co-operation, will strengthen a competition authority's position during its investigation.

In addition, there is anecdotal evidence that criminal sanctions against individuals can have deterrent effects. For example, there have been instances of cartel members locating cartel meetings outside the *United States* in the (mistaken) belief that they could escape the threat of criminal sanctions under US antitrust law. There are also more recent examples of cartels carving out the United States from their operations to avoid the risk of criminal sanctions. That the threat of criminal sanctions weighs much heavier than financial sanctions is further evidenced by the experience of the United States where individuals repeatedly offered to pay high financial fines if they could avoid jail time, but nobody has ever offered to go to jail in order to avoid paying a fine.²⁵

However, there is no systematic empirical evidence available to prove the deterrent effects of criminal sanctions or, more importantly, to assess whether the marginal benefit of introducing sanctions against individuals in the form of less harm from cartel activity exceeds the additional costs that a system of criminal sanctions entails, including the costs of prosecution as well as of administering a prison system. Given the nature of cartel activity, there also appears to be agreement that it would be virtually impossible to generate the relevant data. Countries that use sanctions against individuals in cartel cases do so because they believe that corporate sanctions alone cannot ensure adequate deterrence, and that individual sanctions, including imprisonment, can be useful instruments in the fight against cartels.

Ultimately, each country must determine its own, "right" mix of sanctions that has the most effective deterrent effects against cartels.²⁶ A strong case can be made that cartel enforcement will be more effective if sanctions against individuals are part of that mix. In each jurisdiction, however, this decision depends on a number of factors, including a jurisdiction's cultural and legal environment, its enforcement history in cartel cases, the relationship between a competition authority and courts and prosecutors, as well as the resources of a competition authority. Countries might, for example, consider other mechanisms to provide greater incentives for individuals to defect from cartels, which could be adopted as an alternative or as a complement to individual sanctions. *Korea*, for example, introduced a reward system for individuals who inform the KFTC about a cartel, thus creating incentives for individuals to defect from cartels that do not rely on the threat of sanctions.²⁷ Other countries

and jurisdictions might seek to encourage private enforcement of competition laws to more effectively deter cartels.

A Trend Towards Criminalisation

While the number of OECD members and observers that have actually imposed sanctions against individuals is relatively small, there is a trend toward accepting that sanctions against individuals can contribute to more effective anti-cartel enforcement. The *United Kingdom* has introduced criminal sanctions and initiated its first cases under the new legal regime. In *Australia*, there has been broad support for a criminal sanctions system, and its adoption can be expected soon. And discussions about the benefits of a criminal sanctions system have resumed elsewhere. One such example is *Sweden*, where a Commission proposed in 2004 to criminalise cartel conduct. The Swedish Competition Authority, however, while not objecting to criminalisation as such, raised concerns that the proposal in the way it was designed would actually hamper effective cartel enforcement.²⁸

Factors to Enhance the Effectiveness of a Criminal Sanctions Regime

If a jurisdiction decides to introduce criminal sanctions, several factors should be taken into account to ensure that criminal sanctions contribute as effectively as possible to anti-cartel enforcement while trying to minimise the costs associated with a criminal enforcement regime. Especially where the authority to criminally prosecute cartels has been allocated to public prosecutors and not the competition authority, proper coordination between prosecutors and the competition authority can be of the greatest importance. First, competition authorities may have to work closely with prosecutors to persuade them to bring cases against cartels. In several member countries and observers, including, for example, *Israel* and *Norway*, competition authorities have experienced difficulties in persuading prosecutors to take up cartel cases. In addition, close cooperation will be important to ensure the effectiveness of leniency programmes. Individuals as well as corporations might be more reluctant to voluntarily provide information about cartels under a competition authority's leniency programme if they fear the possibility of criminal prosecutions of individuals. Clear and transparent rules must assure individuals and corporations who come forward and seek leniency that individuals will also have protection against criminal prosecution. In the *United Kingdom*, for example, the competition authority and the public prosecutor's office have made public statements to that effect, assuring leniency applicants that leniency would extend also to criminal prosecutions.

The proper definition of the criminal offence can be another factor that can affect the effectiveness of a criminal sanctions system. Members that recently introduced criminal sanctions, or are considering introducing them, have closely examined this question and concluded that the definition of a criminal cartel offence should be different from the general prohibition of restrictive agreements in the competition act. In addition to protecting rights of defence more effectively by providing greater legal certainty, there were also concerns that criminal sanctions might have excessive deterrent effects if the conduct to which they apply is not clearly defined. These countries, including the *United Kingdom* and *Australia*, therefore opted for, or are considering, a provision that would specify various acts that constitute a criminal cartel offence in a way similar to the definition of hard core cartels in the 1998 Hard Core Cartel Recommendation.

However, using a specific definition of a criminal cartel offence is not a necessary condition for a successful criminal enforcement regime. Countries that obtain criminal convictions based on the general language of their competition statutes, such as the *United States* and *Israel*, rely on consistent case law, prosecutorial discretion, and, sometimes, approval or exemption systems to ensure that there is no uncertainty about the scope of the criminal offence and to avoid the potential risk of over-deterrence.

Relying on the general competition law definition of anticompetitive conduct can hinder criminal enforcement, however, if there is no recognition of a per-se cartel offence. Otherwise, elements of a competition law violation such as market definition, entry barriers, and effects on competition may have to be proven under criminal standards, providing for insufficient deterrence and making it exceedingly difficult to obtain criminal convictions in courts. This has been the experience in *Canada*. As a result, alternative models are currently under consideration that could include a more effective, specific criminal provision for hard core cartels while encouraging pro-competitive alliances.

4. International Cooperation, Including Exchange of Information in Cartel Investigations

Supporting efforts of member countries to strengthen international cooperation in cartel investigations remains a priority area for the Committee. More effective international cooperation can enhance the ability of authorities to detect and investigate international cartels, and reduce the risk of inconsistencies between enforcement regimes.

The Second Cartel Report studied developments in international cooperation in cartel investigations in great detail.²⁹ It observed that the

enforcement community had increasingly become aware of international and global cartels and the substantial harm they cause, and that cooperation among competition authorities to discover and investigate such cartels had substantially increased. The Second Report noted that cooperation was the strongest within a relatively small group of jurisdictions, although other countries were engaged in international cooperation in some cases as well. In most cases cooperation was limited to "informal cooperation" where agencies informally discuss such matters as investigative strategies, market information and witness evaluations, but do not exchange evidence that has been generated by an investigation and is protected by domestic confidentiality laws. The Second Report, however, also recognised that, even though informal cooperation can be quite useful and sometimes help to advance investigations considerably, in many cases investigations of international cartels were significantly constrained by the inability of competition authorities to formally exchange information.³⁰

Many of these trends have continued. OECD members and observers have found that international cooperation in discovering, investigating, and prosecuting international cartels has reached unprecedented levels. New investigative strategies have been used successfully, such as coordinated, simultaneous surprise inspections in several jurisdictions. Confidentiality waivers in cases of simultaneous leniency applications have created more opportunities for multi-jurisdictional cooperation. In several cases, countries were able to assist others in providing access to evidence and witnesses located in their jurisdictions. More countries than ever cooperate by exchanging knowhow and expertise in cartel enforcement, in particular in the field of investigative techniques. The number of bilateral cooperation agreements has substantially increased.³¹ One enforcement official recently concluded: "Cooperation among competition law enforcement authorities has undergone a sea change in the past five years," and "[o]ur cooperation with foreign antitrust authorities has never been more effective."³²

Despite appreciable progress, however, substantial room for improvement remains in the area of international cooperation. Most importantly, often cooperation among competition authorities does not include the formal exchange of confidential information. If a greater number of competition authorities were authorised to exchange confidential information in cartel investigations, efforts to detect, investigate and prosecute international cartels would be more effective.

4.1 *Enforcement Cooperation*

In many cases of successful cooperation in investigations of international cartels, OECD members have continued to rely on informal cooperation,

including the discussion of investigative strategies, market information, and witness evaluations. Despite its limitations, informal cooperation can be very effective and contribute to more effective enforcement. A recently developed form of successful informal cooperation is the coordination of surprise inspections in several jurisdictions which enable the participating authorities to maintain the surprise element of their investigations and to avoid the possible destruction of evidence.

Cooperation through Coordinated Inspections³³

In February 2003, for the first time an international cartel investigation went overt simultaneously in four jurisdictions: In investigations of suspected cartel activities related to heat stabilisers and impact modifiers, the Canadian Competition Bureau, the European Commission, the Japanese Fair Trade Commission, and the Antitrust Division of the US Department of Justice coordinated simultaneous searches, the servicing of subpoenas and drop-in interviews. In Europe, officials from the European Commission and Member States searched 14 companies located in six Member States as a part of these parallel efforts. Overall, more than 250 investigators and agents were involved in the simultaneous launching of these investigations on three continents.

Cooperation through exchanges of information that is not considered confidential also proved helpful in many cases. Frequently, the 1995 OECD Cooperation Recommendation³⁴ continues to provide the framework for this type of cooperation, especially between OECD members that have not entered into a bilateral cooperation agreement. *Korea*, for example, reported that it notified several other competition authorities in accordance with the 1995 Recommendation when it initiated cartel investigations, and received support from several of the notified authorities which provided non-confidential information from their own investigations. It considered the information it received of substantial help in its own investigation.

Successful cooperation among competition authorities is also supported by a regular exchange of knowhow and expertise related to enforcement activities, including tools and techniques for the detection of cartels, investigative techniques and evidence gathering, such as electronic searches, and case management. Annual meetings of cartel enforcers focusing on the practical aspects of cartel enforcement, which began in 1999, have come under the umbrella of the ICN since 2004. In the most recent meeting in Sydney, *Australia*, the two-day meeting was combined with a two day workshop focusing on leniency programmes. These meetings not only enable participants to exchange ideas and learn about "best practices" in cartel enforcement. They also provide important opportunities to develop close working relationships,

which in turn can facilitate better enforcement cooperation among an increasing number of jurisdictions.

Despite the achievements in international cooperation through various forms of informal cooperation, in many cases members realised that informal cooperation has its limits and that the inability to exchange confidential information can seriously hamper cartel investigations. *Turkey*, for example, found that the absence of a formal cooperation mechanism authorising the exchange of confidential information with the *European Commission* limited its ability to investigate cartels. In one case, Turkey investigated suspected cartel activity in the gas insulated switchgear industry, which appeared to operate outside Turkey, but affected the Turkish market as well. The same suspected cartel was simultaneously investigated by the European Commission. Despite Turkey's request for cooperation, however, the Commission was unable to exchange any confidential information in the absence of an instrument authorising the exchange of confidential information. The inability to obtain information from abroad significantly impeded Turkey's ability to investigate this cartel.

Where international agreements authorise formal cooperation, competition authorities have used them in an increasing number of cases to more effectively investigate cartels. Cooperation under these instruments can include search operations at the request of another country. *Germany*, for example, undertook extensive search operations at the request of the *United States*. In one case it is reported that more than 100 police officers and Cartel office staff simultaneously searched business premises in several German states following a request for assistance in a cartel investigation by the United States.

Cooperation in cartel investigations in the European Union has undergone substantial reforms under the new legal framework introduced by Regulation 1/2003, which entered into force on May 1, 2004. The Regulation introduced far-reaching cooperation mechanisms within the European Competition Network, which comprises the competition authorities in EU member states and the European Commission. In addition to authorising the exchange of confidential information among competition authorities, the Regulation also authorises competition authorities to request assistance of other competition authorities in investigations of suspected infringements of arts. 81 and 82, including investigations of suspected cartels.³⁵ The first such requests for assistance have been issued in cartel cases, resulting in inspections on behalf of the requesting EU member state.

4.2 *Best Practices for the Formal Exchange of Information*

Competition authorities have consistently found that the ability to exchange confidential information can substantially contribute to more effective cooperation and enforcement in international cartel cases. The Committee therefore has for many years sought ways to promote the sharing of confidential information in cartel investigations, consistent with the mandates of the 1995 Cooperation Recommendation³⁶ and the 1998 Hard Core Cartel Recommendation.³⁷ Much of the Committee's work has been documented in the Second Report. The Second Report also described the Committee's discussions with the business community, represented by the OECD's Business and Industry Advisory Committee (BIAC), including issues on which the two sides tended to disagree.³⁸ In addition, the Committee studied practices and rules related to information exchanges in other law enforcement areas where international cooperation is common. In these areas, such as securities regulation and tax, authorities appear to operate under significantly less restrictive regimes concerning confidentiality protection, and therefore exchange information much more frequently in international investigations.

More recently, better coordination of leniency programmes has led to increased opportunities to share confidential information and better cooperate. The number of leniency applications submitted simultaneously to more than one competition authority has increased, and simultaneous leniency applications can include waivers of confidentiality rights. Such waivers create more opportunities for multi-jurisdiction cooperation by enabling the competition authorities involved to share information they have received in the leniency applications. However, even in cases where leniency applicants are willing to give waivers, a broader authority to exchange confidential information would be desirable because confidentiality waivers cover only information submitted by the leniency applicants, and competition authorities usually cannot share incriminating information that they obtain as a result of these applications. For example, where a competition authority obtains documents during a dawn raid that was triggered by information provided by a leniency applicant, any such documents usually are still subject to confidentiality protections and cannot be shared with authorities in other jurisdictions.

Based on its ongoing work related to information exchanges, the Committee embarked on the development of Best Practices for the formal exchange of information in cartel investigations in 2004, and adopted the final version of the Best Practices in October 2005. The laws of many member countries prevent competition authorities from exchanging confidential information in cartel investigations, or severely restrict their ability to do so. The Best Practices aim to identify safeguards that member countries should

consider applying when they authorise competition authorities to exchange confidential information in cartel investigations. It is hoped that by identifying appropriate safeguards for information exchanges, the Best Practices would assist member countries to remove obstacles to effective cooperation by authorising the exchange of confidential information in cartel investigations. During the drafting process, the Committee continued extensive discussions with the business community and bar associations to better understand their concerns.

The Best Practices are based on the following principles:³⁹

- International treaties or domestic laws authorising a competition authority to exchange confidential information in certain circumstances should provide for safeguards to protect the confidentiality of exchanged information. On the other hand, such safeguards should not apply where competition authorities exchange information that is not subject to domestic law confidentiality restrictions.
- Member countries should generally support information exchanges in cartel investigations. It should, however, always be at the discretion of the requested jurisdiction to provide the requested information in a specific case, or to provide it only subject to conditions, and there should be no obligation to act upon such a request. A country may decline a request for information, for example, because honouring the request would violate domestic law or would be contrary to public policy in the requested jurisdiction. In addition, information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty/leniency programmes.
- When initiating an exchange of information, jurisdictions should act with the necessary flexibility in light of the circumstances of each case. They should consider engaging in initial consultations, for example to assess the ability of the jurisdiction receiving the request for information to maintain the confidentiality of information in the request as well as the confidentiality of exchanged information.
- Appropriate safeguards should apply in the requesting jurisdiction when it is using the exchanged information. In this context, the Best Practices address in particular the use of exchanged information for other public law enforcement purposes, disclosure to third parties, and efforts to avoid unauthorised disclosure.

- Information exchanges should provide safeguards for the rights of parties under the laws of member countries. The Best Practices specifically mention the legal profession privilege and the privilege against self incrimination. In this context, member countries may have to take into account differences in the nature of sanctions for violations of competition laws concerning hard core cartels in different jurisdictions.
- In light of concerns that prior notice to the source of information can severely disrupt and delay investigations of cartels, the Best Practices advise against giving prior notice, unless required by domestic law or international agreement. Competition authorities may, on the other hand, consider ex-post notice if such notice would not violate a court order, domestic law, or an international agreement, or jeopardise the integrity of an investigation.

Thus, the Best Practices envisage a robust and credible framework of safeguards to protect confidential business information against unauthorised disclosure, without undermining the ability of competition authorities to effectively cooperate in cartel investigations.

4.3 *The Interface Between Public and Private Enforcement in International Cartel Cases*

A number of issues recently have emerged at the interface between public enforcement and private enforcement in international cartel cases. They have highlighted that the interaction between public enforcement and private enforcement can sometimes lead to inconsistencies, and that increased private litigation with broader rights in one jurisdiction could undermine public enforcement efforts against cartels elsewhere, with uncertain net effects on global deterrence of cartels.

Discovery procedures in private litigation before US courts emerged as one area that has received particular attention. The concern has been that the use of discovery procedures in private antitrust litigation before US courts to obtain access to documents that the defendants had submitted in non- US investigations of the same cartel could impede anti-cartel efforts outside the United States. In particular, the *European Commission* has intervened before US courts based on the concern that allowing discovery of leniency applications could substantially undermine its leniency programme. *Canada* intervened on similar grounds and opposed or tried to limit discovery of documents related to cartel investigations and prosecutions in its jurisdiction.⁴⁰ The outcomes of these cases have been mixed, and not all courts have accepted the views of

foreign governments and enforcement authorities seeking to protect the integrity of their enforcement programmes.⁴¹ One response to rulings in favour of broad discovery rights has been an adjustment in the European Commission's leniency policy which now permits oral statements in leniency applications.⁴² Ultimately, however, the potential that civil procedure discovery rules in one country might interfere with public anti-cartel enforcement in another jurisdiction cannot be completely eliminated.

A second important development at the interface between private litigation and public law enforcement against cartels concerned the reach of US antitrust laws in private litigation. In private litigation that followed the prosecution of the well-known *Vitamins* and *Art Auctions* cartels, as well as a cartel for heavy-lift barge services, all of which adversely affected US customers, foreign plaintiffs sought to use US courts to obtain damages from foreign cartel participants where the plaintiffs had been harmed by cartel conduct outside the United States.

The important policy questions raised in these cases with regard to international anti-cartel enforcement prompted several governments to intervene before the Supreme Court in *Empagran*,⁴³ urging the Court to limit the reach of US antitrust law. Their principal point was that even if most countries agreed that price fixing should be condemned, an unreasonable extension of US antitrust law and its private enforcement regime with treble damages would unduly interfere with the policy decisions of foreign jurisdictions on how to remedy anti-competitive conduct that occurred in their territories and how to provide relief to private plaintiffs. They also argued that permitting independently injured foreign plaintiffs to pursue private remedies under US antitrust laws could undermine anti-cartel enforcement as it could reduce the incentives for cartel participants to cooperate under leniency programmes in the United States and elsewhere. On the other hand, interveners on behalf of the foreign plaintiffs had argued that increased availability of private enforcement in the United States would result in greater deterrence of global cartels, thus ultimately benefiting foreign countries as well. The Court refrained from deciding between the two opposing empirical assertions concerning greater global deterrence. Instead, it relied on comity considerations and the need to avoid unreasonable interference with foreign sovereign interests to hold in favour of a more restrictive construction of the relevant US statute,⁴⁴ at least in the narrow factual circumstances where the worldwide cartel had adversely affected US and foreign customers, but the foreign effects had been "independent" of any adverse domestic effects.⁴⁵

These cases have raised issues which require further study. Competition authorities, in general, look favourably at private litigation in cartel cases in

which customers seek damages for losses they incurred as a result of cartel conduct. The risk of significant damage awards in private litigation can provide a further deterrent against cartels. For this reason, the Second Cartel Report encouraged member countries to explore "means for permitting cartel victims to recover monetary damages from cartel operators, consistent with a country's legal norms and in a way that would avoid unnecessary and vexatious litigation."⁴⁶ The European Commission and EU member states also started to examine ways to encourage more private enforcement of European competition law.

Civil litigation, however, has the potential to interfere with public law enforcement, in the same jurisdiction as well as in foreign jurisdictions. The role of competition authorities in resolving tensions between private and public enforcement in international cartel enforcement frequently will be limited, as they have little influence over procedural rules, including rules concerning the gathering of evidence. They might in certain cases be able to adjust their own enforcement procedures to protect the integrity of their anti-cartel programmes, and sometimes may intervene in court proceedings to argue in favour of rules that limit inconsistencies between enforcement regimes.

The Committee has begun discussions of private litigation in competition cases and intends to further study this area, with a view toward supporting member countries in efforts to provide more opportunity for private enforcement, and to increase the understanding of rules applicable in private litigation in other member countries in order to adjust to such rules.

4.4 *International Agreements*

The survey for this Report disclosed that the number of international cooperation agreements continues to grow significantly. Several have been signed since the adoption of the Second Report, and a growing network of bilateral agreements covers not only cooperation between OECD members, but also cooperative relationships between OECD members and non-members. Such international agreements can include state-to-state cooperation agreements, inter-agency cooperation agreements, mutual legal assistance agreements ("MLAT"), as well as competition-related provisions in bilateral free trade agreements.⁴⁷

While MLATs are not competition specific, they can play an important role in international cartel cases as they provide the authority for formal cooperation, including the exchange of confidential information, if the conduct under investigation amounts to a criminal offence. MLATs have been used in several more recent investigations of international cartels to obtain evidence

located in the territory of another jurisdiction. The MLAT between *Canada* and the *United States* is probably one of the most frequently used MLATs in cartel cases. In an important case, Canadian courts recently upheld the Canadian Competition Bureau's ability to use the MLAT for Canada-US cartel cooperation after parties under investigation for suspected cartel activity in the United States had challenged the MLAT's use to exchange information in cartel cases.⁴⁸

Canadian courts upholding the use of the Canada/US MLAT in antitrust cases

The *Falconbridge* case had its origin in an MLAT request by the US Department of Justice in connection with its investigation into possible antitrust offences by Falconbridge and Noranda in relation to sulphuric acid. After the request for assistance was approved, documents were seized and gathered pursuant to search warrants and an order for production of records. When the Commissioner of Competition sought authorisation to send the records to the United States, Falconbridge and Noranda brought cross applications to have the search warrants and evidence gathering orders set aside, and for a declaration that the MLAT and implementing domestic legislation were not available in aid of the investigation of a Sherman Act violation.

The court rejected Falconbridge's and Noranda's argument that the alleged offence under section 1 of the Sherman Act did not fall within the definition of "offence" under the MLAT. The court also rejected the argument that the MLAT requires "reciprocity" or "dual criminality" such that any alleged offence in the requesting country must also be an offence within the requested country. In this case, the alleged conduct did not amount to an offence under Canadian laws. The court confirmed that the MLAT does not have "a reciprocal offence" or "dual criminality" requirement in terms of the "offence." Rather, the MLAT sets out an obligation to give effect to requests regarding certain "offences" as defined in the MLAT and to give certain kinds of assistance also as set out in the MLAT and subject to various stipulated limitations. The Court of Appeal recognised that this interpretation of the MLAT "places Canada in the position of providing assistance in situations for which it would never have occasion to make a demand." The Court was of the view, however, that this is "precisely what the Treaty envisages."

5. Conclusions

This Report, the final report on the implementation of the Council Recommendation and the progress of member countries in the fight against hard core cartels, has documented that efforts to fight domestic and international cartels have advanced in many respects. Legislative changes in several member countries have conferred greater investigative powers on competition

authorities, authorised stiffer sanctions, and increased the opportunities to effectively cooperate with foreign competition authorities. More competition authorities have created specialised cartel units and/or prioritised the fight against cartels among their activities. High fines are imposed on a regular basis. Cooperation has become much more common, and exchanges of cartel enforcement knowhow have intensified. But much remains to be done.

5.1 *Raising Public Awareness*

There has been a significant increase in the awareness of the harm caused by hard core cartels in many countries. Vigorous campaigns to inform the public about the nature of cartels and the danger they pose, and to enhance public support for the anti-cartel efforts have been developed in some member countries. More countries, however, should consider opportunities to create and expand their own awareness programmes that reach out to key constituents, following the examples of successful programmes that already exist elsewhere. High profile cases, especially those that directly affect consumers, are often the most effective vehicles to increase public awareness of cartels.

In many countries, there is also room to work more extensively with procurement officials in an effort to fight bid rigging more effectively. Bid rigging cartels are pervasive, so virtually every country can benefit from a more aggressive approach against them. Several countries have developed comprehensive programmes to reach out to procurement authorities, in particular to inform procurement officials about the harm caused by bid rigging cartels, to discuss with them how procurement procedures can be adjusted to make the formation of cartels less likely, and to inform them about ways to monitor markets for possible signs of bid rigging. Countries that have not yet undertaken similar efforts should consider developing their own programmes, taking into account programmes that already exist elsewhere, to make procurement officials effective allies in anti-cartel enforcement efforts.

5.2 *Sanctions*

A policy of imposing strong sanctions for cartel conduct is an indispensable part of a successful anti-cartel programme. High financial sanctions have become more common in many countries. But this is not the case in all countries, and it appears that sanctions are not yet at optimal levels. Countries therefore should seek opportunities to further increase corporate fines for participating in cartels.

To enhance both deterrence and the effectiveness of leniency programmes, countries also should consider introducing and imposing sanctions against

individuals, including criminal sanctions where it would be consistent with social and legal norms. If a country accepts that corporate sanctions alone cannot ensure adequate deterrence, and that criminal sanctions can be a useful instrument in the fight against cartels, it should consider measures that maximise the benefits of criminal sanctions and limit their costs. These measures include: securing broad public support for a criminal sanctions regime, persuading prosecutors and judges that cartels should be criminally prosecuted and that criminal sanctions should be imposed, and close cooperation between competition authorities and public prosecutors.

5.3 *International Cooperation*

Cooperation among competition authorities in cartel investigations has become more common. Cooperative relationships between countries, including the exchange of enforcement knowhow and expanded work relationships at the level of enforcement officials, have increased. These developments are critical for more successful efforts to discover and prosecute international cartels. Further means of enhancing international cooperation in cartel investigations should be considered. In particular, countries should consider authorising their competition authorities to exchange confidential information with foreign competition authorities, provided appropriate safeguards against unauthorised disclosure are in place such as those developed in the Committee's Best Practices for formal information exchange in cartel investigations. Countries that prosecute cartel conduct as a crime should consider exploring ways of making more effective use of MLATs. Ways should be examined of coordinating leniency programmes, especially by encouraging leniency applicants to simultaneously apply in as many countries as possible.

5.4 *Next Steps*

The Competition Committee will continue to consider the anti-cartel effort as one of its top priorities. It intends to focus on the following areas:

- *Enforcement Procedures:* Examine the potential use, in particular in civil law jurisdictions, of plea bargaining-type procedures in cartel prosecution to use resources more effectively;
- *Role of Prosecutors:* Discuss ways to ensure more effective cooperation and coordination with public prosecutors in criminal enforcement regimes;
- *Harm:* Gather more information about harm caused by cartels, and methods to measure harm;

- *Leniency Programmes:* Continue discussions of effective leniency programmes, including ways to better coordinate leniency programmes;
- *Cooperation & Information Exchange:* Continue promoting enhanced opportunities for competition authorities to exchange information in cartel investigations; and
- *Private Enforcement:* Examine ways to permit cartel victims to recover monetary damages from cartel operators in a greater number of cases, taking into account issues arising at the interface between private and public enforcement against cartels.

NOTES

1. Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels.
2. Implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels: First Report by the Competition Committee.
3. Implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels: Second Report by the Competition Committee, at 9.
4. Second Report, *supra* note 3, at 13.
5. The Second Report was also recognised in the academic literature on cartels. *See, e.g.*, John M. Conner, *Price Fixing Overcharges: Legal and Economic Evidence* (2005); on file with OECD.
6. Review of the Trade Practices Act 1974 (Dawson Report), Chapter 10, Penalties and other remedies 150-63 (2003). The Dawson Report cautioned that the introduction of criminal sanctions should be conditioned on the ability to reach satisfactory conclusions on a number of important preliminary questions, such as the definition of a criminal offence. As reported further below, new legislation has been proposed in the meantime which would introduce many of the reforms discussed in the Dawson Report.
7. *Verizon Communications v. Trinko*, 540 US 398, 408 (2004).
8. Much of this information is available in greater detail in the annual reports on competition enforcement activities which member countries and observers to the Committee file with the Competition Committee and which are available on the OECD Competition web site, at www.oecd.org/competition.
9. At the time of this Report, the Cartel Office's orders imposing fines are not yet final since most of the companies concerned filed appeals.
10. *See* the discussion of raising the awareness of procurement officials of the harm caused by cartels, *infra*, at 20.
11. AKZO received full immunity from fines for having revealed the cartel.
12. Until May 2004, private homes could not be searched by the Commission.
13. Information about the ICN's activities related to cartel enforcement is available at <http://www.internationalcompetitionnetwork.org/cartels.html>.

14. *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For; Antitrust Enforcement and the Consumer*; available at <http://www.usdoj.gov/atr/contact/newcase.htm>.
15. <http://www.usdoj.gov/atr>.
16. Annual Reports of competition policy developments are available at <http://www.oecd.org/competition>.
17. Available at <http://www.usdoj.gov/atr/public/guidelines/primer-ncu.htm>.
18. <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02296e.html>
19. WTO law as well as EU law impose requirements on national procurement laws that might limit the extent to which such laws can be adjusted to make the formation of cartels more difficult. However, even within the framework set forth by WTO and EU procurement rules, adjustments can be made to reduce the likelihood of cartels.
20. Second Report, *supra* note 3, at 22.
21. Conner, *supra* note 5, at 67. The author used estimates from more than 500 cartel episodes. See also Gregory J. Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook*, Economic Analysis Group Discussion Paper 30 (2003) (estimating average price increase of more than 20 percent).
22. Second Report, *supra* note 3, at 22. The Second Report also acknowledged, though, that some believe that as few as one in six or seven cartels is detected and prosecuted, implying a multiple of at least six.
23. Second Report, *supra* note 3, at 23 (emphasis added).
24. Cartels: Sanctions Against Individuals (2005). A complete version of the roundtable discussion is available at:
<http://www.oecd.org/dataoecd/61/46/34306028.pdf>. Strengthening private enforcement of competition laws against cartel participants can also increase deterrence. However, since this topic was not addressed during the roundtable on sanctions against individuals, it is not discussed in the following text.
25. *Id.*, at 105. The United States emphasised that it would not accept an offer to pay a fine in lieu of a prison sentence.
26. In determining the "right" mix of sanctions, a country may also decide that concerns about a risk of bankruptcy should not be taken into account when imposing fines on corporations, thus eliminating a factor that could result in lower financial, corporate fines.
27. Several commentators have suggested that a reward scheme could be an effective tool to uncover cartels and could also make the formation of cartels

- more costly and therefore less likely. See Cécile Aubert, Patrick Rey, & William E. Kovacic, *The Impact of Leniency and Whistleblowing Programs on Cartels*, 23 Int'l J. Indust. Org. (forthcoming).
28. Sweden, Annual Report on Competition Policy for 2004 (2005), available at: <http://www.oecd.org/competition>. Claes Norgren, Intervention at the Conference on Antitrust Reform in Europe, Brussels, 2005, available at http://www.kkv.se/press/Pdf/tal_cn_050309.pdf.
 29. Second Report, *supra* note 3, at 24.
 30. Second Report, *supra* note 3, at 26-30.
 31. See also *infra*, at 37.
 32. Scott D. Hammond, *An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program*, presentation before the American Bar Association Midwinter Leadership Meeting, January 10, 2005, available at <http://www.usdoj.gov/atr/public/speeches/207226.pdf>.
 33. Commission Press Release IP 03/33 (February 14, 2003). The same strategy has successfully been used in other cases as well. See, e.g., Commission Press Release IP 03/107, May 14, 2003 (coordinated inspections in the copper concentrate sector).
 34. Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, C(95)130/FINAL, available at: <http://www.oecd.org/competition>.
 35. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L1/1 (2004), arts. 12 (exchange of information) and 22 (assistance). See also Commission Notice on Cooperation within the Network of Competition Authorities, O.J. C101/43 (2004).
 36. *Supra*, note 34.
 37. *Supra*, note 1.
 38. Second Report, *supra* note 3, at 33. For a detailed discussion of some of these issues see also Scott D. Hammond, *Beating Cartels at Their Own Game – Sharing Information in the Fight Against Cartels*, presentation before the Competition Policy Research Center, Fair Trade Commission of Japan, November 20, 2003, available at: <http://www.usdoj.gov/atr/public/speeches/201614.pdf>.
 39. The text of the Best Practices is available at: <http://www.oecd.org/competition>. See also Annex 2.
 40. **In re Vitamins Antitrust Legislation**, Misc. No. 99-197 (TFH) MDL No. 1285 (D.D.C. Dec. 18, 2002), 2002 US Dist LEXIS 25815.

41. *Compare* In re Methionine, Case No. C-99-3491 CRB (N.D. Cal. July 29, 2002) (motion to compel discovery of leniency statements denied) *with* In re Vitamins Antitrust Legislation, Misc. No. 99-197 (TFH) MDL No. 1285 (D.D.C. Dec. 18, 2002) (leniency submission held to be discoverable).
42. For a description of the European Commission's concerns raised by these cases *see, e.g.*, Oliver Guersent, *The Fight Against Secret Horizontal Agreement in the EC Competition Policy*, in 2003 Fordham Corp. Law Inst. 43, 51-53 (B. Hawk ed. 2004).
43. Hoffmann-La Roche v. Empagran, 124 S. Ct. 2359 (2004).
44. Foreign Trade Antitrust Improvement Act of 1982, 15 USC. § 6a (2000) ("FTAIA").
45. The Supreme Court remanded the case to the appeals court for further consideration of the plaintiffs' argument that the foreign conduct and domestic conduct were linked (and not "independent"), and therefore the foreign conduct fell under the jurisdiction of US antitrust laws. On remand, the appeals court affirmed the dismissal of the plaintiffs' antitrust claims for lack of subject matter jurisdiction under the FTAIA on the ground that the domestic (US) effects of the defendants' conduct did not proximately cause the foreign plaintiffs' injuries. *Empagran v. Hoffmann-LaRoche*, 2005 US App. LEXIS 12743 (D.C. Cir. June 28, 2005). *But see* In re Monosodium Glutamate Antitrust Litigation, 2005 US Dist. LEXIS 8424, 2005-1 Trade Cas. (CCH) ¶74781 (D. Minn. May 2, 2005) (court upholding subject matter jurisdiction under the FTAIA on the ground that domestic effects of an international cartel and foreign plaintiffs' injuries were sufficiently linked).
46. Second Report, *supra* note 3, at 36.
47. Examples of cooperation agreements in competition matters between OECD members include agreements and MOUs of the Korean Fair Trade Commission with the Mexican competition authority and the Australian ACCC; an agreement among the ACCC, the New Zealand Commerce Commission, and the UK's Office of Fair Trading and Department of Industry and Commerce; an agreement between the governments of Canada and Mexico; and an agreement between Japan and the European Community. Examples of cooperation agreements with non-OECD members include a fair trade agreement between Korea and Chile; the Korean Fair Trade Commission's MOUs with CIS countries; an MOU between the Canadian and Chilean competition authorities; and Australia's free trade agreements with Thailand and Singapore. Overall, the member countries and observers participating in the survey for this Report reported some 30 new bilateral cooperation agreements, if MLATs are included.
48. *Canada (Commissioner of Competition) v. Falconbridge Ltd.* [2003] O.J. No. 1563 (Ont. C.A.), *leave to appeal denied*, *Canada (Commissioner of Competition) v. Falconbridge Ltd.* [2003] S.C.C.A. No. 302, File No. 29845.

Annex 1

**RECOMMENDATION OF THE COUNCIL
CONCERNING EFFECTIVE ACTION AGAINST
HARD CORE CARTELS**

(Adopted by the Council at its 921st session on 25 March 1998)

THE COUNCIL,

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

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

Having regard to the Council Recommendation that exemptions from competition laws should be no broader than necessary and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways";

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

Recognising that benefits have resulted from the ability of competition authorities of some Member countries to share confidential investigatory information with a foreign competition authority in cases of mutual interest, pursuant to multilateral and bilateral treaties and agreements, and considering that most competition authorities are currently not authorised to share investigatory information with foreign competition authorities;

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

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

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

I. RECOMMENDS as follows to Governments of Member countries:

A. CONVERGENCE AND EFFECTIVENESS OF LAWS PROHIBITING HARD CORE CARTELS

1. Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:

- a) effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and
- b) enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:
 - a) a “hard core cartel” is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;
 - b) the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

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

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries’ important interests.
2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:
 - a) the common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country’s laws, regulations, and important interests;

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

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

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

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

II. INSTRUCTS the Competition Law and Policy Committee:

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

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

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

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

Annex 2

**BEST PRACTICES FOR THE FORMAL EXCHANGE
OF INFORMATION BETWEEN COMPETITION AUTHORITIES
IN HARD CORE CARTEL INVESTIGATIONS**

(2005)

These Best Practices for the formal exchange of information¹ between competition authorities in hard core cartel investigations² (“Best Practices”) have been developed under the sole responsibility of the OECD’s Competition Committee.

The OECD gives high priority to effective competition law enforcement, particularly against hard core cartels.³ This has been recognised in recent acts by the OECD Council, which also encouraged member countries to cooperate in their law enforcement activities:

- The Council’s Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade recommended that, when permitted by their laws and consistent with their interests, Member countries should co-

¹ Throughout this document “exchanging information” and “providing information” are meant to refer to situations in which one competition authority shares information with, or otherwise makes information available to, another competition authority, including reciprocal exchanges of information between two competition authorities and the provision of information which one competition authority has obtained at the request of another competition authority.

² Throughout this document “investigation of a hard core cartel” is meant to include all steps related to the enforcement of competition laws against hard core cartels.

³ Throughout this document “hard core cartel” is meant to refer to hard core cartels as defined in the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels.

ordinate competition investigations of mutual concern and should comply with each other's requests to share information.

- Furthermore the Council's Recommendation Concerning Effective Action Against Hard Core Cartels recognised that member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process, to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information.
- The latter Recommendation also encouraged member countries to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

The Best Practices are based on these two Council Recommendations and draw from the Committee's previous work on the fight against hard core cartels, and in particular the subject of information exchanges in hard core cartel investigations.⁴

Consistent with these Council Recommendations and in light of the Competition Committee's work on the topic of information exchanges in cartel investigations, the Committee believes that member countries should generally support information exchanges and should, in accordance with their laws, seek to simplify and expedite the process for exchanging information in order to

⁴ The Committee's previous work on the subject of information exchanges in hard core cartel investigations has been documented in reports by the Committee to the Council on the implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels. The Committee also held roundtable discussions on various issues related to cooperation and information exchanges in hard core cartel investigations. Representatives of the business community contributed to the Committee's discussions, and their views have been taken into account in developing these Best Practices.

avoid imposing unnecessary burdens on competition authorities and to allow an effective and timely information exchange.

The Competition Committee also recognises that:

- a member country may decline to comply with a request for information, or limit or condition its co-operation;
- the exchanging of confidential information presupposes effective safeguards (i) to protect against improper disclosure or use of exchanged information; and (ii) for privileged information, in particular information subject to the legal profession privilege, as well as for other rights under the laws of member countries involved in the exchange of information, which may have to take into account differences in the nature of sanctions for violations of competition laws concerning hard core cartels in different jurisdictions;
- information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty programs, and that, to that end, most member countries have adopted policies pursuant to which they do not exchange information obtained from an amnesty applicant without the applicant's prior permission;
- member country authorities should seek to ensure that information exchanges do not have negative consequences for informants, for example by deciding not to disclose their identities in certain cases;
- regional organisations and regional agreements may imply a very close cooperation which requires less safeguards than set out in these Best Practices.

Based on the above, the Competition Committee believes that member countries should take note of the following Best Practices when they enter into international agreements, or adopt domestic legislation, authorising the exchange of confidential information in investigations of hard core cartels under their competition laws, and in their policies and practices applicable to such exchanges:

I. Information Exchanges Covered by These Best Practices

A. These Best Practices apply to situations where (i) for the purposes of the investigation of hard core cartels under the competition laws of the requesting jurisdiction a competition authority in one jurisdiction provides

information obtained from private sources to a competition authority in another jurisdiction; (ii) the competition authority would normally, under domestic law, be prohibited from disclosing such information to other competition authorities; and (iii) the disclosure of such information can occur only because it is authorised in certain circumstances by an international agreement or domestic law. International agreements and domestic laws authorising such disclosure, as well as policies and practices of competition authorities applicable to such exchanges, should provide for the safeguards identified in these Best Practices.

B. The Best Practices should apply to exchanges of information that has been obtained on behalf of a foreign competition authority following a request for assistance as well as information already in the possession of the requested jurisdiction.

C. These Best Practices do not apply to:

- (i) Exchanges of information not subject to domestic law restrictions and which competition authorities therefore are free to exchange without authorisation by international agreement or domestic law;
- (ii) Information exchanges among members of a regional organisation or parties to a regional agreement that have adopted specific rules governing information exchanges among competition authorities, unless such exchanges involve information originating from a jurisdiction that is outside the regional organisation or not party to the regional agreement; and
- (iii) Information exchanges in the context of private litigation.

II. Safeguards for Formal Exchanges of Information

A. *Authority to Exchange Information*

1. Before making a formal request for information, a requesting jurisdiction should seek to consult with the requested jurisdiction to understand the circumstances under which the requested jurisdiction can act upon the request, in particular, whether it may have any disclosure requirements with respect to the information in the request and/or whether it would have to give notice to the source of the information. The requested jurisdiction should confirm that it will to the fullest extent

possible consistent with its laws maintain the confidentiality of the information in the request.

2. The requesting jurisdiction should provide sufficient information as is necessary for the requested jurisdiction to act upon the request. The requesting jurisdiction should explain to the requested jurisdiction in detail how the request for information located in the territory of the requested jurisdiction concerns the requesting jurisdiction's investigation of a violation of the requesting jurisdiction's competition laws concerning hard core cartels.
3. The requested jurisdiction should have discretion to provide or not to provide the requested information. Reasons for declining to provide the requested information might include, but are not limited to: (i) the requesting jurisdiction's investigation relates to conduct that would not be deemed hard core cartel conduct by the requested jurisdiction; (ii) honouring the request would be unduly burdensome for the requested jurisdiction or might undermine an ongoing investigation; (iii) the requested jurisdiction believes that confidential information may not be sufficiently safeguarded in the requesting jurisdiction; (iv) the execution of the request would not be authorised by the domestic law of the requested jurisdiction; or (v) honouring the request would be contrary to the public interest of the requested jurisdiction.
4. The requested jurisdiction may offer to provide the requested information only subject to conditions and/or limitations on use or disclosure. It should at least consider doing so if otherwise it would have to decline the request for information.

B. Provisions Concerning Confidentiality, Use, and Disclosure in the Requesting Jurisdiction

1. The requesting jurisdiction should identify its domestic confidentiality laws and related practices so that the requested jurisdiction can consider the requesting jurisdiction's ability to maintain the confidentiality of the exchanged information.
2. The exchanged information should be used or disclosed by the requesting jurisdiction solely for purposes of the investigation of a hard core cartel under the requesting jurisdiction's

competition laws in connection with the matter specified in the request and solely by the enforcement authorities in the requesting jurisdiction, unless the laws of the requested jurisdiction provide the power to approve the use or disclosure of the exchanged information in other matters related to public law enforcement, and the requested jurisdiction has granted such approval in accordance with its domestic law requirements prior to the use of the information in such other matter in the requesting jurisdiction.

3. The requesting jurisdiction should confirm that it will to the fullest extent possible consistent with its laws: (i) maintain the confidentiality of the exchanged information; and (ii) oppose the disclosure of information to third parties for the use of such information in private civil litigation, unless it has informed the requested jurisdiction about such third party request for disclosure of the information, and the requested jurisdiction has confirmed that it does not object to the disclosure.
4. The requesting jurisdiction should ensure that its privilege against self incrimination is respected when using the exchanged information in criminal proceedings against individuals.
5. The requesting jurisdiction should take all necessary measures to ensure that an unauthorised disclosure of exchanged information does not occur. In addition, it should make information available about the consequences under its domestic law in the event of such unauthorised disclosure. If, under exceptional circumstances, an unauthorised disclosure of exchanged information occurs, the requesting jurisdiction should take steps to minimise any harm resulting from the unauthorised disclosure, including promptly notifying the requested jurisdiction, and to ensure that such unauthorised disclosure does not recur. The requested jurisdiction should consider whether it is appropriate to notify the source of the information about the unauthorised disclosure.

C. *Protection of Legal Profession Privilege*

1. The requested jurisdiction should apply its own rules governing information subject to and protected by the legal profession privilege when obtaining the requested information.

2. The requesting jurisdiction should, to the fullest extent possible, (i) formulate its request in terms that do not call for information that would be protected by the legal profession privilege under its law; and (ii) ensure that no use will be made of any information provided by the requested jurisdiction that is subject to legal profession privilege protections of the requesting jurisdiction.

D. Notice to Source of the Exchanged Information

1. If an information exchange is made consistent with these Best Practices, the requested jurisdiction should not give prior notice of the exchange to the source of the information, unless such notice is required under its domestic laws or an international agreement.
2. If the requested jurisdiction provides notice to the source of the information of the fact that information has been exchanged, it should do so only if such notice does not violate a court order, domestic law, or an obligation under a treaty or other international agreement, or jeopardise the integrity of an investigation in either the requesting or requested jurisdiction.
3. Prior to giving notice to the source of the information in accordance with Sections D.1 or D.2, the requested jurisdiction should, where practicable, consult with the requesting jurisdiction.

III. Transparency

To the extent possible without compromising legitimate enforcement objectives, jurisdictions should ensure that their relevant laws and regulations concerning information exchanges covered by these Best Practices are publicly available.

OECD PUBLICATIONS, 2, rue André-Pascal, 75775 PARIS CEDEX 16

PRINTED IN FRANCE