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## **OECD Global Forum on Competition**

### **HOW ENFORCEMENT AGAINST PRIVATE ANTI-COMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

**(Background note by the Secretariat)**

*This note is submitted FOR DISCUSSION under Session IV of the Global Forum on Competition to be held on 12-13 February 2004.*

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## **HOW ENFORCEMENT AGAINST PRIVATE ANTI-COMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

### ***NOTE BY THE SECRETARIAT***

#### **1. Introduction**

1. In the second meeting of the Global Forum on Competition, on 14 and 15 February 2002, the first session dealt with competition policy and economic growth and development. In particular, competition policy issues in developing and transition markets were discussed. Several participants called for more systematic evidence that competition is good for transition and developing economies. In order to raise support for the establishment and refinement of modern rules, effective enforcement and independent institutions in the competition law and policy area, advocates for reform need concrete and convincing examples. Such examples are also crucial for successful advocacy aiming at creating and enhancing a competition culture. The fourth meeting of the Global Forum on Competition will address various aspects of the beneficial effects of competition. Session IV of the meeting, on 13 February, will discuss how enforcement against private anti-competitive conduct has contributed to economic development.

2. The centre of gravity of this session will not primarily rest upon theory and principles, but on the practical experience offered by real-life cases. Participants are invited to submit descriptions of competition cases from their jurisdictions that demonstrate how law enforcement has halted restrictive behaviour and the subsequent effects on economic development. This note will briefly recall how anti-competitive conduct harms buyers, ultimate consumers, and the economy as a whole. It will touch upon factors that make developing and transition economies particularly vulnerable to competitive restraints, and the tools available for fighting private anti-competitive behaviour. Some examples from the OECD's past work are presented as an inspiration for participants' contributions. Finally, the invitation to submit cases will set out some details on contents, format and timing.

3. After having received contributions from participants, the Secretariat intends to add a post-script to this note, summarising the main points from the submitted cases and proposing issues for discussion. Subject to participants' views, the material discussed in the Forum meeting could also serve as a starting point for further work on this issue.

#### **2. Private anti-competitive conduct – why and how?**

4. In principle, a market economy rests upon a model where the consumer<sup>1</sup> has a free choice between alternative products (goods or services) and alternative suppliers of those products. The suppliers are expected to compete among each other, trying to offer products that best meet the consumer's preferences, in the hope of being rewarded by increased sales. In real life, this is not always what happens. On the contrary, as every competition official knows, 'competition has a tendency to neutralise itself'.

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<sup>1</sup> The term 'consumer' is in this context also understood to include buyers who are not end-users.

Thus, competitors have obvious reasons to avoid competing. This can be done in a number of ways, and there are a number of effects of such market behaviour.

### **2.1 *The incentives behind anti-competitive conduct***

5. In theory, the exclusion of competition allows a seller to raise his price from the competitive level to the monopoly level. In spite of the subsequent reduction of the quantity sold, this will leave him with increased total profit. Practical experience confirms that weak competition – or the absence of it – often allows sellers to charge higher prices. Thus, the profit-maximising motive is clearly one of the driving forces behind attempts to restrict or exclude competition.

6. However, empiric studies may fail to demonstrate a strong link between high profits and lack of competition. A lack of competitive pressure will allow a firm to let costs increase, and as a consequence profits may stay low in spite of excessive pricing. This may leave room for organisational slack, so-called x-inefficiency, waste, a passive approach to product development and innovation, or increased remunerations to staff and management. Consequently, management may have incentives to restrict competition that do not always concur with owners' interests.

7. Conversely, higher than normal profits are not necessarily the result of competitive restraints. There are also situations where efficiency-enhancing behaviour may lead to a high profit.

8. Business enterprises often have more complex and multifarious objectives than the simple profit-maximising goal of economic theory. For instance, many firms strive for growth and expansion to a higher degree than is explained by short-term economic gains. Thus, some anti-competitive conduct may primarily aim at growth, which in its turn could have a lessening of competition as an effect.

### **2.2 *The effects of anti-competitive conduct***

9. The effects of anti-competitive conduct, and subsequently of competition authorities' successful activities to halt such conduct, are often indirect, long-term, and related to the general functioning of the economy. On the macro-economic level, economic research – including work done by the OECD - supports the conclusion that effective competition leads to growth and enhanced welfare. However, the effects of implementing a competition law and enforcing it in individual cases are more difficult, maybe impossible, to prove scientifically. Still, advocacy work aiming at building public support for competition policy and strengthening competition culture cannot rely on generalities. Competition authorities need to provide concrete examples of the harms of anti-competitive conduct, and how competition law enforcement can effectively address those harms and allow the good effects of competition to have their free play.

10. Economic theory points to the reduction of total output as the most detrimental effect of competitive restraints. Such quantitative effects can sometimes be observed in specific product markets where economic regulation excludes competition. For instance, shortages of supply have in some countries affected taxi services or the housing market. Corresponding quantitative effects of private anti-competitive conduct may be less obvious. However, market sharing arrangements by definition prevent customers from accessing certain sources of supply, and collusive arrangements to raise the price make the product inaccessible to customers who would have been prepared to pay the competitive price, but not more.

11. Price increases are more commonly recognised as the immediate effect of horizontal agreements to co-ordinate pricing. From an economic point view, this could be seen as an effect on income distribution that does not affect economic efficiency at large. However, many countries perceive the maximisation of

consumer surplus as a major objective of competition policy. The OECD Competition Committee recently conducted a survey about the economic harm caused by hard core cartels.<sup>2</sup> Although economic effects are not easily quantified, this survey identified estimated price effects in 14 cases ranging from 3% to 65%, with a median of between 15 and 20%.

12. Direct effects on prices may also result from unilateral behaviour by a seller enjoying a position of dominance or substantial market power. Although the concept of a monopoly price is clearly defined in theory, such cases of so-called exploitative abuse of dominance present considerable difficulties in practical competition law enforcement. Thus, short of evidence of the “true” costs and productivity under competitive pressure, estimates of the difference between the actual price and a competitive price are mostly uncertain.

13. In addition to static effects of anti-competitive conduct, competitive restraints are considered to have – maybe still more serious – dynamic effects. In a market where agreements allow competitors to refrain from aggressive marketing or where new entry is hampered, the efforts to increase consumer satisfaction tend to fade away. Such effects may negatively affect research and development in order to improve existing products or replace them with new ones. They may prevent new products, new producers or new distribution channels from appearing on the market. And they may take away the incentives for developing more efficient production methods in order to save costs. Such effects are more difficult to observe in practice. A rationalisation that does not take place, a product that is not invented, or a firm that does not challenge existing suppliers do not manifest themselves. To the extent such dynamic effects can be demonstrated to result from successful enforcement against private anti-competitive conduct, they should provide weighty arguments in competition advocacy work.

### 2.3 *Different forms of private anti-competitive conduct*

14. “Hard core cartels are the most egregious violations of competition law.” This conduct, which includes agreements among competitors to fix prices, restrict output, submit collusive tenders or share markets, “injures consumers in many countries by raising prices and restricting supply.” It also “distorts world trade” by creating “market power, waste and inefficiency in countries whose markets would otherwise be competitive.” These are the conclusions from the 1998 Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels.<sup>3</sup>

15. Other forms of agreements may or may not have anti-competitive effects. Some agreements between direct competitors (horizontal agreements) may be harmless – or even pro-competitive – for instance an agreement on common standards or joint research and development. Vertical agreements – between firms that do not compete in the same market – may enhance competition between different brands of the same product. On the other hand such agreements could restrict competition between suppliers of the same brand. Vertical agreements may also have the effect of protecting a domestic market from foreign entry, especially in small economies. The anti-competitive effects of vertical agreements are in many jurisdictions assessed on a rule-of-reason basis, and are in general looked upon less severely than horizontal agreements.

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<sup>2</sup> The results are reported in ‘Fighting Hard-Core Cartels. Harm, Effective Sanctions and Leniency Programmes’, (OECD 2002), and ‘Hard Core Cartels. Recent Progress and Challenges Ahead’, (OECD2003). These reports, as well as many other OECD documents and recommendations relating to competition policy, can be found at the competition page of the OECD web site, at [www.oecd.org/competition](http://www.oecd.org/competition).

<sup>3</sup> Available at [www.oecd.org/competition](http://www.oecd.org/competition).

16. Some firms have achieved a market position allowing them to act autonomously, without having regard to reactions from competitors or even their customers. Such a position of dominance is in most jurisdictions not seen as a restriction of competition in itself, especially when arrived at by satisfying customers more efficiently than the firm's competitors do. However, market power may enable a firm to take unilateral action that restrains competition. So-called *exploitative* abuse of a dominant position refers to a situation where the dominant firm raises the prices – or by other means enriches itself – in a way that would not have been possible in a competitive market. *Exclusionary* or predatory abuse is about driving competitors out of the market, disciplining them in an effort to attenuate their competitive influence, or preventing new entry, by anti-competitive means that are only available to a dominant firm. As set out above, cases of exploitative abuse entail difficulties both in practice and theory, and in most developed countries this category of cases play a diminishing role in competition law enforcement. Transition economies, on the other hand, tend to put more emphasis on exploitative abuse cases in their enforcement work.

17. Mergers, take-overs, concentrations and similar structural or institutional measures may restrict or prevent competition to the extent that market power is created or strengthened. Merger control normally includes powers to prohibit, or effectively address post-implementation, mergers that meet certain criteria for being anti-competitive. However, in practice few notified mergers are halted altogether as the anti-competitive effect often may be eliminated through modifications of the arrangement.

### **3. Special characteristics of developing and transition economies**

18. Although much of private anti-competitive conduct follows the same patterns in developed, industrialised countries and developing and transition economies, there are some special characteristics of a “new” economy that may call for attention. One is the process of major change, for instance when an informal subsistence economy needs to develop structures based upon contracts, enterprises and trade. Or when a planned economy, where the state is the major economic player, is succeeded by a market with private actors. Another special feature of developing and transition economies deals with the competition culture. Lack of competition culture affects sellers' and buyers' behaviour in the market, as well as various stakeholders' attitude to competition law enforcement and, often, also to competition as such. Still another aspect relating to prevailing attitudes is that economies in development may be more vulnerable to corruption, cronyism and disrespect of rules – behaviour that may put law-abiding companies at a competitive disadvantage.

19. Developing and transition economies may have structural weaknesses that make them particularly vulnerable to private anti-competitive conduct. The following factors, where they are found, are likely to have a negative impact on competitive pressure.

- Greater proportion of local markets insulated from trade liberalisation measures
- Limited access to essential inputs
- More limited distribution channels
- More dependent on imports (basic industrial inputs) and/or exports (for growth)
- Greater incidence of administrative/institutional barriers to imports
- Weak capital markets

### **3.1 Major competition problems related to the 'creation' of competitive markets**

20. The process of replacing a state monopoly by a number of private enterprises may in itself contain elements that distort competition on equal terms, or facilitate anti-competitive behaviour by certain market actors. A former monopolist being challenged by new entrants may have 'inherited' advantages from the former position, like a strong financial position, control of certain network facilities, connections and political support, or established relations to suppliers and customers. Such a dominant firm or 'incumbent operator' may find many ways to make life difficult for new entrants and in the end exclude competitors effectively. In many countries that have liberalised markets, the competition law enforcer finds itself inundated by endless cases of alleged abuse of dominance resulting from the imbalance between a former monopolist and new entrants.

21. Another example related to the opening of markets for competition deals with the privatisation of a former monopolist. Transition and developing economies may have several reasons to encourage foreign investors to take over state-owned firms. One obvious motive is the lack of domestic capital, but a foreign investor may also bring modern production and management methods that are crucial for growth. In order to attract potential foreign owners, a country may offer special advantages. There are obvious risks that terms related to such privatisation, if not considered carefully in view of possible anti-competitive effects, may enable the new owner to limit or exclude competition, particularly if it is allowed to purchase a monopoly position.

### **3.2 Private anti-competitive behaviour in developing and transition economies**

22. In general, private anti-competitive behaviour in developing and transition economies largely take the same forms as in more developed countries. However, the relative importance of different categories of cases may vary. There may also be some special kinds of infringements that are more common in less advanced economies.

23. Where competition law enforcement is young and competition culture less developed, firms may form **cartels** without realising them to be illicit behaviour. Typically, most cartel cases in transition economies involve small or medium-sized enterprises. Such 'naïve' cartels are easy to discover as participants do not make efforts to hide them – sometimes they are even voluntarily reported to the competition authority. Despite the small scale of such anti-competitive behaviour, they may still cause considerable harm to local consumers. Therefore competition authorities rightly take action also against 'naïve' cartels, although with less draconic consequences than in the case of more serious, and perhaps covert, conspiracies. Advocacy and information activities obviously have a role to play in these cases.

24. Younger competition regimes often have relatively few cases of **serious hard core cartels** involving big companies. This does not necessarily imply that developing and transition economies are spared such anti-competitive behaviour. However, when competition laws are first introduced one of the major shortcomings often deals with the powers to demand information and search for evidence. Even where competition authorities have such powers, sanctions for refusal to co-operate may be weak and the administrative capacity to match large enterprises may be insufficient. Still, given the serious harm caused by hard core cartels, not least in transition and developing economies, this is an area where more vigorous competition law enforcement may provide important contributions to economic development.

25. Transition and developing countries often have more **abuse of dominance** cases, as compared to countries with a longer record of competition law enforcement. Another conspicuous difference is the strong focus on exploitative abuse in many transition economies, whereas this category of cases has next to disappeared from the case records of developed countries. One explanation may be traditions of price

control in planned economies, which come back in new disguise after the introduction of competition laws and policies. However, there may also be more legitimate reasons for taking action against prices considered to be abusively high. Potential competition and new entry may be lacking as a result of entry barriers following from the state of transition; lack of competition culture may prevent competitors from underbidding excessive prices; or more relevant institutions for dealing with the situation may still be lacking.

26. There are differing views on the usefulness of including **merger control** in the earliest stages of establishing competition law and institutions. On the one hand, merger control calls for advanced economic analysis and authorities that have not yet developed the needed expertise may risk doing more harm than good. On the other hand, merger control is an area which raises public and political interest in and support for competition, and may serve as a front-runner for other branches of competition law and policy.

27. Irrespective of the level of development of an economy, one core aspect of merger control rules is about the **thresholds for notification**. Setting these thresholds low may result in an important administrative burden for the competition authority, in spite of only a small share of those cases actually causing any concerns from a competition point of view. However, where competition authorities receive part of their funding from merger notification fees, there may be administrative reasons for keeping the number of notified mergers high. Experience from transition economies demonstrate that competition authorities may risk focusing excessively on the formal aspects of merger notification, rather than on the economic effects of the structural changes as such.

#### **4. Tools to fight private anti-competitive conduct**

28. Remedies to private anti-competitive conduct aim at (a) halting the conduct, (b) recapturing the gains from illicit behaviour, (c) modifying the behaviour of firms so that anti-competitive effects are reduced or eliminated or (d) deterring companies from engaging in such activities. Procedural tools similar to remedies aim at compelling companies to provide information or in other ways submit to, and cooperate with, an investigation.

##### **4.1 *The nature of available remedies***

29. The most common sanctions imposed in response to anti-competitive conduct are fines of either an administrative or a criminal nature. Some jurisdictions also allow for jailing individuals, although that would be applied less commonly than pecuniary sanctions. Periodic penalties may be used in order to compel a company to submit to an investigation, for instance by providing documents or information contained in documents, or giving access to premises for an inspection.

30. Other remedies include orders to terminate an infringement of competition rules and decisions to approve a merger or an agreement subject to specific terms. Voluntary commitments by a firm may enable the competition authority to approve a merger or an agreement that would otherwise have been prohibited. Competition authorities mostly find structural remedies to be more effective than behavioural ones.

##### **4.2 *The need for effective rules, procedures and institutions***

31. Competition laws enforced by competition authorities and adjudicated by courts of justice are the major tool to fight private anti-competitive conduct. The first step to promote and protect a competitive economy is having such rules and institutions in place. However, there is also a qualitative aspect of

competition law enforcement. The law must enable action against the most serious forms of anti-competitive behaviour, and allow for sanctions serious enough effectively to deter anti-competitive conduct. It must also provide the competition authority with effective tools for investigation, including the right to request and search for information. After having established a credible enforcement and sanctioning record, many countries have found leniency rules, encouraging firms fully to co-operate with the competition authority, to be a prerequisite for discovering egregious hard core cartels. Finally, the competition authorities and the judiciary must have the necessary qualitative and quantitative resources for effectively implementing the rules of competition legislation. Under these conditions, there is broad consensus that competition law enforcement serves as a major tool for halting anti-competitive behaviour, and thereby contributing to growth and enhanced welfare throughout the economy.

## **5. Examples of successful competition law enforcement contributing to economic development**

32. Anti-competitive conduct negatively affects or eliminates the benefits of effective competition like static and dynamic efficiency and consumer surplus gains – all being prerequisites for growth and enhanced welfare. Consequently, competition law enforcement that effectively sanctions and deters such conduct should lead to economic development. However, such effects may sometimes be difficult to demonstrate in the short term. One reason is evidently the general difficulty of isolating effects in the economic development process. Another one is the time span that may occur between the removal of competitive restraints and market actors taking advantage of the new situation.

33. Examples of successful competition law enforcement should ideally not be confined to the elimination of anti-competitive behaviour but also describe how the subsequent development was beneficial to consumers and contributed to economic efficiency. Such examples are most effective in advocacy work, in order to demonstrate that competition is not just a model for economists but offers tangible benefits to every citizen. Where such evidence of concrete effects is impossible to produce, examples used for advocacy purposes should at least aim at describing how the elimination of anti-competitive conduct in the specific case is expected to contribute to economic development.

### **5.1 Cases from the OECD's past work**

34. The following cases are taken from the OECD's past work with developed as well as transition economies. The purpose is not to have these cases discussed at the meeting of the Global Forum on Competition, but rather to offer some examples serving as inspiration for contributions from participants.

#### **Box 1. The German Ready-mix Concrete Case**

This was the largest cartel case prosecuted to date by Germany's Bundeskartellamt, involving 62 businesses from 28 business groups, and 42 individuals. The respondents had engaged in a series of quota agreements in the years 1999-2000, affecting Berlin and several other regions in Germany. The conspiracy affected sales of concrete worth about €1.3 billion. The estimated overcharges totalled about €112 million. The investigation was prompted by complaints about price increases received from construction companies. Later, anonymous information was also provided. Evidence of the cartel included detailed records kept by the participants, specifying who was to provide food and drink for the cartel meetings. Actual sales were regularly compared to the agreed allocations, and those who exceeded their sales quota were punished in the next allocation of contracts.

Fines totalling about €153 million were assessed, which amounted to about 137% of the estimated overcharges.

The indirect effects of hard core cartel cases like this one are typically much more important than the direct ones. Halting the cartel behaviour obviously results in lower prices for ready-mix concrete in the region, with a subsequent reduction of construction costs and an increased quantitative output. The most important effect of major cartel cases, where impressive sanctions are imposed, is the deterrent effect on anti-competitive conduct in other regions and other economic sectors, which cannot be quantified on a case-by-case basis.

### **Box 2. The Lithuanian seaport case**

Klasco, a stevedore company in Klaypeda seaport, provided access to piers by introducing a system of passes for the territory it leases. Companies providing services to vessels, like supplying equipment or spare parts, were allowed to purchase single entry passes on the condition that they could present a preliminary order for their services from ship owners or captains. However, such conditions were not applied to one of the service providing companies, Komeximas. Being an affiliate company to Klasco, Komeximas was able to supply services to ships on the basis of free permanent passes. The Lithuanian Competition Council found that this behaviour constituted an abuse of a dominant position.

Exclusionary behaviour based upon a position of significant market power strengthens a monopolistic structure and consequently harms economic welfare. Limiting or eliminating competition in a market by such means not only excludes current competitors, it also prevents new entry.

### **Box 3. The Slovenian Liquefied Gas Case**

A group of liquefied gas distributors in Slovenia had agreed on so-called 'technical regulations for maintenance of gas bottles'. These rules set a uniform price for the maintenance of gas bottles and required dealers to charge this price to final costumers as a prerequisite for distributing gas in bottles to dealers. The investigation by the Slovenian Competition Protection Office showed that the elasticity of demand was very small, which made it relatively easy for cartel members to raise prices significantly. The agreement among distributors affected about 300,000 gas bottles sold at the agreed price for a total of SIT 60,888,000 per year.

Another effect of this agreement was the refusal to supply dealers. The distributors taking part in the agreement had a market share larger than 60%. As a consequence of this conduct the Competition Protection Office found that the distributors also infringed the law by abusing their dominant position.

Neither the static nor the dynamic effects of this infringement could have been measured. However the gravity of the conduct is apparent taking into account that this agreement precluded

the autonomous conduct of the dealers of an important product. It also potentially prevented new entry or the development of new distribution channels and could or in fact did cause other indirect effects.

#### **Box 4. The Russian Gasoline Case**

As a consequence of privatisation, the Russian gasoline company Tvernefteprodukt JSC obtained high market shares in the wholesale and retail gasoline market in the Tver region. After receiving complaints from customers the Tver Regional Office of the Ministry for Antimonopoly Policy and Support to Entrepreneurship initiated an investigation. As a result, the Office declared that the Tvernefteprodukt JSC maintained prices far above the competitive price. The investigation also revealed that the market environment indicated a high possibility of concluding anti-competitive vertical agreements with the oil-processing enterprise. In view of these facts the competition authority concluded that Tvernefteprodukt JSC infringed the law by its conduct.

The high market share of the Tvernefteprodukt JSC, together with the low shares of the other economic entities in the market, created an industry structure that triggered a number of negative effects on economic development. Apart from the high prices, the quality of gasoline degraded and service became unsatisfactory. Due to the structure and the characteristics of the market, entry barriers were extremely high. In addition, those barriers to entry were aggravated by the conduct of Tvernefteprodukt JSC, such as refusing access to oil storage tanks.

#### **Box 5. The Latvian Dairy Products Case**

Valio and Rigas piena kombinats, two companies active in the Latvian dairy products market, agreed to set up a joint enterprise for advertising and trade. The Competition Council of Latvia made an assessment of the foreseeable positive and negative effects of the agreement. Since the parties were competitors or potential competitors, one negative result would have been the restriction of competition in various product markets. The agreement could also have facilitated joint pricing or a concerted discounting strategy. On the other hand, the joint venture would have provided Valio - a new entrant - access to the Latvian market for dairy products. Given this new entry the authorization of the agreement was expected to result in the improvement of production and the supply of new products (especially products beneficial for healthy nutrition). Having evaluated the positive and the negative effects of the agreement the Competition Council approved the joint venture.

Some joint ventures have few if any anti-competitive effects, while at the same time offering real efficiency benefits. This category of agreements include joint ventures conducting activities that parents could not perform individually, provided there are no restrictions on the competitive activities of the parties to the joint venture. Good examples of such joint ventures are those set up to reap important economies of scale through common production of inputs accounting for a minor portion of the parents' total costs. Such joint ventures should present no real difficulty for competition authorities. They should simply be left alone or approved as quickly as possible.

At the other end of the spectrum are joint ventures offering no real benefits, but entailing substantial risks to competition. Typically such arrangements involve little in the way of real integration among the parents. Once it has been determined that a joint venture falls into this category, it can be summarily prohibited - especially if it is essentially a sham, *i.e.* a hard core cartel masquerading as a joint venture.

## **5.2 Invitation to GFC participants to submit contributions**

35. Participants are invited to submit contributions describing at least one case from each jurisdiction demonstrating how the enforcement of competition law against private anti-competitive conduct has contributed to economic development. Contributions should not exceed five pages. To the extent possible, the cases should not just illustrate how competitive restraints were limited or eliminated, but also subsequent effects to consumers and the economy at large.

36. If the identity of firms or other facts of the case are not in the public domain, the cases may be anonymous as requested to respect confidentiality rules.

37. Submissions in English or French should be sent in electronic form to Mrs. Laurence Langanay (Assistant, Competition Division) at the following e-mail address: [Laurence.langanay@oecd.org](mailto:Laurence.langanay@oecd.org) , no later than **Monday 1st December 2003**.