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COMPETITION COMMITTEE**

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**Working Party No. 3 on Co-operation and Enforcement**

**INTERNATIONAL CO-OPERATION - STOCKTAKING EXERCISE OF THE COMPETITION  
COMMITTEE'S PAST WORK**

-- Secretariat Note --

12 June 2012

*The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 12 June 2012.*

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- Email: antonio.capobianco@oecd.org].

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## INTERNATIONAL CO-OPERATION – STOCKTAKING EXERCISE OF THE COMPETITION COMMITTEE’S WORK OVER THE LAST 20 YEARS

*By the Secretariat*

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1. This Note offers an overview of the work on international co-operation done by the Competition Committee and its working parties (together the “Committee”), based on the numerous discussions that took place over the past twenty years. The purpose of this exercise is to identify key issues concerning international co-operation that have already been analysed by the Committee and to assist delegates in shaping the scope of future work on international co-operation.

2. The Note is organised as follows: It first summarises the background to this exercise and the methodology that the Secretariat followed in reviewing the extensive body of work of the Committee in this area (section 1). It then describes the main work streams identified in the stocktaking exercise, i.e. formal instruments, mergers and cartels (section 2), before reviewing some of the key issues that can be drawn from the OECD work on international co-operation (section 3); a final section suggests possible issues that the delegates might want to address during the WP3 discussion on 12 June 2012 (section 4).

3. In the annexes to this Note, the Secretariat has included: a list of the OECD documents covered by this stocktaking exercise, organised chronologically and with reference numbers for each document ([Annex 1](#)); a more detail description of the work done in the area of mergers ([Annex 2](#)) and cartels ([Annex 3](#)); [Annex 4](#) includes a summary of the work on exchange of information between agencies in enforcement cases; and [Annex 5](#) includes a summary of other relevant work which does not necessarily fall in any of the previous categories.

## 1. Background and methodology

4. In July 2011, the Chairman of the Committee sent out a letter to all delegates concerning long term strategic planning, and possible themes which could be taken up by the Committee over the course of the next two years.<sup>1</sup> One of these themes concerned International Co-operation with the objective of a review and possible revision of the 1995 Recommendation of the Council Concerning Co-operation between Member countries on Anti-competitive Practices affecting International Trade (the “1995 Co-operation Recommendation”), in addition to identification of needs for additional instruments or other Committee outputs to enhance international co-operation between competition agencies. The Chairman emphasised that the Committee would aim to learn from examples of successful international co-operation in other fields, both within the OECD and outside. Delegates were encouraged to respond in writing with their feedback.<sup>2</sup>

5. In December 2011, following the feedback, a revised scoping note was issued.<sup>3</sup> The delegates were again requested to respond in writing with their thoughts on these more specific questions.<sup>4</sup> Following the feedback received, the Secretariat circulated a workplan detailing the planned strategy and action items under the theme of international co-operation. The proposed objective of this work stream was to study and share experience and insights on international co-operation among competition agencies with a view to improving it. The work would include thorough explorations of the reasons for international co-operation, the relative merits of various forms of co-operation, lessons from co-operation

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<sup>1</sup> See Paper “The Competition Committee’s two strategic themes for 2012-2014: international co-operation and evaluation of competition interventions – Workplans” [DAF/COMP(2012)1].

<sup>2</sup> DAF/COMP/WD(2011)70

<sup>3</sup> Key issues identified in the revised scoping paper included; (i) what is the value of international co-operation? (ii) what kinds of international co-operation can there be? (iii) changes since the 1995 Recommendation and how to improve it, (iv) can we learn from experiences in other policy areas? (v) considering incentives for co-operation, (vi) the OECD’s role in improving co-operation and (vii) constraints on further co-operation.

<sup>4</sup> DAF/COMP(2012)1/ANN1

efforts in other policy fields, constraints on greater co-operation, experience with the 1995 Recommendation on International Co-operation, areas where improvements are needed, and potential solutions/enhancements. The proposed work plan also included a detailed table summarising specific projects, their title and projected completion date.<sup>5</sup>

6. During the February 2012 Committee meetings, delegates endorsed the project as it was proposed in the Secretariat scoping paper and decided that before starting on any substantive projects set out in the work plan, a ‘stocktaking’ exercise would be carried out. In order to manage effectively the review of such a large body of material, the Secretariat decided to include in the exercise documents going back as far as 1991, when the work on the 1995 Recommendation on International Co-operation started, spanning a period of just over 20 years. An exception was made for OECD instruments on international co-operation where the Secretariat has looked at all existing instruments, the oldest one dating from 1967.

7. The research encompassed all public OECD documents, in addition to those background documents which have not been published but which are available on OLIS. All the relevant documents, including their title, date and reference number, have been listed in the table annexed to this paper (Annex 1). This paper, however, does not attempt to cover all the documents reviewed. Instead it offers a summary of the main questions asked, and the conclusions and key findings drawn from, the primary publications, discussions, reports and papers concerning international co-operation.

## **2. Key work streams identified in stocktaking exercise**

### **2.1. OECD instruments on international co-operation**

8. Over the last 45 years, the OECD approved a series of Council Recommendations which have been elaborated and progressively refined by the Committee, dealing directly or indirectly with international co-operation between competition authorities on enforcement cases. While four of these instruments date from before the period covered by the stocktaking exercise, for completeness they have been included in the following section. The section also covers the 2005 Committee Best Practices on the exchange of information between competition authorities in hard core cartel cases.

9. Unlike for other recommendations,<sup>6</sup> the Committee never reported to the Council on the application of the various recommendations on international co-operation which have been adopted over time, and it has never reviewed the experiences of the Member countries with the 2005 best practices.

#### **2.1.1. OECD Recommendations on international co-operation**

10. The first Recommendation on international co-operation in enforcement cases dates back to 1967.<sup>7</sup> This first instrument recognising that the powers of competition authorities to co-operate are limited, encouraged Member countries to (a) notify other countries of an investigation involving their important interests and (b) co-ordinate their respective actions when more than one jurisdiction is looking at the same case, and (c) supply each other with any information on anti-competitive practices. The Recommendation acknowledges that competition authorities should operate within the limit of existing

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<sup>5</sup> DAF/COMP(2012)1

<sup>6</sup> See for example the three implementation reports on the 1998 Recommendation on Hard Core Cartels or on the 2001 Recommendation on Structural Separation, or the ongoing work on the implementation of the 2005 Recommendation on Merger Review and the 2009 Recommendation on Competition Assessment.

<sup>7</sup> See Council Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(67)53(Final)]

national laws and that the Recommendation should not be construed as affecting national sovereignty and extra-territorial application of national competition laws.

11. In 1973, the Council adopted a new Recommendation,<sup>8</sup> which, in keeping with the earlier version, recognised that closer co-operation between Member countries is needed. In order to facilitate the resolution of cross-border cases, it recommends that Member countries implement on a voluntary basis a consultation procedure in cases where anti-competitive business actions in foreign jurisdictions affect the interests of a Member country. Should the consultation fail to provide a satisfactory solution, the issue could be submitted to the Committee for conciliation.

12. In 1979 a new version of the Recommendation was adopted,<sup>9</sup> repealing the previous two recommendations of 1967 and 1973. The 1979 recommendation combined the previous two, and is divided in two sections. The first deals with notification, exchange of information and co-ordination of actions when a Member country decides to take an enforcement action which is likely to affect the interests of another Member country(ies). The second part of the Recommendation deals with consultation and conciliation procedures when a Member country considers that anti-competitive actions by firms located in another member country(ies) are likely to affect its important interests.

13. The 1979 recommendation was replaced in 1986 by a new version,<sup>10</sup> which in addition to the provision of the 1979 text includes in an Annex a set of ‘Guiding Principles’, which are intended to clarify the procedures laid down in the Recommendation on notification, exchange of information, consultation and co-ordination. The Guiding Principles were then refined by the Committee in 1995,<sup>11</sup> when the Council adopted the latest recommendation on international co-operation (the “1995 Co-operation Recommendation”). In the revision there were no substantive amendments to the recommendation itself, only to the Appendix.<sup>12</sup> The 1995 Co-operation Recommendation is still in force today.

#### 2.1.2. *Other OECD Recommendations indirectly dealing with international co-operation*

14. The **1998 Recommendation on Hard Core Cartels**<sup>13</sup> marked the first time the OECD defined and condemned a particular kind of anti-competitive conduct. The Recommendation was expected to

<sup>8</sup> See Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [C(73)99(Final)]

<sup>9</sup> See Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(79)154(Final)]

<sup>10</sup> See Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(86)44(Final)]

<sup>11</sup> See Recommendation Concerning Co-operation between Member Countries on Anti-competitive Practices Affecting International Trade [C(95)130(Final)]

<sup>12</sup> For example, the text lists new circumstances in which notification would be appropriate including the *possibility of remedies that would require or prohibit conduct in the territory of another Member country*. It also includes a new section on *co-ordination of concurrent investigations and proceedings*, which specifies that such co-ordination should be undertaken on a case-by-case basis and should include notification of applicable time periods and schedules, sharing of information consistent with national laws on confidentiality, and co-ordination of negotiation and implementation of remedies. It also introduces a new description of various *means by which information may be provided by one competition agency to another, including obtaining information by compulsory means*. As in the case of concurrent investigations, it was specified that such co-operation should be undertaken on a case-by-case basis, with assistance subject to the applicable national laws of the assisting agency.

<sup>13</sup> See Recommendation concerning Effective Action against Hard Core Cartels [C(98)35/FINAL]

contribute to the efficient operation of international markets by promoting, *inter alia*, co-operation among Member and non-Member countries. The first part of the 1998 Cartel Recommendation provides that Member countries should ensure their competition laws effectively halt and deter hard core cartels. The second part of the Recommendation stresses Member countries' common interest in preventing hard core cartels and sets forth principles concerning the "when" and the "how" of co-operating with respect to hard core cartels.

15. The Recommendation invites Member countries to improve co-operation by positive comity principles, under which a country could request that another country remedy anti-competitive conduct that adversely affects both countries. It recognizes 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. It also recognizes the benefit of investigatory assistance in gathering of documents and information on behalf of a foreign authority. The Recommendation also encourages the review of obstacles to effective co-operation with respect to hard core cartels and consideration of actions, including national legislation and/or bilateral or multilateral agreements or other instruments, to eliminate or reduce them.

16. The **2005 Recommendation on Merger Review**<sup>14</sup> came out of a desire to consolidate and reflect the wide-ranging work on merger control, and also take into account important work by other international bodies in this area, in particular the International Competition Network (ICN).<sup>15</sup> The goal was to create a single document that would set forth internationally recognised best practices for the merger review process, including co-operation among competition authorities in merger review. Part B of the Recommendation deals specifically with Co-ordination and Co-operation on cross-border merger cases. In particular, it invites Member countries to co-operate and to co-ordinate their reviews of transnational mergers in order to avoid inconsistencies. Member countries are encouraged to consider actions, including national legislation as well as bilateral and multilateral agreements or other instruments, by which they can eliminate or reduce impediments to co-operation and co-ordination.

*2.1.3. Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations*

17. In 2004, the Committee started developing a set of Best Practices for the formal exchange of information in cartel investigations. The final version of the Best Practices on formal exchange of information in cartel investigations (the "2005 Best Practices") was adopted in October 2005. The 2005 Best Practices aimed to identify safeguards that Member countries should consider applying when they authorise competition authorities to exchange confidential information in cartel investigations. By identifying appropriate safeguards for information exchanges, the 2005 Best Practices assist Member countries in removing obstacles to effective co-operation by authorising the exchange of confidential information in cartel investigations.

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<sup>14</sup> See Recommendation on Merger Review, C(2005)3.

<sup>15</sup> The Recommendation addressed all steps of the merger review process, including the definition of thresholds to establish jurisdiction over international mergers, notification requirements, transparency of the merger review process, procedural fairness, the protection of confidential business information, and co-ordination and co-operation among competition authorities. It also encouraged Member countries to ensure that competition authorities have sufficient powers to conduct efficient and effective merger review and to effectively co-operate and co-ordinate with other competition authorities in the review of transnational mergers. Recommendations were made on (a) notification and review procedures, (b) co-ordination and co-operation, (c) resources and powers of competition authorities, (d) periodic review, (e) definitions.

18. The 2005 Best Practices were based on the following principles:

- 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 honoring the request would violate domestic law or would be contrary to public policy in the requested jurisdiction.
- 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.

## 2.2. *General discussions on international co-operation*

19. As it will be discussed below, the Committee carried out substantial work on international co-operation in the areas of cartels and mergers. In addition, however, the Committee has dealt with international co-operation from a more general perspective in two instances of particular importance.

20. In 1993, a paper on **Mutual Assistance Agreements**<sup>16</sup> emphasised the importance of drawing lessons from existing international agreements developed by authorities in other policy fields, notably taxation, money laundering and securities. It was noted that significant provisions had been established for information sharing and other forms of mutual assistance. Particular attention was drawn to the treatment of confidential information, the types of assistance available, the bilateral or multilateral nature of the agreement and common denominators to such agreements.

21. It was shown that confidentiality protections had not posed a barrier to the exchange of information in these fields. Under securities laws, for example, it was reported that information benefitting from confidentiality provisions could nonetheless be shared upon assurance that the receiving country will respect the confidentiality. Similarly bank secrecy did not seem to pose an insurmountable obstacle to the

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<sup>16</sup> DAF/COMP/WP3(93)3

exchange of information in money laundering investigations. At the same time, discretion was often reserved for the requested authorities to refuse to provide protected information. The types of assistance were also not limited to the simple transfer of information already in the hands of the requested authority – instead various *joint investigations* were reported to be possible.<sup>17</sup>

22. The paper also considered the respective merits of bilateral and multilateral approaches. Bilateral agreements were found to generally complement multilateral agreements or conventions, or may be inserted into multilateral conventions of wider geographic or substantive scope. The OECD Model Tax Convention was given as a pragmatic compromise which could form the basis for similar approaches in other areas of economic activity. While not a multilateral instrument, the Convention provides an agreed scheme of reference in a multilateral setting (the OECD) which is designed to inspire all the bilateral conventions concluded between OECD member countries and harmonise approaches.

23. This paper emphasised that a ‘common denominator’ should underlie all international agreements involving the exchange of information, consisting of the following considerations: (i) clear procedures for the exchange of information should be a priority task, (ii) countries should be able to refuse an information request if it does not conform with domestic law/administrative usage, (iii) rules of confidentiality of the requesting country apply to confidential information received from the other country, (iv) banking secrecy cannot be invoked as a justification for withholding information internationally if rules are lifted domestically, and (v) a request for information may be refused if it prejudices sovereignty, security, public order or other essential interests.

24. In 1999, the Committee issued a **Report on Positive Comity**,<sup>18</sup> focused on how to make international markets more efficient through ‘positive comity’ in competition law enforcement. The 1995 Co-operation Recommendation distinguished between a request that another country engaged in an enforcement action (a *positive comity request*) and a request for assistance in the requesting country’s enforcement action (a *request for investigatory assistance*). Both requests for assistance are governed by the same standard: the requested country is to give “full and sympathetic consideration” to the request. However, despite the voluntary nature of the request, in the positive comity context, concerns were raised that pressure to respond to requests for co-operation would divert resources from case investigations and make it more difficult for competition authorities to adhere to their own enforcement agendas. A distinction was also drawn with *negative comity*, which was described as the principle that a country should (i) notify other countries when its enforcement proceedings may have an effect on their important interests and (ii) give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.

25. The report explained that there is no precise standard by which requested countries should decide whether to take remedial action. Since any remedial action is voluntary and may take into account the requested country’s legitimate interests, it is clear that the requested country is free to deny the request. The phrase “full and sympathetic consideration” necessarily implies that a request should not be automatically rejected merely because of considerations that would exist in all or virtually all such requests.<sup>19</sup> The cost/benefit analysis is that of the requested country, but it should take into account the interests of the requesting country and the long-term benefits of more effective competition enforcement.

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<sup>17</sup> Examples from the tax field showed that a tax examiner from one authority may attend the examination of a taxpayer in another jurisdiction. Under securities law, regulators in one country can use their investigative powers to collect information on behalf of a foreign authority.

<sup>18</sup> DAF/COMP/WP3(99)19.

<sup>19</sup> For example, because the target firms are domestic, or because the necessary resources could provide more short-term benefit for the requested country’s economy if spent on another case.

The likely cost to the requested country of diverting enforcement resources from pursuing other illegal conduct is relevant to whether a request should be granted. This cost should be weighed against future savings in enforcement costs, other benefits from the reciprocal nature of positive comity, and the benefits of more effective competition law enforcement. When resource constraints would otherwise require declining a request, a requested country may consider the possibility of granting the request in part or may inquire whether the requesting country is willing to contribute financial or staff resources.

26. The report set out both the benefits and limits of positive comity. The benefits include improved effectiveness and efficiency, reduced need for sharing confidential and other information, avoidance of jurisdictional conflict, avoiding harm to requested country's interests and protecting other legitimate interests of the requested country. The limits of positive comity were listed as the law of the requested country, bans on sharing of investigatory information, need for experience, confidence and trust and the voluntary nature of comity.

### 2.3. *Discussions on international co-operation and mergers*

27. The Committee devoted significant resources to discussing international co-operation in cross-border merger cases during the 1990's. Several reasons seem to have influenced the decision of the Committee to invest in this area: an increasing number of countries adopted merger control rules (e.g. the European Union, Brazil, Mexico, Austria, and Italy, to name a few), the markets tended to become increasingly global, and the number of transactions which had a cross-border element increased significantly. All this raised the question, particularly in the international business community, of the costs and complexity of multi-jurisdictional merger filings and of the risks that divergent decisions might chill firms' incentives to engage in pro-competitive and efficiency-enhancing transactions.

28. At the beginning of the 1990s, the Committee decided to undertake an unprecedented study aimed at reviewing national merger procedures and to identify differences which contributed to ineffective co-operation among enforcers, and identify areas of procedural convergence and co-operation. The study was based on the review of nine cases, all of which had a cross-border dimension. The **Whish-Wood Report** was published in 1992<sup>20</sup> and informed the future work of the Committee. In particular, the report focussed its recommendations on how to improve co-operation and alignment of procedures by encouraging the use of waivers, by defining confidential information, by disseminating information on transactions which are subject to multiple filing, by harmonising notification forms and filing requirements.

29. Following the recommendations of the Whish-Wood report, in the second half of the nineties, the Committee started working on a **Model Notification Form**, with the idea that a common form would foster convergence in pre-merger notification procedures, simplification and savings for the merging parties and over time enhance the ability of enforcers to co-ordinate their reviews. The work, however, did not result in a model form, but rather in an agreed **Framework for a Notification Form**, listing categories of information that a filing form should include and explanatory notes for each of these categories.

30. As a natural follow up from the work on notification forms, in 2001 the Committee began to discuss work on **Merger Review Procedures**. The interest of the business community on this topic was very strong and BIAC presented a number of position papers to discuss with the Committee the viability of developing a set of **Best Practices in International Mergers**, which would also include best practices facilitating international co-operation between reviewing agencies. This work stream was accompanied by several Secretariat surveys (including in the context of discussions at the Global Forum on Competition) and lead to the preparatory work for a Recommendation on Merger Review. The Recommendation had to

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<sup>20</sup> DAF/CLP/WP3(93)6/PART 1

take into account the work done by the Committee and by the International Competition Network on merger review procedures, including a set of Guiding Principles for Merger Notification and Review and a set of Recommended Practices for Merger Notification Procedures. The **Recommendation on Merger Review** was adopted in 2005.<sup>21</sup>

31. Following the adoption of the Recommendation, the intensity of the work on international co-operation in mergers decreased. A number of policy roundtables, however, have indirectly addressed international co-operation aspects of merger control. Particularly noteworthy findings based on the Secretariat Executive Summaries are:

- **Roundtable on Substantive Criteria used for Merger Assessment (2002)**<sup>22</sup>: *“International co-operation among competition authorities, particularly as regards mergers affecting international markets, would be facilitated by the adoption of a common merger test.”*
- **Roundtable on Merger Remedies (2003)**<sup>23</sup>: *“Where several competition authorities consider remedies in the same transaction, co-ordination and co-operation among them is important to ensure consistency between remedial solutions. Despite differences in substantive test and procedures, such co-operation and co-ordination with respect to remedies has been successful in an increasing number of transnational mergers.”*
- **Roundtable on Standard for Merger Review (2009)**<sup>24</sup>: *“Convergence on a common substantive test may benefit international co-operation, however diverging standards are generally not perceived as hampering international co-operation.”*
- **Roundtable on Cross-border Merger Control: Challenges for Developing and Emerging Economies (2011)**<sup>25</sup>: *“For an effective review of cross-border transactions, and to ensure consistent decisions, international co-operation between the competition authorities involved is essential. There are three main types of co-operation: multilateral, regional and bilateral. While all three are relevant to DEEs [Developing and Emerging Economies], bilateral contacts are a key element for effective review of cross-border mergers [...]. Increased co-operation should be encouraged between competition authorities in the design of remedies in cross-border merger cases. Behavioural remedies should be considered as a viable option when remedies are required.”*

#### 2.4. *Discussions on international co-operation and cartels*

32. In contrast to the debate on international co-operation issues in merger cases, the debate on international co-operation in cartel cases really only started in the Committee after the adoption of the **1998 Recommendation on Hard Core Cartels**. The Recommendation included a section on International Co-operation and Comity in Enforcing Laws Prohibiting Hard Core Cartels.<sup>26</sup> There is no significant trace of

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<sup>21</sup> See also discussion above.

<sup>22</sup> DAF/COMP(2003)5

<sup>23</sup> DAF/COMP(2004)21

<sup>24</sup> DAF/COMP(2009)21

<sup>25</sup> DAF/COMP/GF(2011)13

<sup>26</sup> See also discussion above.

specific and targeted discussion before then,<sup>27</sup> other than general discussions on confidential information sharing in competition cases which do not distinguish between merger and cartel cases. This is for example the case for a 1994 paper on **Effective Co-operation in International Antitrust Enforcement: Confidential Information Sharing and other Essential Mutual Assistance**,<sup>28</sup> which develops a list of principles that could serve as an outline for instruments to encourage exchange of confidential information in the competition enforcement area. The principles were developed based on experiences of competition authorities and of enforcers in other policy areas, particularly securities and tax.

33. International co-operation however features significantly in all the three reports to the Council on the implementation of the hard core cartel recommendation.

- The **First Report** (2000) includes an entire section dealing with international co-operation, with a particular focus on information sharing. It reviews legal and practical obstacles to effective co-operation and the solutions which emerged in some countries to deal with such obstacles; the costs and benefits (for individual agencies and for the enforcement system alike) of information sharing; the record of information sharing in cartel cases; and the risks of an improper disclosure and the safeguards that can be put in place to protect disclosure of confidential information.
- The **Second Report** (2003) also included a detailed section on international co-operation, which discusses the results of two questionnaires sent by the Committee to better understand the intensity of existing co-operation, i.e. number of requests for co-operation, the costs and benefits of international co-operation, and the main impediments to such co-operation. The report also reviewed two well-known cartel cases with cross-border implications (the Vitamins and the Graphite Electrode cases) to provide insights on the costs and benefits of co-operation, as well as the substantial constraints on effective co-operation.
- The **Third Report** (2005) concludes that while cartel enforcement had reached unprecedented levels, formal co-operation among enforcement agencies still suffered from the legal constraints to exchange of confidential information. This limitation was only partially overcome by the proliferation of leniency programs and confidentiality waivers granted by leniency applicants. The report confirmed that co-operation is mostly informal, and that this form of co-operation proved effective despite its limitations.

34. The work carried out in the area of cartels mostly focused on ways in which to improve international co-operation by facilitating the sharing of information between competition authorities. In 2002, a joint roundtable discussion was held with BIAC on **Information Sharing in Cartel Cases**<sup>29</sup> to discuss the concerns of the business community relating to information sharing, and in particular to look at safeguards viewed as necessary to protect against improper disclosure or use of shared information. This led the Committee, in 2004, to start working on the development of **Best Practices for the Formal Exchange of Information in Cartel Investigations**. The final version of the Best Practices was adopted in October 2005.<sup>30</sup> Recognising that the laws of many member countries prevent competition authorities from

<sup>27</sup> The main reason for the limited attention given by the Committee to specific issues arising from international co-operation in cartel cases is probably that until then very few agencies around the world had a fully developed anti-cartel program, which made opportunities for case interaction at international level very rare. In addition, until the second half of the 1990s cartel investigations often had a domestic dimension and did not require access to evidence located abroad.

<sup>28</sup> DAF/COMP/WP3(94)1

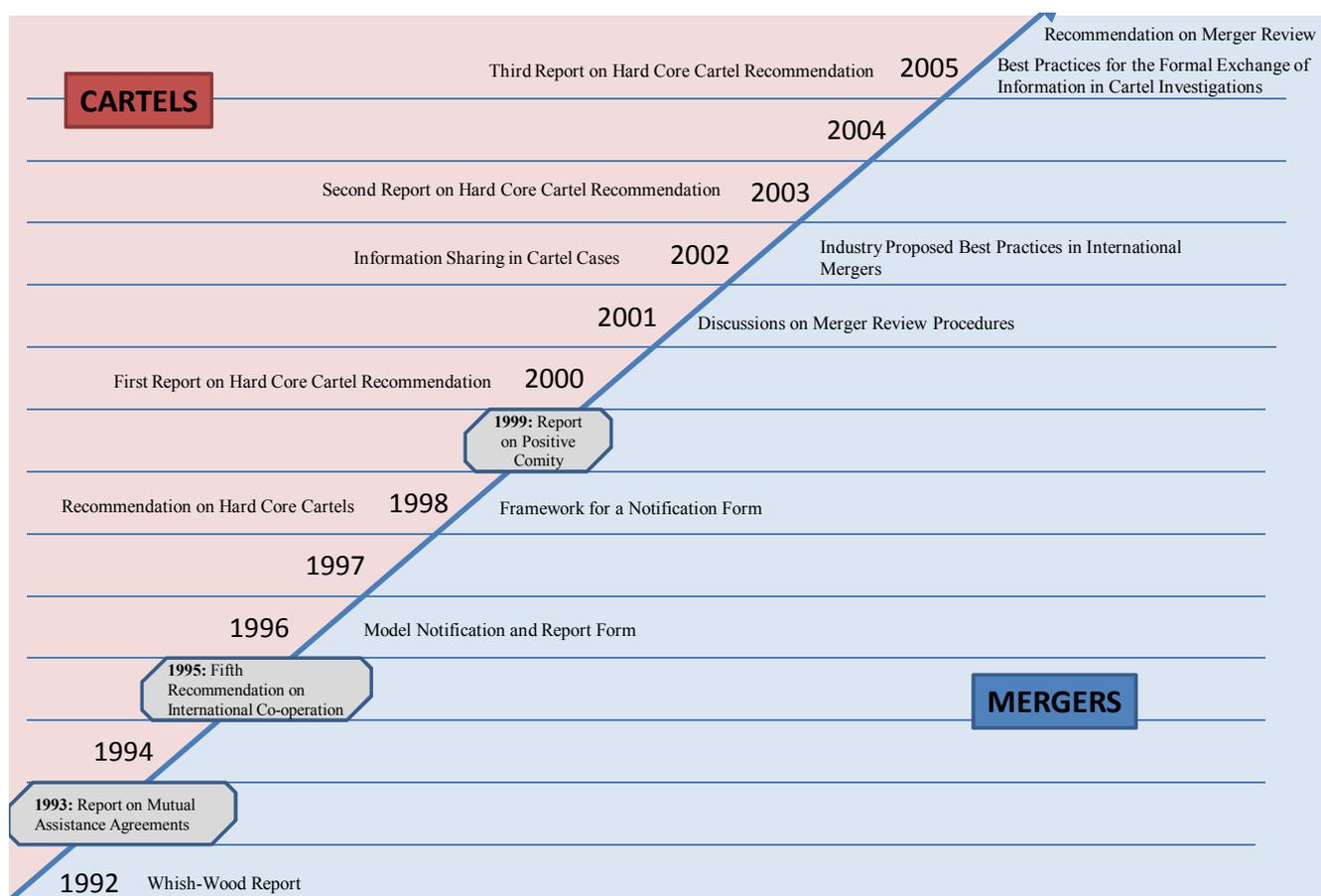
<sup>29</sup> CCNM/GF/COMP(2002)2

<sup>30</sup> See discussion above.

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. By identifying appropriate safeguards for information exchanges, the Best Practices assist Member countries to remove obstacles to effective co-operation by authorising the exchange of confidential information in cartel investigations.

35. The most recent discussion on international co-operation and cartels took place in the 2012 Global Forum on Competition, which held a roundtable on **Improving International Co-operation in Cartel Investigations**.<sup>31</sup> The GFC roundtable is the first stepping stone in the long-term strategic project on international co-operation approved by the Committee in February 2012. The discussion indicated that while informal co-operation and co-ordination is well developed, formal co-ordination still suffers from many practical and legal constraints. Experience from other enforcement and policy areas (tax and anti corruption) indicated that multilateral binding instruments did prove successful in fostering co-operation across borders, in particular to overcome national constraints to information exchanges.

**Figure 1. International Co-operation Timeline  
Key documents and Instruments: 1967 to 2005**



<sup>31</sup> Publication forthcoming [Background Paper, DAF/COMP/GF(2012)6].

YEAR	DOCUMENT
1967	First Recommendation on International Co-operation
1973	Second Recommendation on International Co-operation
1979	Third Recommendation on International Co-operation
1986	Fourth Recommendation on International Co-operation
1995	Fifth Recommendation on International Co-operation
1998	Recommendation on Hard Core Cartels
2005	Recommendation on Merger Review
2005	Best Practices for the Formal Exchange of Information in Cartel Investigations

### 3. Key points from the stocktaking: lessons and gaps in the OECD work on international co-operation

36. This section of the paper considers key points that have emerged from the stocktaking exercise to help the delegates' discussion on the scope of the international co-operation project.

37. The stocktaking exercise shows that the Committee has focussed its past work principally on *formal* co-operation between competition enforcers. It also shows that important results, in terms of improved co-operation, have been registered in the areas of mergers, mainly thanks to the increased use of waivers granted by notifying parties allowing agencies to exchange confidential information. Less encouraging results have been achieved in the area of international co-operation in cartel enforcement cases, where the legal and practical constraints to effective co-operation have not been overcome to the same extent, despite the fact that the Committee has developed instruments to foster better co-operation. The issue of legislative limits to the exchange of confidential information which exist in most jurisdictions continue to be the main obstacle to co-operation in cartel cases, and is far from being resolved. The dissemination of leniency programs and waivers has only partially solved the existing problems with the exchange of confidential information.

38. The stocktaking exercise also shows that agencies have been successful in developing effective co-operation mechanisms in clearly defined circumstances:

- i) when the number of potential parallel cases was high, the risk of inconsistent outcomes across jurisdictions significant, and the potential chilling effect on global reach of domestic companies a real threat (see the number of bilateral agreements signed by the major enforcement agencies in the 1990s and the recent trend to sign co-operation agreements with authorities in large emerging economies);
- ii) when the degree of integration of national markets was such to require a tight co-ordination between enforcers of the jurisdictions involved (see agreements between Australia and New Zealand, the Nordic Alliance, or the European Competition Network); or
- iii) when jurisdictions could rely on a common legal system, allowing enforcers to share confidential information and to assist each other in obtaining evidence of alleged anti-competitive conduct located in a foreign jurisdiction (see for example the European Competition Network).

39. A review of the body of work done by the Committee also indicates a number of possible areas of work which have not been addressed, or addressed only partially, by the Committee in the past twenty years:

- The first remark is that co-operation between enforcers has only been looked at in the context of mergers and cartels. No work has been done so far by the Committee on international co-operation issues that might affect the investigation of unilateral conduct/abuse of dominance cases. While the main reason for this appears to be the fact that unilateral conduct cases are mostly concerned with domestic dominant firms, this may have changed in recent years. An increasing number of cases and investigations concern the commercial strategies of dominant players on global markets and co-ordination and co-operation of competition authorities' actions has become more relevant. Recent Committee discussions on the digital economy have highlighted this as an issue for the international enforcement community.
- The Committee has never worked on a report to the Council on the experiences with the implementation of 1995 Recommendation on International Co-operation, or any of its previous versions. Therefore, the Committee is not in a position to know if and how the negative comity and positive comity provisions in the Recommendation have affected the quality and intensity of co-operation among agencies. At the same time, the Committee has never investigated the reasons why certain provisions in the Recommendation seem to have had little if no application. For example, there is no record of the use of the consultation and conciliation procedures in the Recommendation. Similarly, the Committee has never monitored the use and usefulness of the 2005 Best Practice for the formal exchange of information between competition authorities in hard core cartel investigations.
- The Committee on various occasions<sup>32</sup> has reviewed the benefits and costs of sharing confidential information with a foreign competition authority. The Committee, however, has not fully and systematically addressed the reasons for considering enhancing international co-operation as such. Only a partial discussion of the benefits of positive comity was included in the 1999 Report on Positive Comity. While references to the importance of international co-operation for an effective enforcement of competition rules are frequent, the Committee has not done a comprehensive review of why this is so: what are the benefits of effective international co-operation for both the enforcement and the business community; what are the key elements of an effective co-operation systems and the costs related to setting it up; and what are the costs for the business and the enforcement community of the current arrangements?
- One other issue that the Committee has not fully addressed over the last twenty years is the analysis of the comparative advantages and disadvantages of existing co-operation models. Reference to co-operation under a bilateral vs. a multilateral framework is a constant in the work of the Committee. However, the only time when the Committee compared the advantages and drawbacks of each type of co-operation from a systematic and analytical perspective dates back to 1993.<sup>33</sup> This is an area where the Committee could revise its findings based on the extensive experience gained by agencies who are involved in both bilateral and multilateral co-operation platforms.
- The Committee's work has mostly focussed on how to improve effective co-operation between OECD countries, and has only rarely attempted to identify constraints to international co-

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<sup>32</sup> See in particular the First Report on the implementation of the Recommendation on Hard Core Cartels.

<sup>33</sup> See the 1993 paper on Mutual Assistance Agreements.

operation between larger and more experienced competition agency and smaller or newer agencies. Different constraints may apply to co-operation between these agencies which might require different solutions.

- Finally, there has been very little, if any discussion in the Committee about ways to develop new means of co-operation, which would enhance the principle of international comity to include concepts such as mutual recognition of competition decisions, identification of a lead agency in competition investigations, joint case teams. Some of these innovative solutions have been put forward in the past, e.g. by the 2000 ICPAC report,<sup>34</sup> but their feasibility (and the challenges that they pose) have never been reviewed by the Committee.

40. The stocktaking has also highlighted some recurring issues/discussions in the Committee's past work on international co-operation. A number of these policy discussions are still very up-to-date, but raise the question of why in some of the areas, which were extensively discussed, agencies have achieved little progress in terms of practical solutions to the issues addressed. In order to move forward on some of these issues, the Committee will need to decide if it wants to take more substantive actions to put in place mechanisms to progress towards a new international co-operation framework.

- On many occasions, the Committee has looked at impediments, constraints or challenges to effective international co-operation. Significant work has been done in identifying these challenges, whether legal or practical. With the exception of the constraint posed by legal limitations on the exchange of confidential information (see next point), the Committee has not devoted significant resources to discuss practicable solutions to these constraints. Issues which could be addressed by the Committee in order to identify more effective solutions are: double criminalisation requirements; resource constraints which restrict agencies from engaging in extensive co-operation efforts; optimal institutional settings to facilitate co-operation; or jurisdictional restraints to co-operation (e.g. a particular conduct is exempted from competition in one jurisdiction and not in another, or is considered anti-competitive in one country but not in another<sup>35</sup>).
- The issue of the exchange of confidential information between competition authorities and the constraints this poses to international co-operation is the most recurring topic addressed by the Committee over time. The Committee has also invested in developing instruments and best practices in this area but has not monitored the extent to which these solutions have been implemented and, if they have, whether they contribute to reducing barriers to effective co-operation. It is striking to note that despite the many sessions devoted to addressing this sensitive issue over a long period of time, agencies continue to identify the inability to engage in information sharing as the one constraint that currently limits international co-operation. The Committee should consider exploring (soft and hard) legal solutions to this issue which in itself would allow international co-operation to improve significantly regardless of other possible measures that could be put in place to this end. For example, while on several occasions competition authorities have emphasised that an internationally accepted definition of "confidential information" could facilitate discussion between agencies as to what information can or cannot be exchanged under the current rules, the Committee has never embarked in such exercise.

<sup>34</sup> Available at <http://www.justice.gov/atr/icpac/index.html>.

<sup>35</sup> This could be for example the case of export cartels. The stocktaking exercise does not cover the work of the Joint Working Party on Trade and Competition, which carried out work in this area. For a recent discussion on international co-operation and export cartels, see the Background Paper on improving international co-operation in cartel investigations [DAF/COMP/GF(2012)6].

- Lessons from other policy areas, in particular experiences from tax, securities and anti-corruption agencies, have been presented to the Committee on a regular basis, starting in 1993 and continuing most recently in the 2012 GFC Roundtable on improving international co-operation in cartel cases. However, the Committee never went beyond a mere review of these experiences to discuss if and how they could be transferrable, and under which conditions, to international co-operation in competition cases. Many of the points raised above, e.g. multilateral binding instruments for the exchange of confidential information, enhanced comity provisions and joint working arrangements, have been implemented with success in other policy fields. The Committee could explore more in details how these experiences can be used to improve co-operation between competition enforcers.

#### 4. Issues for the discussion

41. The WP3 meeting of 12 June 2012 will be the opportunity for delegates to review the extensive work done by the Committee on international co-operation with the view to identifying areas of work which could be undertaken during the course of the long-term project on international co-operation. The project allows the Committee to address, in a systematic way, issues that have already arisen in the past but that require a fresh approach, or new issues.

42. Delegates should address some fundamental questions which might shape the scope of the project in a very clear way. In an increasingly integrated global economy, where the number of jurisdictions enforcing competition rules in parallel is increasing year after year, the Committee should decide whether to invest resources in developing new models for co-operation. In particular, it should address the following questions:

- Should a **multilateral framework** be developed on a global (as opposed to only regional) level to overcome the limitations with the existing network of bilateral co-operation agreements?
- Where soft instruments seem to have failed, should **hard international law** be developed to address the existing limits at national level to disclosure of confidential information to foreign agencies?
- Should the international enforcement community develop new principles of **enhanced comity** to allow new co-operation mechanisms to be put in place?

43. In addressing these fundamental questions, and without committing to any particular outcome for the Committee's long-term project on international co-operation, delegates may also want to consider whether to engage in delivering the following intermediary outputs:

- The preparation of a report to the Council on the 1995 Recommendation and of a review of experiences with the 2005 Best Practices for information sharing, in order to establish how both instruments have been used and whether there are areas that should be expanded or amended;
- A discussion on international co-operation issues in unilateral conduct/abuse of dominance cases, to assess similarities and differences with other enforcement areas, and to establish if specific measures should be developed;
- A discussion on the value of international co-operation as tool promoting efficiency in enforcement; particular emphasis could be placed on (i) the reasons why international co-operation is a necessary condition for effective cross-border enforcement, not just from the perspective of individual agencies but from the perspective of the international enforcement

system as a whole and of the business community; (ii) the loss in terms of efficacy of the enforcement action due to ineffective or non-existent co-operation (e.g. enforcement gaps, reduced credibility of the enforcement actions and overall loss of deterrent effect); and (iii) the gains for the international enforcement community from effective co-operation (e.g. consistent decisions, higher deterrence, reduced follow-on litigation, lower enforcement costs).

- A discussion on the current constraints to international co-operation; looking beyond the legislative limitations on information exchange, this discussion should identify possible solutions to other constraints to international co-operation ;<sup>36</sup>
- A comparative review of the structure, content, and scope of current bilateral and multilateral co-operation frameworks; the discussion should focus on their respective pluses and minuses, and it should aim at identifying the more suitable or effective model for particular types of cases, or particular jurisdictions;
- A discussion on methods of enhanced comity (e.g. joint investigations, lead agency, work sharing arrangements, etc.) and their feasibility in merger, cartel and unilateral conduct cases; the discussion should focus on the practical and legal constraints agencies would be facing in implementing these arrangements, and the solutions that should be pursued at international level;
- A discussion on how tools and techniques used in other policy areas for effective co-operation can be used in the competition context.

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Such a discussion is currently planned for the October 2012 meeting of WP3.

## ANNEX 1

**TABLE OF DOCUMENTS COVERED BY THE STOCKTAKING EXERCISE  
(IN CHRONOLOGICAL ORDER)**

<b>Date</b>	<b>Document</b>	<b>Cote no.</b>	<b>Subject</b>
1967	Recommendation	C(67)53(Final)	Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade
1973	Recommendation	C(73)99(Final)	Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade
1979	Recommendation	C(79)154(Final)	Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade
1986	Recommendation	C(86)44(Final)	Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade
1991	Secretariat Note	DAFFE/CLP(91)1	Towards an International Framework for Competition Policy
1991	Secretariat Note	DAFFE/CLP(91)9	Towards Greater Convergence in Competition Policy
1991	Secretariat Note	DAFFE/CLP(91)6	Practical Application of the 1986 OECD Council Recommendation
1991	Secretariat Note	DAFFE/CLP/WP3(91)9 DAFFE/CLP/WP3(92)2	Practical Application of the 1986 OECD Council Recommendation – Discussion Issues
1992	Secretariat Note	DAFFE/CLP/WP3(92)5	Merger Control Procedures in OECD Countries and the EEC
1992	Secretariat Note	DAFFE/CLP/WP3(92)8	Process Convergence in Merger Enforcement – List of Discussion Issues
1992	Secretariat Note	DAFFE/CLP/WP3(91)5/RE V1	Co-operation between Member Countries under the 1986 Council Recommendation
1993	Report	DAFFE/CLP/WP3(93)6/PART1	Merger Process Convergence Project (Whish and Wood)
1993	Secretariat Note	DAFFE/CLP(93)4	Convergence Steering Group: Proposed Work Program
1993	Secretariat Note	DAFFE/CLP/WP3(93)3	Mutual Assistance Agreements
1993	Secretariat Note	DAFFE/CLP/CSG(93)6	Steering Group on Convergence – Enforcement Issues

Date	Document	Cote no.	Subject
1993	Secretariat note	DAFFE/CLP(93)4	Convergence Steering Group: proposed work program
1994	Issues Paper	DAFFE/CLP/WP3(94)1	Effective Co-operation in International Antitrust Enforcement: Confidential Information Sharing and other Essential Mutual Assistance
1994	Secretariat Note	DAFFE/CLP/WP3(94)2	The Sharing of Confidential Information in International Antitrust Enforcement
1994	Secretariat Note	DAFFE/CLP/WP3(94)4	Analysis of Responses to Questionnaire on Co-operation and Information Sharing
1995	Secretary General Note	C(95)130	Revised Recommendation of the Council concerning Co-operation between Member Countries on Anti-competitive Practices Affecting International Trade
1995	Summary Record approving Recommendation	CE/M(95)4/PROV	Revised Recommendation on Co-operation between Member Countries on Anti-competitive Practices Affecting International Trade
1995	Draft Recommendation	DAFFE/CLP/WP3(94)5/RE V1 DAFFE/CLP/WP3(94)5/RE V2	Co-operation between Member Countries
1995	Secretariat Note	DAFFE/CLP/WP3(95)3	Discussion of Draft Revised Recommendation of the Council on Co-operation between Member Countries
1995	Secretariat Note	DAFFE/CLP/WP3(95)5	Common Elements in Pre-Merger Notification and Information Gathering
1995	Summary Record	DAFFE/CLP/WP3/M(95)2	65 <sup>th</sup> Meeting of WP3
1995	Secretariat Note	DAFFE/CLP/WP3(94)4/RE V1	Revised Analysis of Responses to Questionnaire on Co-operation and Information Sharing and Recommendation
1997	Secretariat Note	DAFFE/CLP/WP3(97)2	Common Elements in Pre-Merger Notification Systems
1997	Secretariat Note	DAFFE/CLP/WP3(97)3	Discussion of Draft Model Notification and Report Form for Concentrations
1997	Secretariat Note	DAFFE/CLP/WP3(97)3/RE V1	Discussion of Comments on the First Draft of the Model Notification and Report Form for Concentrations and Description of the Second Draft
1997	Summary Record	DAFFE/CLP/WP3/M(97)2	69 <sup>th</sup> Meeting of WP3
1998	Recommendation	C(98)35/FINAL	Concerning Effective Action Against Hard Core Cartels
1998	Secretariat Note	DAFFE/CLP/WP3(98)4	Report on Notification of Transnational Mergers

<b>Date</b>	<b>Document</b>	<b>Cote no.</b>	<b>Subject</b>
1999	Secretariat Note	DAFFE/CLP/WP3(99)11	Plans for Report to Council Concerning Hard Core Cartels
1999	Report	DAFFE/CLP(99)19	Positive Comity
2000	Report	N/A	Hard Core Cartels
2000	Roundtable	DAFFE/CLP(2000)33	Competition Issues in Joint Ventures
2001	Draft Questionnaire	DAFFE/CLP/WP3(2001)16	International Co-operation in Cartel Investigations
2001	Issues Paper	DAFFE/CLP/WP3(2001)5	International Co-operation in Transnational Mergers
2001	Issues Paper	DAFFE/CLP/WP3(2001)10	Proposals for Work on Harmonisation of Merger Review Procedures
2001	Aide Memoire	DAFFE/CLP/WP3/M(2001)2/ANN2	International Co-operation in Investigations of Transnational Mergers
2001	Secretariat Note	CCNM/GF/COMP(2001)1	Merger Enforcement and International Co-operation
2001	Roundtable	CCNM/GF/COMP/WD(2001)1	Merger Enforcement and International Co-operation
2001	BIAC Note	DAFFE/CLP/WP3(2001)12	Harmonisation of Merger Control Procedures
2001	Roundtable	CCNM/GF/COMP(2001)1	Merger Enforcement and International Co-operation
2002	Report	N/A	Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes
2002	Discussion Draft	DAFFE/COMP/WP3(2002)1	Best Practices for the Review of International Mergers
2002	Secretariat Note & Questionnaire	DAFFE/COMP/WP3(2002)3	Harmonisation of Merger Control Procedures
2002	Summary of Questionnaire Responses	DAFFE/COMP/WP3(2002)7	Harmonisation of Merger Control Procedures
2002	Secretariat Note	DAFFE/COMP/WP3(2002)8/REV1	Discussion of Three Merger Notification Issues
2002	Secretariat Note	DAFFE/COMP/WP3(2002)13	Summary of responses to questions 16-20 of the questionnaire on Harmonisation of Merger Control Procedures
2002	Secretariat Note & Questionnaire	DAFFE/COMP/WP3(2002)3/REV1	Summary of Discussion with BIAC on Merger Control Procedures

<b>Date</b>	<b>Document</b>	<b>Cote no.</b>	<b>Subject</b>
2002	Secretariat Note	CCNM/GF/COMP(2002)6	International Co-operation in Mergers: Summary of responses to questionnaire and suggested Issues for Discussion
2002	Roundtable	CCNM/GF/COMP(2002)1 CCNM/GF/COMP(2002)2	Information Sharing in Cartel Cases
2003	Report (2nd)	DAFFE/COMP(2003)2	Effective Action Against Hardcore Cartels
2003	Secretariat Scoping Paper	DAFFE/COMP/WP3(2003)6	Possible revisions to the Cartel Recommendation
2003	Secretariat Note	DAFFE/COMP/WP3(2003)1/REV1	Future work on Hard Core Cartels and Merger Control Procedures and a Notional Schedule
2003	Report	N/A	Fighting Hard Core Cartels: Recent Progress and Challenges Ahead
2003	Secretariat Scoping Paper	DAFFE/COMP/WP3(2003)7	Proposed Council Recommendation on Mergers
2003	Secretariat Note	DAFFE/COMP/WP3(2002)14	Analysis and discussion of selected responses to the questionnaire on harmonisation of merger control procedures
2003	Roundtable	DAFFE/COMP(2003)5	Substantive Criteria used for Merger Assessment
2003	Roundtable	DAF/COMP(2004)21	Merger Remedies
2003	Issues Paper	DAFFE/COMP/WP3(2003)4	Developing Co-operative Relationships
2003	Roundtable	CCNM/GF/COMP(2003)5	Competition Policy and Small Economies
2003	Secretariat Note & Questionnaire	DAFFE/COMP/WP3(2003)3	Information Exchanges in International Co-operation in Merger Investigations
2004	Discussion Paper	DAFFE/COMP/WP3(2004)4	Recommended Practices for Formal Information Exchanges in International Cartel Investigations
2004	Secretariat Note	COM/DAFFE/DSTI/CP(2004)46	Cross-Border Enforcement Co-operation
2004	Summary	DAF/COMP/WP3(2004)7 DAF/COMP/WP3(2004)9	1995 Co-operation Recommendation – Stocktaking of Member Country Experiences
2004	Report	N/A	Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity
2005	Best Practices	DAFFE/COMP(2005)25/FINAL	Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations
2005	Report	N/A	Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation

<b>Date</b>	<b>Document</b>	<b>Cote no.</b>	<b>Subject</b>
2005	Recommendation	C(2005)34	Merger Review
2005	Issues Paper	DAF/COMP/WP3(2005)1	Cross-Border Remedies in Merger Cases
2007	US submission	DAF/COMP/WP3/WD(2007)42	Inventory on Effective Co-operation Practices
2008	Roundtable	DAF/COMP/GF(2008)10	The Interface between Competition and Consumer Policies
2009	Roundtable	DAF/COMP(2009)21	Standard for Merger Review
2010	Roundtable	DAF/COMP(2010)32	Exit Strategies
2011	Roundtable	TBC	Cross-border Merger Control: Challenges for Developing and Emerging Economies
2011	Key Findings	N/A	Competition Issues in the Financial Sector
2011	Key Findings	N/A	Competition and Procurement
2012	Roundtable	TBC	Improving International Co-operation in Cartel Investigations

## ANNEX 2

### SUMMARY OF DOCUMENTS ON INTERNATIONAL CO-OPERATION AND MERGERS

1. During the 1990s a substantial amount of work in the area of mergers was carried out by the Committee, most notably with the publication of the 1992 **Whish-Wood Report**.<sup>1</sup> The study was to take a more empirical approach, to discover what the companies involved in these mergers were actually experiencing, and to see how effectively the co-operation process was working. Three principal goals for the study were identified as: (i) to review procedures employed by the Member countries with respect to the pre-merger review and regulatory approval of mergers and other concentrations; (ii) to identify areas of procedural difference that impede co-operation among Member countries and add unnecessary regulatory costs to firms or enforcement agencies in the merger process; and (iii) to identify potential areas of procedural convergence and co-operation consistent with regulatory goals of individual Member countries.

2. Each of these goals was to be pursued through the study of particular cases in which two or more different authorities reviewed a single transaction. WP3 identified nine cases for study, and engaged consultants for the purpose of developing a detailed account of the enforcement process in each case, both from the point of view of the parties and their attorneys, and from the point of view of the participating agencies. With the help of the concrete accounts of the nine cases, the consultants were able to draw conclusions and make recommendations about the course of future process convergence and co-ordination among competition authorities. The recommendations were as follows:

- i) Increased general co-operation plus a protocol specifying the permissible types of co-operation for particular cases, which would indicate in more detail how the 1986 OECD recommendation should be implemented;
- ii) Establishment of a waiver system;
- iii) A commitment on the part of each member state to draw up confidentiality guidelines under its own law, both for the use of internal agency staff and for dissemination to the public;
- iv) Require the parties to notify the fact of notifications to other agencies;
- v) More efficient dissemination of information in the public domain;
- vi) Create one or two model filing forms, which request common information in a single format, and which use different country annexes as appropriate;
- vii) Harmonize the time periods within which decisions must be made, which would also permit greater harmonization of the filing forms themselves.

3. Following Recommendation 6, in 1996 WP3 considered the possibility of creating a **Model Notification and Report Form**, containing provisions that were common to the forms used by Member

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<sup>1</sup> DAF/COMP/WP3(93)6/PART 1

Countries.<sup>2</sup> Two alternative suggestions were put forward: drafting of two model notification forms (one for the initial notification and another for a request for additional information) or if the drafting of model forms was considered too ambitious, developing a common format for information required for pre-merger notification. A model protocol could also include provisions for the protection of confidential information pursuant to a waiver.

4. It was recognised that such a form could not completely supplant existing forms in most countries, and that even if it were immediately practical to do so, such a step would require amending national laws or regulations in most cases. On the other hand, such a model could foster convergence of premerger notification procedures among countries over time, and further, in appropriate circumstances national competition agencies could voluntarily permit the use of the form, or parts of it. As noted in the Whish-Wood Report, standardisation of reporting requirements could ease the burdens of parties to mergers that are reportable in more than one country, and could also enhance the ability of competition agencies to co-operate in their investigations of such transactions.

5. Following comments provided by delegates on the Model Notification and Report Form, a second draft was prepared by the Secretariat for discussion in September 1997.<sup>3</sup> The discussions showed the difficulties associated with drafting a notification form that might be employed in several different countries, each currently having different laws and regulations governing notifications of concentrations. However, given that harmonising premerger notification procedures was generally considered by both the enforcement community and the private sector to be a desirable goal, WP3 felt it could be useful to create a form providing a common format for submitting information that was required by most, if not all Member countries. Such a form would have at least two benefits: (1) in the longer run, countries could formally incorporate into their forms some or all of the provisions of the model form and (2) in the shorter run, to the extent competition agencies have discretion to modify information requirements in specific cases, they could employ some or all of the specifications on a case-by-case basis as appropriate. Although the challenges presented by the project were significant, the promulgation of a model form was seen as a positive first step in dealing with the substantive and procedural issues presented by large multinational mergers.

6. However, in May 1998, WP3 reported that the study of existing forms and national laws that underlie them had highlighted that harmonisation was a difficult process and involved more than simply promulgating a 'model form' that could be adopted by individual countries.<sup>4</sup> The result was a **Framework for a Notification Form** (rather than a 'model form'), containing accompanying text explaining the rationale for each of the categories of specifications. The categories were: (a) identify the parties to the transaction, (b) describe the transaction that is the subject of the notification, (c) describe the operations of the parties in the notified country, (d) identify and describe markets in which the transaction could have horizontal or vertical effects, (e) submit listed documents and (c) confidentiality waiver.

7. In May 2001, a roundtable discussion on **International Co-operation in Transnational Mergers** was held.<sup>5</sup> The Secretariat summarised the work done so far in the area of merger control and set out proposals for work on harmonisation of merger review procedures.<sup>6</sup> As the Framework for a Notification Form was an attempt to synthesise the different types of national forms into a single

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<sup>2</sup> DAF/COMP/WP3(97)2

<sup>3</sup> DAF/COMP/WP3(97)3/REV1

<sup>4</sup> DAF/COMP/WP3(98)4

<sup>5</sup> DAF/COMP/WP3(2001)5

<sup>6</sup> DAF/COMP/WP3(2001)10

document, concerns were raised that the final document was too equivocal, compromising its usefulness. It was not clear the extent to which the Framework had been influential (although it had been employed extensively by authorities in Brazil in their development of a new merger form.) It was suggested that WP3 could develop a protocol for co-operation among national competition agencies that could be invoked jointly by merging parties and relevant competition agencies, an idea originally proposed in the Whish-Wood Report. This protocol could provide for waivers of restrictions on disclosure of confidential information under appropriate circumstances and for protection of confidential information by participating competition agencies. It could also set forth procedures for co-ordinating time frames and remedies among participating countries.

8. In August 2001 a roundtable on **International Co-operation in Investigations of Transnational Mergers** was held in the Global Forum on Competition.<sup>7</sup> Several key themes were developed in the discussion including (i) the importance of timing, and the fact competition agencies should begin their discussions as early as possible, (ii) while the exchange of confidential information is important, there can be meaningful co-operation without it and (iii) while the structure of co-operation (bilateral and multilateral agreements) can be useful, far more important is the development of a productive working relationship between competition agencies.

9. In February 2002 a discussion was held on the harmonisation of merger control procedures and the viability of implementing **Best Practices in International Mergers**, with two papers presented by the business community.<sup>8</sup> The provisions of the BIAC Framework and the ABA Best Practices document were organised into three categories, all of which provided opportunities for further work:

1. *Notification rules and review procedures, including:* transactions covered, jurisdictional thresholds, timing (pre-merger/post-merger), triggering event and notification deadlines, notification forms, review periods, and filing fees;
2. *Procedural safeguards, including:* non-discrimination, agency authority, transparency and “due process”;
3. *Procedures facilitating international co-operation, including:* co-ordinating timing of national reviews and various aspects of phase II reviews, protections for confidential information exchanged by competition agencies, and waivers of confidentiality rights by the merging parties.

10. In the February 2002 GFC the results of an earlier questionnaire on international co-operation in merger and cartel investigations were discussed.<sup>9</sup> The questionnaire responses from observers and invitees illustrated that jurisdictions world-wide were at different places in their development of competition policy. Some did not yet have a competition law in place; in others a competition law had only recently been enacted. Some jurisdictions were heavily involved in merger control while others, especially those in which the competition law was new, did little or none of it. The responses showed that virtually all observer and invitee jurisdictions active in competition policy had entered into co-operation agreements with one or more other jurisdictions. Within this set of jurisdictions the number of such agreements was comparable to that existing among Member jurisdictions. Like Member jurisdictions, observers and invitees tended to enter into agreements with jurisdictions geographically close and/or that were close

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<sup>7</sup> CCNM/GF/COMP/WD(2001)1

<sup>8</sup> DAF/CLP/WP3(2001)12 (Recommended Framework for Best Practices in International Merger Control Procedures - BIAC) and DAF/COMP/WP3(2002)1 (Best Practices for the Review of International Mergers – ABA)

<sup>9</sup> CCNM/GF/COMP(2002)6

trading partners. However, there were few instances reported of respondents engaging in international co-operation in merger investigations. Only five countries, reported that they had engaged in any communications with another competition agency about a merger, and none identified more than two such transactions.

11. The questionnaire responses did not clarify whether the invitee jurisdictions would have liked to have engaged in more co-operation. In some cases co-operation was not considered necessary or desirable. In others, however, observers and invitees might have welcomed it, had it been possible. It was concluded that it would be useful to discuss the extent to which jurisdictions – Members, observers and invitees – could benefit from enhanced co-operation with one another in merger investigations, and the means for bringing that co-operation about.

12. Following the GFC, the Secretariat issued a questionnaire to delegations on ‘**Merger Notification Rules and Procedures facilitating International Co-operation in Merger Control**’.<sup>10</sup> It was noted that the ICN was also intending to carry out work in this area, through its subgroup on Notification Procedures of the Mergers Working Group, and efforts would be made to co-ordinate on the projects to avoid duplication and conflict. Part of the questionnaire focused on international co-operation in merger investigations, and specifically: (i) the extent to which information could be exchanged absent a waiver, (ii) the extent to which waivers had been used, (iii) whether laws permitted the competition agency to respond to information requests from foreign authorities, (iv) whether merger notification required identification of other jurisdictions to which the merger is notified, (v) details on mergers in which international co-operation took place and the type of co-operation. A summary of responses to the questionnaire was issued in October 2002.<sup>11</sup>

13. During the October 2002 meetings, and following the discussions between WP3 and BIAC on merger notification rules and procedures, **Three Merger Notification Issues** were identified as the most important and timely for the business community:<sup>12</sup>

- *the use of a subjective standard*, notably minimum market shares, as a notification threshold, compared to more objective standards such as minimum size of the parties or the transaction;
- *defining those transactions involving one or more foreign parties that must be notified*, specifically the extent to which such transactions and /or foreign parties must have a minimum nexus or presence in the country to be notified;
- *the timing of notifications*; specifically whether the parties have flexibility in determining when to notify, or whether they are subject to deadlines for notification.

14. In 2003, WP3 set out a **Notional Schedule** for future work on both hardcore cartels and merger control procedures.<sup>13</sup> Reference was also made to the work done by the ICN on merger review procedures, including a set of Guiding Principles for Merger Notification and Review and a set of Recommended Practices for Merger Notification Procedures. WP3 considered two issues; (i) the final form that the work on mergers could take and (ii) how the work could take into account the important output of the ICN in this area. It was suggested that a Council Recommendation could be put forward, including the findings of the ICN.

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<sup>10</sup> DAF/COMP/WP3(2002)3

<sup>11</sup> DAF/COMP/WP3(2002)13

<sup>12</sup> DAF/COMP/WP3(2002)8/REV1

<sup>13</sup> DAF/COMP/WP3(2003)1/REV1

15. In 2003 the Secretariat issued a scoping paper for a proposed **Council Recommendation on Mergers**.<sup>14</sup> The paper sets out the previous work in relation to mergers, work related to merger notification and procedures outside the OECD (IPAC and ICN) and how those work products can be differentiated, and an outline of a Merger Recommendation. The suggested sections to address included: (i) notification, review periods and review process, (ii) due process and procedural rights of parties. The Recommendation on Merger Review was approved by the Council in 2005.

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<sup>14</sup> DAFFE/COMP/WP3(2003)7

### ANNEX 3

#### SUMMARY OF DOCUMENTS ON INTERNATIONAL CO-OPERATION AND CARTELS

1. In 1998 the Council approved a Recommendation concerning **Effective Action Against Hard Core Cartels** (the “1998 Cartel Recommendation”). One of the principal recommendations of the 1998 Cartel Recommendation was that countries “co-operate with each other in enforcing their laws against hard core cartels.” International cartels are difficult for national competition agencies to prosecute. Their Members may come from several different countries and relevant evidence may be scattered across these countries, beyond the jurisdictional reach of any single competition agency. Successful prosecution of these cartels may therefore depend upon the ability of national competition agencies to co-operate in their investigative efforts. However, meaningful co-operation in these cases has proved difficult to achieve.

2. Following the 1998 Cartel Recommendation, the Committee issued **Draft Plans for a Report to the Council Concerning Hard Core Cartels** (the “Draft Report”).<sup>1</sup> Overall it was concluded that competition authorities had had more success in implementing the Cartel Recommendation’s call with respect to their individual enforcement programs than its call for co-operation. There had not been much actual co-operation among Members’ competition authorities or consideration of how to remove the obstacles to such co-operation. Most competition authorities neither requested nor received any requests for co-operation in hard core cartel cases in the period assessed (April 1998 through April 1999.) Legal and practical impediments to obtaining truly useful information were a major reason for failing to make requests. Other reasons included no investigations of hardcore cartels, or no investigations that had any international dimensions, or no need for supplemental information.

3. The Draft Report concluded that legal restrictions on sharing information with, and gathering information on behalf of, foreign competition authorities were identified as the major obstacles to effective co-operation. This included the exchange of non-confidential investigatory information, even when proper safeguards existed, and when the exchange would benefit both countries. Another concern highlighted in the Report related to resources, as clearly no competition authority could accept so many requests for assistance that it was unable to fulfil its law enforcement and other legally established responsibilities. However, at the same time the 1998 Cartel Recommendation specifically provides that a request for assistance may be denied on any grounds including the competition authority’s resource constraints. Therefore, while resource constraints would impose limits on the ability of competition authorities to grant assistance requests - particularly those that would be time consuming - resource constraints were not in and of themselves an impediment to the initiation of co-operation programs that include information sharing and information gathering.

4. In 2000 the Committee issued its **First Report on Implementing the Hard Core Cartel Recommendation and Improving Co-operation (the “First Report”)**.<sup>2</sup> The First Report’s principal policy conclusion was that further action to enhance the effectiveness of anti-cartel enforcement and improve co-operation was vitally important to Members’ economies and to the global economy. The first Report noted that the Joint Group on Trade and Competition had also emphasised the importance of this

<sup>1</sup> DAF/COMP/WP3(99)11

<sup>2</sup> <http://www.oecd.org/dataoecd/39/63/2752129.pdf>

anti-cartel work, pointing to convergence resulting from past work, stressing cartels' pernicious effects on trade and competition, and calling for increased competition policy outreach to non-member countries. Members' competition authorities were reported to be interested in searching for means of combating hard core cartels that take into account the differences in their legal regimes and policies, and experience in both anti-cartel activity and international co-operation. No revision to the 1998 Cartel Recommendation or new OECD instrument was deemed appropriate. Instead the First Report suggested the OECD should assist its Member countries' competition authorities to find solutions suitable to their circumstances and on options that work towards a common goal, but take into account individual differences. The five key topics set out in the First Report were: (a) the extent of overcharges and other harm done by hard core cartels; (b) the real world impact of restrictions on co-operation against hard core cartels; (c) optimal co-operation in hard core cartel cases; (d) optimal investigatory tools for hard core cartel cases; (e) optimal sanctions in hard core cartel cases.

5. The first Report contained an entire section on international co-operation and the current obstacles faced by competition authorities in co-operating, in particular through sharing information. Most competition authorities had neither made nor received any requests for co-operation in hardcore cartel cases in the period covered by the first Report (April 1998 to April 1999). In addition to legal and practical impediments to obtaining useful information, the general lack of hard core cartels with an international dimension also explained the scarcity of co-operation requests. Competition authorities were therefore not certain information sharing and co-operation would benefit them specifically. The major obstacle to effective co-operation was identified as legal restrictions on sharing information.

6. However, while resource constraints would obviously impose limits on the ability of competition authorities to grant assistance requests, it was emphasised that they were not in and of themselves barriers to initiating information sharing programs. The benefits of exchanging confidential information were explicitly recognised, and it was emphasised that there is no reason why confidential information could not be both protected and shared. In securities, tax, customs and criminal areas it is common for enforcement authorities to use compulsory process on behalf of foreign authorities and to share highly confidential information. Provided adequate assurances are in place (using for example the various safeguards adopted in other policy areas) confidentiality considerations should not be an absolute bar to providing information. However, at the time of the First Report no competition authorities were authorised to use compulsory process on behalf of foreign authorities except in criminal cases. The laws of almost all Members prohibited the sharing of all information described in the 1995 Co-operation Recommendation, except for information in the public domain.

7. One of the arguments put forward for the lack of information sharing was that confidential information in competition matters is 'more confidential' than in other areas, as it is prospective and relates to firms' plans for the future. However, the First Report found this argument flawed, with no logical basis for the assertion that information in competition cases is more confidential than other fields. In addition businesses are often willing to voluntarily provide waivers of confidentiality in mergers as they have an economic incentive to expedite proceedings (unlike in cartel investigations). The First Report suggests that instead of discussing information sharing in polarised terms, i.e. should there or should there not be exchanges of information, a graduated approach should be adopted, considering the degrees of information sharing and confidentiality. Four possible models were set out:

- i) **comparable downstream protection:** requesting a foreign agency provides comparable protections to any shared information, with case-by-case finding that adequate protections exist for the particular information being sought (business preferred approach);

- ii) **violation based co-operation:** sharing of confidential information is only authorised in hard core cartel cases, with a ‘downstream’ test for adequacy of protection (similar to an MLAT but for non-criminal cases);
- iii) **confidentiality based co-operation:** authorisation of all exchanges except whatever standard of confidentiality it considers appropriate. Confidentiality risks and protections would be minimal;
- iv) **common standards co-operation:** agreement to share information only in cases that met commonly defined standards, or to only share information which meets a common definition of ‘sharable information’.

8. In 2003 the Committee issued its **Second Report on Effective Action against Hard Core Cartels (the “Second Report”)**.<sup>3</sup> The Second Report summarised the findings of two surveys issued on international co-operation in cartel investigations and cases, one in 1999 and a second in 2001. In the first questionnaire countries were asked for information about instances in which they had either requested or responded to requests for information from a foreign competition agency in connection with a cartel investigation. They were also asked for their views on the costs and benefits of international co-operation, and on impediments to such co-operation. In the second, questionnaires were issued both to Member countries and to non-member invitees to the GFC, seeking information on exchanges of information between competition agencies in hardcore cartel cases, other instances of co-operation in such cases, information about investigations or cases that were foregone because of the unavailability of foreign located information, and updates on co-operation agreements and changes in national laws that affect the ability to co-operate.<sup>4</sup>

9. The responses to the first questionnaire disclosed that there had been relatively little co-operation among national competition agencies in cartel investigations and cases prior to 1999. Most of the responding countries had neither made nor received any requests for co-operation in the period covered by the questionnaire. One important reason for there being so few instances of co-operation was that many cartel cases prosecuted during the relevant period did not have an international dimension, that is, they occurred in and affected solely one jurisdiction. In other instances, countries had not prosecuted any cartel cases in the period. Where co-operation would have been useful it was significantly constrained by the inability of countries to disclose confidential information to foreign agencies.

10. The responses to the second questionnaire described a different situation. There had been more international co-operation in the intervening period. It was especially strong between certain countries or groups of countries that had developed close working relationships. Thus, the most active co-operative relationships in cartel investigations were between the European Commission and EU Member states, the United States and Canada, the European Commission and the United States and Australia and New Zealand. Other countries had also engaged in co-operation in one or more cases, including Brazil, Denmark, Estonia, Israel, Italy, Korea, the Netherlands, Spain and the Russian Federation. The survey also disclosed that the number of international co-operation agreements was growing significantly.

11. International co-operation can be classified into two types: formal and informal. In the former, the competition agency of one country makes a formal request of another, usually in writing, for information that the requested country has about a particular case or for assistance in gathering evidence that may exist in the requested country. In the latter, there are informal communications between competition agencies that are case-specific but do not involve the specific exchange of evidence that has been generated by an investigation. The agencies may discuss such matters as investigative strategies,

<sup>3</sup> DAF/COMP(2003)2 and CCNM/GF/COMP/TR(2003)7

<sup>4</sup> DAF/COMP/WP3(2001)16

market information and witness evaluations. The second survey revealed that instances of formal co-operation were relatively infrequent, although a few jurisdictions, notably the U.S. and the European Commission, had made several formal requests in the 1999-2001 period. The information requested included documents, including those seized in a search or dawn raid, assistance in obtaining testimony or information from a witness, information in the files of the requested competition authority, and deliberative process information – evaluation of a case or a market. The questionnaire asked for competition authorities' assessment of the usefulness of the information exchanged. In almost all cases the information received was considered “highly” or “very” useful for the recipient.

12. A particularly interesting result of the second survey was the disclosure of the use of informal co-operation in these cases. This type of co-operation was more common than the formal variety, as it is easier to conduct and does not confront the legal constraints on the exchange of confidential information that exist in every country. Subject to statutory limitations regarding the exchange of information, such informal communications can facilitate discussions about the theory of a particular case; a description of parties; the nature of the evidence; the role played by the parties and potential witnesses. The information or assistance obtained in these instances can streamline the investigative strategy and focus an investigation. Informal co-operation was therefore reported to have contributed to advancing some cases considerably. It was, however, noted that in some cases and especially as a case advances into formal stages, co-operation can be made difficult due to the existence of legislation which prevents disclosure of privileged or confidential information to others.

13. Competition authorities were asked to describe instances in which a cartel investigation would have benefited from international co-operation but it was not attempted because the authority knew that it would not be granted, and to assess the significance to the investigation of the absence of the co-operation. Several countries responded that some of their investigations were significantly constrained because of their inability to obtain information from abroad, especially at the beginning of an investigation. Reference was also made to the expediency of simultaneous dawn raids and the need for mutual assistance agreements.

14. Following the Second Report, WP3 proceeded with a third phase in its work on anti-cartel enforcement. A number of topics to be pursued further were discussed including:<sup>5</sup>

- enhancing international co-operation, by 1) agreeing on best practices in protecting confidential information that is shared among national competition agencies; 2) exploring ways to expand co-operative relationships between jurisdictions; and 3) exploring means of co-ordinating leniency programmes, to encourage the maximum number of applications in situations involving international cartels;
- expanding on the work that the Working Party has done to date on building public understanding of the harm from cartels and on strengthening sanctions against the conduct, by 1) holding discussions on means of quantifying harm and raising public awareness of it; 2) holding discussions on enhancing sanctions, including discussions on fines against individuals, criminalisation of cartel conduct where appropriate, and expanding rights of injured parties to recover money damages from cartel operators; and 3) issuing a follow-up questionnaire to delegations in order to monitor progress in these areas.
- continuing its study of investigation tools, with emphasis on elaborating best practices in administration of leniency programmes and on enhancing means of lawfully obtaining oral testimony from cartel participants.

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<sup>5</sup> DAF/COMP/WP3(2003)1/REV1

15. There was discussion of the form of the final work product of this third phase including the possibility of incorporating the work on international co-operation into a Council recommendation. Therefore, in a 2003 Secretariat Scoping Paper,<sup>6</sup> possible revisions to the 1998 Cartel Recommendation were set out. Updates were suggested with respect to (i) anti cartel enforcement, including investigative tools (e.g. leniency programs) and sanctions, (ii) co-operation (informal co-operation, co-operation with developing countries and possibly more explicit reference to laws permitting the exchange of confidential information), and (iii) an update of the preamble, to better reflect the understanding of the harm that cartel cause to developing countries and the threat of cartels operating across borders.

16. In 2005 the Committee published its **Third Report on Hard Core Cartels and the Implementation of the 1998 Council Recommendation (the “Third Report”)** which found that many of the trends set out in the Second Report had continued. Members and observers found that international co-operation in discovering, investigating, and prosecuting international cartels had reached unprecedented levels. New investigative strategies had been used successfully, such as co-ordinated, simultaneous surprise inspections in several jurisdictions. Confidentiality waivers in cases of simultaneous leniency applications had created more opportunities for multi-jurisdictional co-operation. In several cases, countries were able to assist others in providing access to evidence and witnesses located in their jurisdictions. More countries than ever co-operated by exchanging know how and expertise in cartel enforcement, in particular in the field of investigative techniques. The number of bilateral co-operation agreements substantially increased. The third report was noted that “Co-operation among competition law enforcement authorities has undergone a sea change in the past five years,” and “[...] co-operation with foreign antitrust authorities has never been more effective.”

17. Co-operation through exchanges of information not considered confidential had proved helpful in many cases. Frequently, the 1995 Co-operation Recommendation provided the framework for this type of co-operation, especially between OECD Members that had not entered into a bilateral co-operation agreement.<sup>7</sup> The number of international co-operation agreements continued to grow significantly. Several had been signed since the adoption of the Second Report, and a growing network of bilateral agreements covered not only co-operation between OECD Members, but also co-operative relationships between OECD Members and non-Members. Such international agreements can include state-to-state co-operation agreements, inter-agency co-operation agreements, mutual legal assistance agreements (“MLAT”), as well as competition-related provisions in bilateral free trade agreements.

18. While MLATs are not competition specific, they were reported to play an important role in international cartel cases as they provide the authority for formal co-operation, including the exchange of confidential information, if the conduct under investigation amounts to a criminal offence. MLATs had been used in several recent investigations of international cartels to obtain evidence located in the territory of another jurisdiction. The MLAT between Canada and the United States was referred to as one of the most frequently used MLATs in cartel cases. The Canadian courts upheld the Canadian Competition Bureau's ability to use an MLAT for Canada-US cartel co-operation after parties under investigation for suspected cartel activity in the United States had challenged the MLAT's use to exchange information in cartel cases.

19. Where international agreements authorise formal co-operation, competition authorities reported using them in an increasing number of cases to more effectively investigate cartels. Co-operation under

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<sup>6</sup> DAF/COMP/WP3(2003)6

<sup>7</sup> 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.

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 competition authority staff simultaneously searched business premises in several German states following a request for assistance in a cartel investigation by the United States.

20. Despite appreciable progress, however, it was reported that substantial room for improvement remained in the area of international co-operation. Informal co-operation has its limits and often co-operation among competition authorities did not include the formal exchange of confidential information, which can seriously hamper cartel investigations. Some countries found that the absence of a formal co-operation mechanism authorising the exchange of confidential information limited their ability to investigate cartels. Despite investigating the same cartel, some authorities reported that they were unable to exchange any confidential information in the absence of an instrument authorizing such exchange.

21. The most recent discussion on international co-operation and cartels took place in the 2012 Global Forum on Competition, which held a roundtable on **Improving International Co-operation in Cartel Investigations**.<sup>8</sup> The discussion included representatives from competition agencies, private practice and enforcers from other policy areas, i.e. tax and anti-corruption. The discussion clearly indicated a consensus on the value and extent of *informal* co-operation in cartel cases, but also emphasised that *formal* co-operation was markedly less prevalent, especially between developed and developing countries. Even among regional groupings in developing countries, co-operation was reported as limited, due to legal and capacity constraints as well as a lack of technical expertise. A number of participants noted that convergence on tools and sanctions would be beneficial. It was acknowledged that developing a track record of domestic cartel enforcement was important in demonstrating capability and developing trust between agencies.

22. BIAC offered some practical guidance on addressing the challenges of encouraging co-operation from the parties in providing confidentiality waivers. This included promoting legislative solutions to protect confidential information, and addressing inconsistencies between leniency programmes, which could otherwise undermine the effectiveness of these programmes. Alternatives to co-operation were also suggested, such as assigning a lead-agency to undertake an international investigation based on the best-placed agency to act. Experiences from international co-operation in tax and anti-corruption emphasised the importance of multilateral instruments and the commitment to implement and enforce these obligations. Developing standard definitions of concepts that are common sticking points is also helpful. Building trust and confidence between enforcers is key to formal co-operation, and co-operative relationships are important for developing “early warning systems” that can facilitate the exchange of intelligence. The discussion raised a number of possible topics for the Committee’s future work on international co-operation, including the cost-benefit of co-operation and innovative solutions such as mutual recognition of competition authority decisions and giving precedence to another jurisdiction.

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<sup>8</sup> Publication forthcoming [Background Paper, DAF/COMP/GF(2012)6].

## ANNEX 4

### SUMMARY OF DOCUMENTS ON THE EXCHANGE OF CONFIDENTIAL INFORMATION IN COMPETITION CASES

1. Competition authorities have consistently found that the ability to exchange confidential information can substantially contribute to more effective co-operation and enforcement in competition cases. The Committee therefore has for many years sought ways to promote the sharing of confidential information between enforcers, consistent with the mandates of the 1995 Co-operation Recommendation and the 1998 Cartel Recommendation. Much of the Committee's work on information sharing in cartel cases has been documented in the Second Report. The Second Report also described the Committee's discussions with the business community, represented by BIAC, including issues on which the two sides tended to disagree.

2. In a 1984, an OECD paper noted that “[i]t is ... vitally important that adequate procedures exist to enable competition authorities to obtain sufficient information to evaluate the effects or legality of commercial activities.”<sup>1</sup> It was therefore recommended that: “[OECD] Member countries should supply each other with such relevant information on restrictive business practices as their significant national interests permit them to disclose. Where confidentiality considerations constrain such co-operation, Member countries should consider such measures as may be necessary and appropriate to enable them to supply information or reply to requests from foreign competition authorities, provided that adequate assurances to preserve the confidentiality of the information are received from those authorities.”

3. In 1993 the Whish-Wood Report included among its recommendations greater general co-operation in the process of merger review, as well as the consideration of a system in which parties could choose to waive their confidentiality rights to permit co-operation between agencies. They also noted the advantages of competition authorities collecting information for one another.

4. In 1994, WP3 published a paper on **‘Effective Co-operation in International Antitrust Enforcement: Confidential Information Sharing and other Essential Mutual Assistance’**.<sup>2</sup> It emphasised that none of the information sharing arrangements in place between competition authorities addressed the sharing of confidential information, despite this being the most helpful in antitrust enforcement. The paper studied practices and rules related to information exchanges in other law enforcement areas where international co-operation 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. The information sharing provisions in the area of securities were reported to be the most advanced of any area of international financial co-operation, and provide an example to which arrangements in antitrust could aspire: countries share confidential information and use their compulsory powers to gather evidence on one another’s behalf. The paper reported a ‘pressing’ need for confidential information sharing and co-operation arrangements to be put in place. Given the nascent efforts in the antitrust field and the strong precedents for co-operation in other fields, ten principles were set out which

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<sup>1</sup> Competition Law Enforcement: International Co-operation in the Collection of Information (1984)

<sup>2</sup> DAF/CLP/WP3(94)1

could serve as an outline for instruments encouraging co-operation in information sharing and gathering in the antitrust context:

- i) *Purpose of the agreement and definitions*: This would state briefly the aim of international co-operation and define the main terms used such as "competition laws", "restrictive practices", "important interests", etc.
- ii) *Subject matter*: This would address the issue, in particular whether the agreement would apply only to enforcement of competition laws but also to consultation/co-operation about new legislation.
- iii) *Scope of co-operation*: This would define what areas of mutual assistance in the enforcement of competition laws are covered.
- iv) *Protection of confidentiality of information*: This would define the responsibilities of both the requesting party and the country supplying the information taking account of national rules and the possibility of their modification to accommodate requests from abroad.
- v) *Procedural aspects*: This would cover the procedure for making requests for information (or other forms of assistance), including time periods.
- vi) *Public policy exceptions*: This would consist of a provision defining the circumstances when a request for co-operation could be refused.
- vii) *Permitted uses of the information*: This would define the strict purposes for which the information could be used.
- viii) *Notification*: This would cover the terms of the existing 1986 Recommendation defining the circumstances when requests for information or the simple issuance of information would be made to another country.
- ix) *Consultation and Possible Dispute Settlement/Conciliation*: This would cover the terms of the existing 1986 Recommendation defining the circumstances when requests for information or the simple issuance of information would be made to another country.
- x) *Cost-sharing*: In the event of the co-operation involving substantial costs for a party, this principle would determine the apportionment of costs as between the agencies.

5. Following the Secretariat note, WP3 discussed the possibility of drafting a multilateral agreement for sharing information and other forms of mutual assistance in the enforcement of competition laws.<sup>3</sup> Alternatively it was suggested that a new OECD Council Recommendation could be drafted to complement or perhaps replace the existing 1986 Council Recommendation. It was suggested that the ten principles set out above be included in the paper.

6. In June 1994 the Secretariat issued to all delegates a brief questionnaire on the subject of co-operation and information sharing to gain a better understanding of current practice in international antitrust co-operation in non-merger matters.<sup>4</sup> The questionnaire inquired into two general areas; (i) past and current practice and (ii) future co-operation. The responses to the survey confirm that Member

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<sup>3</sup> See also DAF/CLP/WP3(94)2

<sup>4</sup> DAF/CLP/WP3(94)4

countries were engaging in a meaningful level of international antitrust co-operation under the 1986 Recommendation, and that the opportunities for such co-operation were increasing with the growing internationalisation of business activities. The most meaningful co-operation was pursuant to existing bilateral and regional agreements that permitted, among other things, the sharing of information that would otherwise be confidential and not available to foreign competition agencies. It seemed highly problematic that significantly enhanced co-operation could exist without the ability to share, with appropriate safeguards, confidential information. It was suggested that the role of the OECD would be to foster conditions that would encourage the development of more co-operative arrangements in situations where the need arose.

7. The Secretariat was accordingly asked to issue a further questionnaire, which would provide a basis to propose a draft Council Recommendation along with a check list of principles.<sup>5</sup> However, the responses to the questionnaire did not produce a consensus among the delegations on the type of instrument that should be developed. While it was felt that a separate multilateral instrument would ultimately be the most efficient and perhaps the most effective, the view was widely held that it would be difficult to reach agreement on such a document in the near term. As the circumstances in each country are unique in many respects, it could be equally difficult to arrive at a model bilateral instrument that would have universal application. It was therefore decided it might be most effective for WP3 to consider a set of principles that would be embodied in a revised Council Recommendation, which could then be applied to specific agreements as the circumstances warrant. A second reason for considering this issue in the form of a Council Recommendation was WP3's simultaneous consideration of embodying some of the Whish-Wood recommendations on mergers in a revised Recommendation.

8. The benefits and costs of information sharing were discussed in a 1999 **Report to the Council concerning Hard Core Cartels**.<sup>6</sup> While the benefits of sharing confidential information in cases of mutual interest are recognised in the 1998 Cartel Recommendation, some competition authorities had questioned how such information sharing would benefit them specifically.

9. Three responses were provided to this question. First, as a general policy matter, the benefits of information exchanges should not be assessed simply by asking whether the country in question will receive tangible benefits in every instance of co-operation. Focus should instead be on assessing the benefits to the country of its improved ability to gather evidence, the benefits it receives from cases brought by foreign agencies using information the country has provided, and the overall benefits the country receives from the reduction in hard core cartel activity. Second, since global integration is increasing the number of competition authorities with an interest in bringing at least some international cases, it seems likely that more countries will conclude that the benefits of information sharing would be beneficial to their law enforcement programs. Third, even if a competition authority engages only in purely domestic enforcement, it could benefit from receiving confidential information from a foreign agency in the following circumstances: (i) obtaining a "tip" from a foreign agency about previously unsuspected illegal domestic conduct; (ii) obtaining information located abroad that is relevant to a domestic investigation; and (iii) obtaining evidence establishing that domestic activity relating to an international cartel has violated domestic laws and caused domestic harm.

10. Requests to exchange confidential information can always be turned down if they impose undue direct costs or raise other policy concerns. The report found that over time the delegates' approach to information sharing has become less policy focused and more concentrated on the pragmatic weighing of benefits and costs. Therefore, the principal costs of information sharing (as recognised in the 1998 Cartel

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<sup>5</sup> DAF/CLP/WP3/M(94)1

<sup>6</sup> DAF/CLP/WP3(99)11

Recommendation) relate directly or indirectly to the risk that confidential information will be disclosed or used improperly. The Report also highlighted confusion over the distinction between commercially sensitive information that is protected by laws governing business or trade secrets and non-public information that is not commercially sensitive but is required to be treated as confidential by a competition authority.

11. In 2002 a joint roundtable discussion was held with BIAC on **Information Sharing in Cartel Cases** to discuss the concerns of the business community relating to information sharing.<sup>7</sup> Although there have been differences between the business community and competition authorities on some information sharing issues, there are also important areas of agreement. The Committee has always considered it fundamental that commercially sensitive information should be protected from improper disclosure or use, and sees no reason why information cannot be both shared and protected. BIAC was therefore invited to focus on the safeguards viewed as necessary to protect against improper disclosure or use of shared information. It was suggested that the most productive approach was to identify ways to provide reasonable assurance that any shared information would receive comparable protection “downstream” by the receiving country. The business community approved of this approach because legal protections are visible and able to be compared. In contrast, BIAC emphasised that a system dependent on competition authorities’ assessment of the confidentiality of the requested information would be more subjective, and even an international definition of “business confidential information” would be meaningless in this context.

12. It was questioned whether a downstream protection approach could usefully be supplemented by an approach that permits different treatment for some categories of information. The principal benefit of downstream protection is its elimination of the need to make judgements about the confidentiality of materials. However, those benefits come with a price because they require that various non-confidential materials must be treated as confidential. Thus, even if a country wants only a small amount of non-confidential information – e.g., who attended a particular meeting – both countries must go through the same formalities as if business secrets were involved. This result may be justified, but the issue was raised whether some categories of non-public, non-confidential information could be defined with sufficient specificity and clarity to permit them to be shared using a more streamlined process.

13. In 2002 the Committee published a report on **Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes**<sup>8</sup> which found that agencies with leniency programs promise strong protections against unauthorised disclosure of information. Co-operating with other enforcement agencies about cartel enforcement requires finding ways to communicate about the existence of situations calling for enforcement attention, without divulging the details of those confidential sources. Better co-ordination of leniency programmes was highlighted as having led to increased opportunities to share confidential information and co-operate better. The number of leniency applications submitted simultaneously to more than one competition authority had increased, and simultaneous leniency applications can include waivers of confidentiality rights. Such waivers create more opportunities for multi-jurisdiction co-operation by enabling the competition authorities involved to share information they have received in the leniency applications.

14. However, even in cases where leniency applicants are willing to give waivers, it was felt a broader authority to exchange confidential information would be desirable because confidentiality waivers only cover information submitted by the leniency applicants. Competition authorities cannot usually share incriminating information that they obtain as a result of these applications. For example, where a

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<sup>7</sup> CCNM/GF/COMP(2002)2

<sup>8</sup> <http://www.oecd.org/dataoecd/49/16/2474442.pdf>

competition authority obtains documents during a dawn raid that was triggered by information provided by a leniency applicant, any such documents are usually still subject to confidentiality protections and cannot be shared with authorities in other jurisdictions.

15. In 2003, a discussion on **Information Exchange in Merger Investigations** was held, and following papers by BIAC and the ABA,<sup>9</sup> WP3 agreed the Secretariat would issue a questionnaire for the purposes of acquiring further information on international co-operation in merger investigations. The papers by BIAC and the ABA emphasised that exchange of confidential information should be conducted only through bilateral or multilateral co-operation agreements or treaties, or by means of specific waivers of confidentiality by the parties. The BIAC Framework and the ABA Best Practices provided several recommended provisions for such agreements, governing: downstream protection and use of exchanged information; notices to parties who supplied the information; protection of privileged material; return of information at the conclusion of the investigation; and sanctions that apply to unauthorised breaches of confidentiality. Several suggestions for waiver agreements between competition agencies and the parties, governing types of information for which the waiver is granted, downstream use, protection of information exchanged and notices to the merging parties.

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<sup>9</sup> DAF/CLP/WP3(2001)12 (Recommended Framework for Best Practices in International Merger Control Procedures - BIAC) and DAF/COMP/WP3(2002)1 (Best Practices for the Review of International Mergers – ABA)

## ANNEX 5

## SUMMARY OF OTHER DOCUMENTS ON INTERNATIONAL CO-OPERATION

1. In 2003 the Committee published a framework paper on **Developing Co-operative Relationships**,<sup>1</sup> which discussed co-operative relationships in the context of both anti-cartel enforcement and transnational mergers. The paper noted that the term "co-operative relationship" does not have a fixed meaning when applied to the relationship between antitrust authorities. Co-operation between authorities may take many different forms and significantly depends on the context within which co-operation between agencies takes place. Differences exist with respect to national regimes that authorise co-operative relationships, degrees of intensity that result from the relationships between co-operating parties, and different goals. The Council Recommendations on Co-operation and Cartels focus on case-specific co-operation in general and in cartel cases. Co-operative relationships, however, comprise a wider range of conduct. In particular, contacts that are not linked to a specific case or enforcement action and serve primarily for the exchange of information and discussion of issues of common interest have been recognized as important aspects of the relationship between agencies that can be instrumental for effective case-specific co-operation, both with respect to cartels and mergers. The paper discussed five key aspects including: (i) factors that facilitate the development of co-operative relationships, (ii) instruments establishing co-operative relationships, (iii) enforcement (case-specific) co-operation, (iv) non case-specific co-operation and (v) resources required to build, maintain and expand co-operative relationships.

2. In 2004 a joint paper on **Cross-Border Enforcement Co-operation**<sup>2</sup> was issued with the Committee on Consumer Protection summarising recent activities and developments concerning international co-operation among consumer protection agencies on one hand and competition authorities on the other. The paper discusses some of the important current issues concerning international co-operation including: (i) formal information exchange and informal co-operation, (ii) making remedies effective across borders and (iii) role of international arrangements: bilateral, regional and multilateral.

3. A publication entitled **Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity** was also issued in 2004.<sup>3</sup> This included a compilation of all the documentation presented at the first three meetings of the GFC (2001-2003), including a section on "The Need for Anti-Cartel Enforcement and Merger Control, facilitated by International Co-operation". Information was collected from developing country participants concerning their experiences with international co-operation in cartel and merger cases. Developing country responses showed that virtually all countries active in competition law enforcement had entered into co-operation agreements with one or more other jurisdictions. As for member countries, developing countries tended to enter into agreements with jurisdictions that are geographically close and/or trading partners. Co-operation agreements among developing countries appeared to be based in a large part on the 1998 Co-operation Recommendation, and did not contemplate the sharing of confidential information except as permitted by national law. Reference is made to (i) the primary barrier to co-operation – broad bans on information sharing (ii) sharing non

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<sup>1</sup> DAF/COMP/WP3(2003)4

<sup>2</sup> COM/DAFFE/DSTI/CP(2004)46

<sup>3</sup> <http://www.oecd.org/dataoecd/13/42/27892500.pdf>

confidential information – a partial, temporary solution? (iii) Effective sanctions against cartels (iv) Cartel cases in developing countries and (v) Merger control and international co-operation.

4. A 2008 roundtable on the **Interface between Competition and Consumer Policies**<sup>4</sup> considered which sectors or products would benefit from increased international co-operation between Competition Authorities and Consumer Representatives, with reference made to e-commerce and advertising. Reference is also made to how increased international co-operation between competition authorities and consumers representatives could render the markets more competitive while ensuring and adequate protection of consumers around the globe.

5. The 2011 publication **Exit Strategies and Competition Issues in the Financial Sector (2011)** contained a section on the importance of international co-operation, with emphasis that as many markets are interconnected and banks are active in various countries, this makes international co-operation in crisis management and prevention all the more relevant.

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<sup>4</sup> DAF/COMP/GF(2008)10