Working Party No. 3 on International Co-operation

SUMMARY RECORD OF THE 78TH MEETING
Held on 8 June 2000
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I. Adoption of Agenda

II. Approval of the Summary Record

III. Future Work on Hard Core Cartels
3. The Working Party received two presentations concerning the implications for its work of the recent report by the International Competition Policy Advisory Committee (ICPAC) that had been established by the United States Department of Justice. The report, based in large part on extensive hearings in which officials from many Member countries participated, covered many relevant topics, including cartels and transnational mergers. The first presentation was by James F. Rill, co-chair of ICPAC, who described ICPAC’s findings as very supportive of the Working Party’s activities to both increase enforcement and co-operation. The second was by Mr. Peter Plompen on behalf of BIAC/ICC. During the discussion of the protections the business community would like from countries that authorise the sharing of confidential information, BIAC/ICC volunteered to assist the Working Party by submitting a list of specific questions or concerns. A brief summary of these two presentations and the following discussion is attached in Annex A.

4. The Secretariat first briefed the Working Party on events since the February meeting. The Cartel Report had been approved by written procedure, and the Secretariat had been successful in getting the Report to be one of the main parts of the documentation for the June Ministerial meeting. The concept of an intensified 3-year anti-cartel programme was endorsed, and the Report was featured in the “synthesis” presented to Ministers and was one of only very few documents to be made into a separate “brochure” for the Ministerial. As described in the Report itself, the anti-cartel programme will explore five inter-related topics: the harm caused by hard core cartels; the impact of restrictions on information sharing; optimal sanctions; optimal investigation tools; and optimal international co-operation. The Secretariat suggested that although the CLP need not report again to the Council for another three years, the CLP’s goal of publicising the true nature of the cartel problem would be served by the issuance of intermediate reports. For example, the Secretariat’s revised note on leniency programmes, scheduled for completion by the October meeting, might be the basis for a CLP report.

5. The Secretariat then presented its note [DAFFE/CLP/WP3(2000)4] on future work in the two areas scheduled for discussion at this meeting -- studying cartels’ harm and considering optimal sanctions. As a first step in both of these areas, the Secretariat suggested the issuance of a questionnaire that would seek from each country information on each cartel case (or category of cases) that has been resolved since January 1, 1996. Domestic as well as international cartels would be covered, since the aim is to assess the harm of cartels on Member countries and the global economy. The questionnaire would ask for facts such
as the product, the geographic area, the monetary value of commerce in that product in that area, the
duration of the cartel, any available estimate of harm, the sanction applied and the basis thereof, and an
indication of cases in which the cartel would likely be viewed as particularly heinous by laymen.
Collection of such information would permit estimates of harm to be made using the same methodology
that had been successfully used -- at the suggestion of the United Kingdom -- in the Cartel Report. While
all estimation processes can be subjected to criticism, the process would start on a solid foundation --
actual cases and the volume of commerce involved in each -- and then estimate harm based on the
assumption that on average the overcharges resulting from cartels is 10% of the amount of commerce.

6. In general, there was support for such a questionnaire and for this estimation methodology,
though some delegates questioned whether the methodology would be adequate. The Secretariat noted that
this process seemed the only practical method of making the basic estimates, and that but that it would
considers means -- such as case studies of some big cases -- that might be used to provide backup for the
estimates. The Working Party decided that the Secretariat should issue the questionnaire and should
explore the methodological issues more fully in a note for the October meeting.

7. Concerning sanctions, the Secretariat pointed out that the questionnaire responses would provide
the basis for one aspect of the Working Party’s review of sanctions -- examining what sanctions Member
countries actually apply. With respect to optimal sanctions, the Secretariat suggested a review in a
roundtable in which Members that have conducted serious studies of the issue could present their findings
as a basis for further discussion. Norway explained that it was beginning such a study, which is to be
completed next spring. The Working Party decided to have a roundtable in February to discuss these
issues.

8. After the Secretariat expressed a general concern about the level of its resources for the anti-
cartel programme, the Chairman expressed considerable frustration over the OECD budget process, given
that this area is clearly a high priority. Other delegates also expressed the view that the Working Party’s
work is a high priority, and it was suggested that the work was a higher priority than, for example, the
work of the Joint Group. The Secretariat explained that its budget presentation this year had been prepared
precisely in order to provide greater transparency and to illustrate, among other things, the basis for its
previous warning that its budget for supporting Committee meetings was inadequate. Moreover, the budget
presentation had not included outreach because Members had created a separate outreach budget -- one that
is prepared at a different time and is reviewed by a different committee, the Committee for Co-operation
with Non-Members. The Working Party decided to consider the budget and priorities issues again in
October, and directed to prepare a note explaining its resources, including outreach resources, and the
constraints on its ability to move resources in order to reflect CLP priorities.

9. After concluding its discussion of the two cartel-related topics that were on the agenda for this
meeting, the Working Party moved to Item V of the agenda -- future work, including future work on other
aspects of the anti-cartel programme. As decided at the February meeting, the Secretariat will present a
revised note on leniency programmes, which is a major part of the work on investigation tools. In addition,
the Working Party decided to consider its future work on investigation tools other than leniency and on
co-operation, based on a brief “scoping note” by the Secretariat. Concerning the planned October
roundtable on compliance programs, there was a discussion that clarified that the roundtable will cover all
methods short of litigation that are used by competition authorities to bring about compliance. A new
Secretariat note will be prepared for the October meeting, and BIAC will be invited. Finally, the Working
Party authorised the Secretariat to revise and issue its questionnaire on outreach activities. It was decided
that in October, the Secretariat will make an oral status report on this project, will and thereafter prepare a
note (including information from other international organisations) that will provide the basis for a
discussion by the Working Party in February.
IV. Issues in International Merger Enforcement

10. The Working Party received two presentations concerning the implications of the ICPAC report on its work in the area of international merger enforcement. A brief summary of these presentations and the following discussion is set forth in Annex A.

11. The Secretariat then presented its background note [DAFFE/CLP/WP3(2000)5], initially pointing out that John Clark, the note’s author, had suddenly become unavailable to present the note himself. After discussing various aspects of the current issues raised by the large number of international mergers, the note identified four possible projects: (a) creating a more complete database on transnational mergers; (b) promoting transparency in merger review by, for example, preparing a publication with comprehensive descriptions of the rules and procedures used by Member and observer countries; (c) taking an in-depth look at practical experience in co-operation on transnational mergers, possibly resulting in a report containing some “best practices”; and (d) taking a longer term look at possible means making nations’ merger review procedures as compatible as possible.

12. During the discussion that followed, the consensus was that the first alternative was not really practical, though the Secretariat might give some further consideration to the possibility of collecting somewhat better data through the preparation of guidelines for countries to use in preparing their annual reports. Several countries thought that the publication contemplated by the second alternative would be useful, but it was also pointed out that it would involve unnecessary work since many regimes are very transparent and are fully described in national or other documents. Moreover, there are private sector publications that do a quite good job of describing the rules of most if not all jurisdictions. While it is impossible to keep any compilation of countries rules up to date, it might be worthwhile devoting some time to a discussion of what information of this kind Members put on their own websites. The fourth alternative was generally considered too ambitious and ambiguous. Delegates preferred to work in an area that would be more likely to be useful, and the Secretariat should consider whether the proposal could be narrowed and made more practical. The Chair suggested, and the Working Party decided, that since no one spoke against the third proposal, and several spoke in favor of it, the Secretariat should prepare a note for the October meeting aimed as focusing future work on practical experience in co-operation on transnational mergers.

V. Future Work

13. This topic was addressed under items III and IV. In sum, the October meeting will consist of a roundtable on compliance; a discussion of the methodology for using the cartel questionnaire responses, including methods for using other data to bolster the study’s findings; a brief discussion of a revised note on leniency; a discussion of a scoping note on investigation tools other than leniency and on co-operation; a discussion of the CLP Division’s budget; a discussion of future merger work focusing on the examination of co-operation in investigating merger cases and the possible development of best practices; and an update from the Secretariat concerning outreach, including the questionnaire concerning members’ technical assistance.
ANNEX A

Summaries of ICPAC and BIAC/ICC Presentations and Discussion Thereof

I. Implications for Future Work on Cartels

1. ICPAC did not find evidence that cartels are on the increase; rather, enhanced enforcement seems to be the result of improved investigation tools, including leniency programs combined with higher fines, and improved co-operation in accordance with the 1998 Hard Core Cartel Recommendation. Co-operation should be taken to the next level, and although issues relating to confidentiality do exist, ICPAC regarded the concern as usually less weighty in cartel cases because they are less likely to involve truly confidential, strategic information. Concerns had been expressed to ICPAC about the possibility that information might be shared with a country having a radically different competition law regime, but this concern can be addressed (as it is under the relevant US law, the IAEAA) by limiting exchanges to countries with symmetrical regimes. ICPAC endorsed consideration of the IAEAA, the comparable Australian law, and the Australia/US agreement as possible models for permitting exchanges of confidential information while protecting legitimate business interests. In that respect, a major issue ICPAC addressed was whether notice should be given to a party either before or after its information is shared with a foreign country. The IAEAA does not require such notice, but ICPAC endorsed the concept of notice except where doing so would compromise the investigation or violate a law or treaty. Mr. Rill expressed the view that acceptance of this approach would be beneficial to the goals of the OECD’s anti-cartel programme, on the theory that it would reduce business concern by helping ensure compliance by competition authorities with the applicable law and permitting a party to challenge the authorities’ actions.

2. Mr. Rill also expressed the view that the policy debate would be furthered if businesses understood better the existing confidentiality regimes of different countries, so that they would understand what protections they would have as their own countries consider revising their laws to permit more international information sharing. Mr. Rill saw a report on OECD Members’ confidentiality laws as a possible task for the OECD, but both delegates and the Secretariat later questioned this, noting that (1) the Working Party had recently reviewed Members’ confidentiality laws, and the responses revealed country-specific ambiguities that only in-country experts could address, (2) information on countries’ current confidentiality laws is a dubious indicator of what protections parties would have in the future since those laws would presumably be modified by any country that amends its ban on information sharing, and (3) more generally, the project was not one that utilised the expertise and of the Working Party.

3. The second presentation consisted of BIAC/ICC comments on the ICPAC report and its implications. The comments were generally favorable, though BIAC/ICC expressed greater concerns with respect to interagency sharing of protected information in cartel enforcement. In obviously naked cartels, the evidence is less likely to involve truly confidential, strategic materials, but even OECD countries have differing positions on how they categorise and treat some forms of horizontal agreements. Differing treatment of market division/specialisation agreements is one example, and the business community is also concerned that what most jurisdictions would consider a legitimate price-related term in a joint venture may be characterised by at least some countries as naked price fixing. Moreover, authorities often seek and obtain confidential information to aid in deciding whether an agreement is a hard core cartel or a legitimate joint venture. (The ICC’s first reason for concern about information sharing -- differences in the way Member countries define the four kinds of agreements that together comprise the “definition” of hard core cartel -- was identified in the Cartel Report as a possible area for future work. This idea ranked low on the Working Party’s priorities as they had been discussed in February, but the Working Party may wish to revisit that issue in light of the ICC presentation.)
4. Discussion of these presentations touched on a wide range of issues. In response to questions, Mr. Rill said that he was not suggesting a lower standard of confidentiality in cartel cases (e.g., protecting only business secrets in such cases while protecting all “confidential” documents in other cases). He also said that he did not think that two competition regimes were not symmetrical merely because the financial penalties differed in that one had criminal fine and the other administrative fines. Although a number of delegates questioned the legitimacy of some business concerns relating to information sharing, Mr. Rill made the point that even if this issue turns out to be “a big, stinking red herring,” it is important to bring the business community more into a dialogue on it. BIAC/ICC volunteered to assist the Working Party in considering these issues. Since previous ICC statements raised concerns that have either been addressed by the Working Party or are very general, it agreed to submit a list of specific questions or concerns.

II. Implications for Future Work on Transnational Mergers

5. Mr. Rill noted that about sixty jurisdictions (and climbing) have some form of merger review system in effect, which creates significant problems for businesses as well as enforcers. ICPAC divided its consideration of these issues into two chapters, one on substance and one on procedure. One major recommendation is increased transparency, with each jurisdiction making a public statement of its standards. It urged that the consumer welfare standard be a central motivating force behind merger review, recognising that there would be exceptions but urging that the exceptions’ rational and application be explained. Moreover, there should be a clearer explanation of the basis for decisions, including (in major cases) decisions not to challenge mergers. ICPAC also urged enforcement co-operation, as described in the 1995 OECD Recommendation. Co-operation should also include work sharing, common information requests, common depositions, etc. Having “soft deference,” where the most concerned country would proceed first as “lead agency,” while the other reserved the right to act if it was dissatisfied with the first case, could also be useful. The subject of confidentiality again comes to the fore. Very sensitive information is involved, and is the kind of information that should be exchanged. In this situation, notice seems clearly appropriate, and ICPAC at least implicitly suggests development of a form or model waiver of confidentiality rights, though there is some controversy in this area.

6. On the procedural side, ICPAC also concluded that transparency is vital, and it does not now exist. Filing requirements are very unclear in some jurisdictions, and subjective standards -- based on market share, for example -- are inadequate. Also, some restraint seems appropriate. At least where there is no conceivable competitive nexus between a transaction and a jurisdiction, no notification should be required. It would also be desirable for all countries to use the same triggering event to require filing, and for common filing requirements in a first phase. In the US second phase process, the information requests have sometimes been unduly broad, and the agencies have been working to change this. On the subject of duplicative review by sectoral regulators and competition agencies, ICPAC recommended review of competition issues by only the competition agency. OECD work on bilateral agreements has been and continues to be important. ICPAC also recommended a “Global Initiative,” a new forum in which there could be greater dialogue between business and competition enforcers in OECD and other countries.

7. BIAC/ICC endorsed the ICPAC report in general, and focused its presentation on areas of disagreement. With respect to confidentiality, BIAC/ICPAC does not regard after-the-fact notice as acceptable under any circumstances. Moreover, it regards it as important to have a clear requirement that any information which is shared be forbidden to be used for anything other than the case in which it is shared. The ICC prefers that firms directly provide documents to other interested countries than that enforcement agencies be authorised to share the documents. The ICC also disagrees with ICPAC’s conclusion that enforcement agencies should be permitted to bring cases against mergers that do not meet premerger notification filing thresholds.
8. Both presenters were asked to identify the two most important issues to pursue. Both listed (a) transparency of filing and standards of review (including remedy) and (b) confidentiality issues, with BIAC/ICC adding harmonisation of the timing of filings. The European Commission noted that it had sought to create a model waiver form but had abandoned the exercise because every really became a separate negotiation. It also expressed interest in how filing requirement thresholds should be set, and with respect to the duplicative review issue, it noted that it is seeking to have the US Department of Transportation added to its co-operation agreement. Finland suggested that details regarding the proper handling of confidential should be considered by individual countries, not the OECD. Canada explained a system it has introduced in which the time for conducting a merger review varies depending on whether the Bureau classifies a merger as non-complex, complex, or very complex. The US asked whether ICPAC and BIAC/ICC were merely interested in a model waiver form or were recommending a waiver form that could not be revised by the parties. BIAC/ICC responded that there should be models that reflect standards, because firms have so little bargaining power, but noted that deviation from the models could be permitted. Mr. Rill suggested that both a model form and individual negotiation are probably both important. The US added that co-operation in the merger area is vital because the alternative is collision; moreover, it is important, as the ICPAC report stresses, that enforcers seek both short-term and long-term solutions to the problems in this area.