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INTERIM REPORT ON CONVERGENCE OF COMPETITION POLICIES

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**INTERIM REPORT
ON CONVERGENCE OF COMPETITION POLICIES**

1.0 Ministerial Mandates

1. This Interim Report on Convergence of Competition Policies has been prepared by the Committee on Competition Law and Policy under the mandate of the Ministerial Meetings of 1991 and 1992. The Communiqués of those meetings set forth the mandates as follows:

Competition Policy. The increasing international scope of economic activity has resulted in a situation in which the existing "rules of the game" as defined by national or regional competition policies might be usefully complemented. Ministers ask the Organisation to continue its work on the international dimension of competition policies and on their interaction with policies in other areas such as trade and industry. They note that recent work in the Organisation on competition law and policy provides the foundation for greater policy convergence and progress towards updating and strengthening the existing rules and arrangements (including both policy principles and procedures) for international co-operation in this area. They invite the relevant committees actively to pursue these matters, including the effectiveness of trade rules in facilitating international competition.¹

Trade and competition policies have a common objective: economic efficiency. But these policies have sometimes impinged on each other. OECD governments will seek to: improve consistency between these policies to enhance competition and market access; provide a foundation for convergence of substantive rules and enforcement practices in competition policy; identify better procedures for the surveillance of trade and competition policies; and enhance the interests of consumers.²

2. This interim report presents the substantial work achieved so far by the CLP Committee in response to the above mandates. A separate report prepared jointly with the Trade Committee responds to the mandate to work on the interaction of trade and competition policies.³ Because of the complexity of the topic and the extensive work already completed, this Report focuses on synthesizing the policy orientations emerging from the existing body of work and seeks Ministerial guidance on the future work of the CLP Committee on the convergence agenda.

2.0 The Underlying Reasons for Convergence

3. Competition policy faces new challenges. National markets are increasingly affected by international factors. Trade liberalisation and globalisation affect competition policy in ways that may give rise to trade policy concerns, and in ways that underscore the benefits to be derived from greater competition policy convergence and greater international cooperation⁴. Greater convergence in competition policy, laws, enforcement methods and analytical tools can contribute substantially to international economic efficiency notably by facilitating international flows of goods, services, capital and technology. Convergence will enable governments to resist pressures to impose impediments to trade -- tariffs, non-tariff barriers, other policies -- and will ensure that such impediments are not replaced by private restraints on international trade. Further impetus towards convergence is provided by the possibility that competition policy will be an important new issue to be discussed within the new World Trade Organisation as well as in future bilateral and multilateral trade negotiations.

4. Another reason to provide more coherent competition policy models is that many countries including non Member countries are now amending their existing statutes and institutions or developing totally new ones.

5. Greater convergence could facilitate competition enforcement internationally. Indeed, there is concern that diverging competition laws and enforcement practices result in administrative, compliance and enforcement costs for government and the private sector, although these cost burdens have yet to be properly documented and are based for the most part only on anecdotal evidence.

6. Greater convergence among competition laws and jurisdictions is not only desirable but is achievable in light of the strong evidence of convergence in recent years. There is consensus among CLP Committee members that the process of convergence should continue. The goal of this process is not uniformity in competition policy, law and practice. Competition law must reflect the institutional and policy framework of each Member country.⁵ The Committee is working on a convergence process which preserves flexibility and scope for innovation.

3.0 The Convergence Process

7. Countries large and small have been amending their existing laws and enforcement practices, or adopting new laws and competition policy institutions, in a manner which directly or indirectly brings about greater convergence among competition jurisdictions. Other forces have also played a prominent role -- the process of European Union market integration, including its expansion to include the EFTA countries and the countries in transition in Central and Eastern Europe, is an important example -- but the OECD also has been an important forum helping to guide and inform this process.

8. The OECD has promoted convergence by encouraging:

- discussions which focus attention on a single competition issue⁶ which brings about "de facto" consistency of approach notwithstanding the legal differences⁷

- the sharing of information, experiences and analytical approaches at CLP meetings
- a series of publications setting forth model analyses in a number of areas⁸
- cooperation and consultation among competition jurisdictions, as seen in the significant use of the 1986 OECD Recommendation and the growing number of bilateral competition cooperation agreements
- comity among jurisdictions in order to take account of the interests of other Member countries in formulating and enforcing competition statutes
- the development of modern competition laws which have as a minimum: provisions on conspiracies, bid-rigging, mergers and abuse of dominance/monopolies; limited and diminishing sectoral and other exemptions; provisions which are transparent and consistent with national treatment (i.e. no discrimination based on country of ownership); and provisions which are based on well articulated and accessible legal or administrative processes⁹
- competition enforcement processes and institutions which are independent or otherwise sufficiently insulated from undue political and business pressures
- greater stress on competition and efficiency related economic criteria over broader socioeconomic objectives; and for a consistent efficiency-based approach to be applied to all parts of the same statute
- the application of a flexible, economics-based, case-by-case approach to most business arrangements and practices with the exception of price fixing, market sharing and bid-rigging activity as well as non-price vertical restraints.

9. As a result of this work, innovation and experimentation in competition law and practice by individual Member countries is increasingly taking place within the context of a coherent set of general rules, principles and international benchmarks which provide an important context for national law reform as well as international competition cooperation. This is where the process of convergence has made its most important contribution.

10. Convergence may be more important or more likely to occur in some parts of competition law and practice than in others. The Committee believes that less emphasis should be given to strict uniformity in law and institutions and more to greater similarity in underlying principles, policy objectives and enforcement efforts. Progress is more likely in areas which do not require substantive changes to and convergence in national laws and institutions. Finally, perhaps the highest levels of convergence may be anticipated with respect to the analytical methods which are employed in assessing cases, collecting and analyzing evidence, and developing enforcement policies and guidelines. These can include: market definition and analysis; the identification and analysis of entry barriers; the treatment of foreign competition; the methods used to analyze technological change; and the treatment of static and dynamic efficiencies.

11. Based on work to date, the CLP Committee finds convergence emerging with respect to the issues set forth in the Annex to this Report. These areas are discussed at a fairly general or conceptual policy level.¹⁰ These general concepts can provide a basis for international cooperation where details of specific cases can be discussed among competition authorities and within the CLP.

4.0 Areas for future work

12. The Annex suggests that considerable progress towards convergence has taken place with respect to objectives and other principles, analytical tools, enforcement practices and some areas of substantive law such as horizontal agreements and resale price maintenance.

13. While some convergence is apparent in other areas as well, the Annex also notes that important differences among jurisdictions remain particularly with respect to the coverage of competition laws, the treatment of non-price vertical restraints, abuse of dominance and monopolisation as well as merger review. Moreover, the topics covered in the Annex address only a portion of the many difficult issues covered in a typical competition statute and in international competition relations and business practices. More work is therefore needed to develop greater understanding and consensus on benchmarks for competition law and practice. This is the purpose of the medium-term work program set forth below. This program covers essentially the next three years, 1994 to 1996 inclusive.

14. The major elements of the medium-term work programme approved by the CLP Committee are set out below.

- Continuing work on the **key analytical tools** in competition policy and enforcement.
- Examining **current enforcement practices** and **means for strengthening international cooperation** in a globalised economic environment.
- Continuing to examine the potential for competition policy to be incorporated in **future international agreements**. A first Roundtable has been held jointly with the Trade Committee in April 1994.
- Examining the application of competition rules to **publicly sanctioned monopolies**.
- Continuing the CLP's work on the potential for greater **sharing of and assistance in obtaining confidential information**, using as a point of reference the exchanges of sensitive information between governments which take place in such areas as taxation, securities law and money laundering, as well as the provisions contained in existing bilateral agreements in the competition policy area.
- On the basis of the findings of a recently published study, continuing efforts to harmonize the **filing and review processes with respect to mergers**¹¹

15. The medium-term work programme proposed here is designed to allow the OECD to continue to take a leadership role in the international convergence of competition policies and to facilitate interaction between competition policy and other policy areas like trade and investment.

ANNEX

AREAS OF CONVERGENCE IN COMPETITION POLICY AND LAW

A. Definitions, Principles, Objectives and Coverage

Definition of Competition Policy

1. In accordance with the practice employed in the majority of OECD countries, competition policy is defined as the body of laws and regulations governing business practices (horizontal or vertical agreements between enterprises, abuses of dominant positions, monopolization, mergers and acquisitions). Broader definitions of competition policy exist in some countries, which include all government policies which affect competition such as aids and subsidies to enterprises, regulation of prices and output of monopolies, and demonopolization. These latter policies will be mentioned below to the extent that they overlap or interact with the narrower concept of competition laws and their enforcement.

Principles Underlying Competition Law

2. There is a growing trend among OECD Member countries that competition policies and laws are to be designed and enforced in a manner consistent with the principles of non-discrimination and transparency; as well as with due process and the rule of law. These features of competition policy and law are a key source of their effectiveness and credibility both domestically and as an instrument of international economic efficiency and integration. In addition, competition policy instruments are increasingly being applied in a manner consistent with the principle of comity among nations so that the enforcement actions of one country take account of the sovereignty, competition policy and related economic interests of other countries. Comity is an important principle underlying competition policy and its enforcement.

3. While significant differences continue to exist based on the political and economic structures of individual Member countries, many Member countries are making significant efforts to better ensure that their enforcement policies, practices and decisions are appropriately insulated from undue political pressures and influences. When broader public interest concerns are raised, efforts are being made to better ensure that these interventions are selective, transparent and fully accountable to legislatures and the general public.

Objectives of Competition Policy

4. There is general consensus that the basic objective of competition policy is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources - and thus efficient market

outcomes -in free market economies. While countries differ somewhat in defining efficient market outcomes, there is general agreement that the concept is manifested by lower consumer prices, higher quality products and better product choice.¹²

5. There are a number of other broader objectives such as pluralism, decentralization of decision-making, promoting small business, achieving greater fairness in marketplace transactions, promoting the ability to compete in international markets and similar objectives frequently encompassed by notions of public or general interest which are present in the statutes of some, but not all, countries. Another important goal is opening up markets which are in some way sheltered from competition. These supplementary objectives may sometimes conflict with the efficiency objective. At the same time, they are often important to securing broad-based political support for the establishment of modern competition laws and institutions or for the reform of existing laws and institutions.

6. While a certain amount of diversity is apparent in the objectives revealed in OECD countries competition laws, it is not clear that this diversity is a significant obstacle to the achievement of greater convergence across the major areas of competition policy, as shown in subsequent paragraphs.

Coverage of Competition Law and Policy

7. There appears to be a consensus in OECD countries that in order to achieve their principal objective of promoting efficiency, competition laws need to be applied uniformly and universally throughout the economy with a minimum of exemptions.

8. The primary target of all countries' competition laws is anti-competitive conduct by private or - in varying degrees - public enterprises engaged in all kinds of economic activity to the extent that this conduct is not subject to regulatory control under some other statute. The sectors frequently, partially or sometimes totally excluded from the purview of the competition laws are therefore those where there are special reasons for believing that competition cannot function to ensure an efficient outcome of the market. In other words, some perceived lasting failure of the market requires special government regulation. Another reason for regulation is the priority given to the provision of universal service which may only be achieved through regulation. The sectors where activities have been frequently exempted are the public utilities -- gas, electricity and water, telecommunications and the various transport modes. There may also be broader socio-economic reasons for regulating activities so that agriculture, banking and insurance may not be fully covered. In addition, regulation and exemption from competition laws have often resulted from the efforts of particular industry pressure groups to shelter the industry from competition. The CLP Committee recognizes that at times regulations are necessary for reasons related to market failure (due to natural monopoly, externalities, or asymmetric information). In these instances, there is a trend for exemptions from competition laws to be allowed only when and to the extent necessary to achieve the regulatory purpose; and competition authorities often try to continue to have the power to exercise control of abuse. Accordingly, the trend is for any such exemptions to be limited to regulated conduct clearly specified in the statute or its regulations, for every effort to be made to isolate the market activities from

the non-market ones, and to fully apply competition laws to the former. In addition, the regulatory scheme is often assessed critically to ensure that the instruments used are the ones which cause the least harm to economic efficiency and are least likely to lead to concerns for competition agencies.

9. There is an increasing recognition in all countries of the need to re-examine the justification for special forms of regulation due to the perception that regulation may also not result in an efficient outcome in particular markets. In response to this perception, as well as changing economic and technological conditions, the last decade has seen the abolition or reduction in the amount of direct regulation and the subsequent extension of the application of competition laws to activities in the energy, banking, transport and communications sectors. In this context, the recommendations made by the OECD Council in 1979 remain relevant: countries should re-evaluate the sectoral exemptions granted to see whether they are still justified in terms of costs and benefits to the public, and if they are, to try to ensure that express or implied exemptions from restrictive business practices statutes are no broader than necessary to achieve the objectives of the regulatory schemes. In addition, only those activities which are required or approved by the competent authorities to achieve the purposes of the regulatory scheme should be exempted from control under competition laws and appropriate powers given to the competition authorities to combat behaviour which goes beyond the scope of the regulation. There is also increasing recognition that any such exemptions should be limited in time, and periodically reviewed to ensure that the conditions initially justifying the exemption continue to operate.¹³

10. While there has been a widespread shift away from public enterprise and towards the private provision of goods and services in OECD countries, public enterprises, whether owned by the national government, state or local authorities are also sometimes not covered by competition laws. A distinction must be made between public enterprises operating in competitive markets and public monopolies which are granted an exclusive right to operate services or produce. Where such enterprises do not enjoy monopoly status, there is a consensus that such firms should be subject to competition laws in the same way as private enterprises, although there are still gaps in the coverage of some national competition laws in this regard. Where public monopolies exist, many OECD countries are giving consideration to possible restructuring, separating out any potentially competitive activities and fully applying the competition laws to such activities. In the wake of deregulation and privatisation, it has often been found necessary in some countries to strengthen the enforcement of competition laws and to ensure that public regulation is not replaced by anti-competitive behaviour.

11. Another area where there has frequently been incomplete coverage is that of professional services. As a result largely of such professions being allowed a considerable degree of self regulation, many practices operated by professionals such as restricting entry, preventing advertising and fixing fees did not fall within the legislation in some countries. The last decade has witnessed a significant extension of competition laws and their enforcement to professional services.

12. There would seem to be agreement in many OECD countries that competition laws should not extend to agreements between employers and employees relating to the terms and conditions of employment, since these are viewed as falling within the scope of social or labour policy rather than competition policy. Some OECD countries however are giving attention to ways of increasing the

efficiency of their labour markets by extending the scope of their legislation to certain labour markets.

13. In earlier work of the Committee, the issue has been addressed as to how far practices of multinational enterprises fall within the scope of competition laws. It is generally recognized that conduct which amounts to a simple allocation of functions among enterprises under common control is not considered to be collusive behaviour. Such conduct may, however, fall under the provisions on monopolization or abuse of a dominant position to the extent that it has an anti-competitive effect on third parties.

B. Analytical Tools

Market Definition

14. Economic analysis is playing an increasing role in the enforcement of competition laws and this has led to increased emphasis in recent years by competition authorities and analysts on a correct approach to several areas which require careful consideration when determining the prevailing degree of competition in a given market, for example, the definition of the relevant market, the identification of barriers to entry to that market and the treatment of import competition in enforcement cases.

15. Proper market definition is critical to effective antitrust enforcement because it identifies the products and firms which compete or might compete with one another. This knowledge is essential to the analysis of agreements, practices by dominant enterprises and mergers. For example, a narrow market definition is more likely to lead to a finding of market dominance or substantial market power than a broader definition.

16. There are two dimensions to the relevant market -- product and geographic. The relevant product market in a particular case may be a single homogeneous product or a variety of substitutable goods, while the relevant geographical market may be local, regional, national or international. Substitutability or interchangeability of products from the point of view of the buyer are important in defining both product and geographic markets.¹⁴ On the supply side, sellers who produce or who could easily switch production to the product in question must also be considered. In addition, specific types of buyers may constitute separate relevant markets.

17. Competition authorities in OECD countries use two closely related approaches in defining the relevant market. One is to consider what factors buyers actually take into account in switching to other products and the other is to assess indirectly the substitution behaviour of buyers. The first method involves considering a variety of factors such as the technical or functional substitutability, the comparability and correlation of prices, both over time and at a given point in time, switching costs and buyers' perceptions. It would seem that some competition authorities prefer another method consisting of making an estimation of the relevant market based on homogeneous goods and adding to this by including more or less close substitutes as described by buyers.

18. As trade and other barriers come down and the international economy becomes more integrated, the appropriate geographic market for antitrust purposes consists increasingly of two or more countries or at times the total

international economy. The result is that some national matters which in the past might have raised competition concerns are no longer problematic, while the same problems have now become cross-border issues involving two or more jurisdictions and international anti-trust analysis and enforcement.

Barriers to Entry

19. Factors which prevent or deter entry are important considerations in determining how competitive a particular market is, along with the number and size of competitors. As with the definition of the relevant market, with which they are closely related, the analysis of entry conditions is an important starting point for determining the degree of competition prevailing in a particular market. They are especially important in the context of evaluating horizontal mergers and the behaviour of dominant firms.

20. While significant differences continue to exist among jurisdictions, academics and competition policy practitioners with respect to the identification and treatment of entry barriers, the analysis of barriers among antitrust jurisdictions is increasingly focused on:

- sunk costs¹⁵ (particularly in association with economies of scale and scope and product differentiation -- with the latter often related to advertising or marketing expenditures or to patents, trademarks or other intellectual property);
- government erected statutory or regulated barriers (e.g. in relation to international trade barriers, mandatory standards, industrial incentives, and other policy interventions);
- the possible use of strategic behaviour by incumbents to discourage entry (including raising rivals and own costs); and,
- the imperative to differentiate entry barriers from healthy inter-firm rivalry.

21. From the economic perspective, barriers can be either technical or strategic. Technical barriers relate to production technology (e.g. economies of scale) whereas strategic barriers arise from expenditures purposely undertaken to deter entry (e.g. foreclosure of distribution facilities to new entrants), though these often can overlap.

22. A list of the varied structural and behavioural factors constituting barriers to entry is difficult to establish. A common thread through most OECD countries consideration of this issue from the point of view of enforcement and empirical case studies is, however, that these factors include economies of scale and scope (especially if these are associated with substantial sunk costs) and product differentiation, whether this is achieved by advertising or marketing expenditures or by patents and trade marks.

23. In sum, all countries recognize the importance of identifying obstacles to entry in their analysis of the competitive structure and behaviour of a given industry. Where there is good reason to believe that entry at sufficient scale is quick and easy in a well-defined market, there is a growing agreement that potential competition should be sufficient to prevent incumbents from exercising market power. However, where high barriers discourage prompt new entry, the competent authorities may have to decide on a case-by-case basis what structural or behavioural remedies should be applied.

C. Substantive Rules

Horizontal agreements

24. Horizontal agreements, agreements between actual or potential competitors, can reduce, eliminate or increase competition. The effects of horizontal agreements on competition are often paralleled by effects on trade.

25. There is a strong consensus among competition officials on the proper enforcement posture towards horizontal agreements even though legal structures and terminology differ across jurisdictions. Two broad categories are drawn. The first is "hard core cartels" or "naked restraints" such as price fixing, output restraints, market division, customer allocation and bid rigging which can be normally expected to reduce or eliminate competition and to lack redeeming effects on economic efficiency. Once an agreement is so characterised, it is prohibited outright in almost all OECD Member countries.

26. Second, agreements may involve co-operation among competitors which may not harm competition in the market overall or in which the harm to competition may be counterbalanced by other considerations. In some jurisdictions, the legality of these agreements depends on the outcome of a potentially extensive case-by-case or "rule of reason" examination. In others, guidelines, regulations or block exemptions are used to give guidance in at least a portion of the cases. Among the kinds of co-operation among competitors which fall into this second category are standard setting, joint research and development, certain joint ventures, and, in most instances, joint purchasing.

27. Export cartels are arrangements between firms which have substituted an agreement on prices, output or related matters for independent decision-making in relation to goods or services to be exported to foreign markets. Not all co-operative arrangements among export firms are considered to be export cartels, but only those which seek to restrain competition through cartel-like behaviour. Co-operation is often required particularly for small and medium-sized enterprises if they are to be able to export at all. Consequently, determination that an arrangement is an export cartel involves consideration of the structure, purpose and effects of the arrangement.¹⁶

28. Effective enforcement against export and other cartels will necessarily centre on the jurisdiction(s) in which the anticompetitive effects are felt although much of the information necessary for successful prosecution will often be located in another country. This means in turn that if Member countries wish to facilitate action against such agreements, they would need to focus on developing for competition officials the legal mechanisms for co-operation in international cartel investigations and especially for the sharing of information among national competition offices.

Vertical relationships

29. Vertical relationships range from transactions between completely independent enterprises to the integration of two or more levels within a single enterprise. Between these extremes fall contractual arrangements which restrict the freedom of action of the upstream or downstream firm (or both).

30. Policy discussions concerning these contractual relationships have focused on non-price vertical restraints, as vertical price restraints - resale price maintenance - with some exceptions are prohibited per se in nearly all OECD Member countries.

31. Non-price vertical restraints such as exclusive territories and exclusive dealing agreements can have a variety of effects on both trade and competition. In terms of procompetitive effects, vertical restraints can be efficiency-enhancing through such means as improved co-operation and mutual commitment, reduced free-riding, the certification of quality to consumers, reduced cost of entry and improved sharing of risk. In this way, these procompetitive effects can have parallel positive effects on trade through the lowering of barriers to entry and increasing market access.

32. On the other hand, non-price vertical restraints may decrease intra-brand and inter-brand competition and may have other anticompetitive effects since they may create or enhance barriers to entry by raising rivals' costs. The risk of anticompetitive effects is increased when these restraints are widespread or are used by a firm which is dominant in either the upstream or downstream market. There is however a divergence of view on the extent to which a reduction in intra-brand competition should be considered anti-competitive.

33. When analysing the effects of vertical restraints, the likely pro- and anticompetitive effects need to be weighed. Because these effects depend heavily on the facts and may vary over time, it is difficult to recommend a priori that a given non-price vertical restraint should be considered to be either legal or illegal in all jurisdictions. Rather, a case-by-case evaluation is called for. In this evaluation, the behaviour of the firm, its position on the market in which the restraint occurs as well as the structure of that market are factors to be taken into account.

34. New entry by a foreign firm may be considerably more difficult if non-price vertical restraints such as exclusive dealing tie up domestic distribution systems. This difficulty is increased if the restraints will run for many years but would be decreased if the market is expanding or alternative distribution systems are being created. Vertical restraints such as exclusive dealing may facilitate new entry, for example a new entrant may find it helpful to offer an exclusive arrangement as an incentive to a potential distributor in a new market.

35. The distinction between static and dynamic effects should be kept in mind when analysing the effects of vertical restraints. It may occur also that the net effect of a vertical restraint is perceived as procompetitive under standards of competition law in one country while it might be perceived as anticompetitive or trade distortive by another country (e.g., when a distribution system is regarded as efficient and duly competitive between brands but it is not possible for potential competitors, including foreign ones, to enter).

D. Abuse of Dominance/Monopolization

36. While the Committee has yet to address the related areas of abuse of dominance and monopolisation, it notes that some issues relating to both are treated in this report, e.g., market definition, barriers to entry and vertical

restraints. In addition, the Committee has issued a report on predatory pricing, which is one type of conduct indicative of monopolisation or which constitutes an abuse of dominance¹⁷. Although convergence in the area of abuse of dominance and monopolisation is not as advanced as in other areas of competition law, consensus is emerging that the main thrust of these provisions is to protect the process of competition rather than the viability of individual competitors.

E. Merger Review Process Issues

37. Some progress has already been made in bringing about convergence in merger review standards and related enforcement policies and practices. Approximately two years ago, the CLP Committee concluded that rather than addressing the remaining differences in merger review standards -- some of which could prove to be quite intractable -- near term work should focus on process issues.

38. A subsequent resulting study, which has now been derestricted and published, provides a number of practical recommendations for convergence in merger review processes among jurisdictions. These recommendations have received considerable support from Member countries of the CLP Committee, but full approval awaits further study and consultations with business groups. The recommendations before the Committee include the following:

- development of more specific guidelines for the application of the 1986 OECD Recommendation in connection with merger investigations, including suggestions to: (i) notify at an earlier stage; (ii) establish contact directly between the competition authorities; and, (iii) notify every other competition authority known or understood to be investigating, or likely to investigate, the transaction;
- development of one or alternate models of a protocol for parties to a merger to waive confidentiality protection in order to permit the sharing of confidential information among reviewing authorities;
- collection and dissemination to other Member countries of each member's guidelines on the application and interpretation of their confidentiality laws as applied to merger investigations;
- development of a model formulation that Member countries could incorporate into their merger notification forms to elicit information about notifications to, and inquiries by, competition authorities of other jurisdictions;
- measures to encourage competition authorities when requested to identify for foreign counterparts publicly available information relevant to the investigation at hand and, as far as practicable, assist in obtaining such information;
- consideration of the feasibility of model filing forms for those questions that are likely to be common to the various authorities examining the same transaction.

Working Party 3 of the CLP Committee is now actively considering these proposals.

F. Effective Enforcement

Enforcement Issues Generally

39. There is agreement in OECD countries that the enforcement of competition laws should be a transparent, even-handed process with a minimum necessary of compliance costs to enterprises (recognizing as well the growing budget constraints faced by many antitrust authorities) and cost-effective methods employed by the enforcement authorities. Hence, there is recognition that the rules of competition should, to the extent possible, be simple and clearly understood in the light of enforcement practice. In addition to formal decisions or regulations adopted under the basic legislation, this implies that the competition enforcement authorities may and do have recourse to guidelines and advice on business conduct.¹⁸

40. There is also a widely held view that in order to ensure fairness and legal certainty, competition laws should be enforced by an authority that is insulated from undue political pressure and subject to judicial review of its decisions. Where responsibility is shared with other government regulatory authorities for the particular sector, all countries take the view that the respective areas of responsibility should be clearly set out in the relevant legislation so that competition matters are separated out from regulatory functions.

41. Because of the resource constraints faced by many agencies, there is also a trend toward: more selective application of the law -- emphasizing the most serious anti-competitive conduct involving significant amounts of economic activity; more compliance-oriented and "fix-it-first" approaches; and the use of techniques short of litigation to resolve cases.

42. Most countries' competition laws cover a mixture of practices which are generally prohibited, such as horizontal price and market-sharing agreements, collusive tendering and resale price maintenance and those which are subjected to a case-by-case examination, such as other non-cartel horizontal or non-price vertical practices, mergers and acquisitions. The transparency objective is particularly important for practices which may or may not be anti-competitive according to the particular circumstances of the case.

43. For some agreements and practices which are prohibited, many statutes recognize that procedures for seeking exemptions or authorizations should be available for enterprises wishing to claim that their conduct confers benefits which outweigh any anti-competitive effects. Such procedures may consist of blanket exemptions for particular categories of agreement or provisions allowing individual exemption if certain benefits can be demonstrated.

44. If there is agreement on the principles of enforcing competition laws, the actual procedures for investigating, prosecuting and sanctioning anti-competitive behaviour are widely different. One major difference is that certain practices are treated as criminal offences under some legislations but as administrative under others. There is however widespread agreement that the hard core cartel offences should be dealt with severely, whether criminally or administratively. This is seen by the extent of the sanctions imposed in many jurisdictions on enterprises which have engaged in price-fixing.

45. All countries agree on the need for a range of remedies to deter anti-competitive conduct. Such remedies include injunctions, divestiture,

damages, undertakings, as well as pecuniary penalties and sometimes imprisonment, depending on the jurisdiction. The need for adequate remedies to deter and punish anti-competitive behaviour is evident in all competition statutes, and many jurisdictions have substantially increased the level of fines in recent years.

46. As regard pecuniary penalties, while there appears to be a wide convergence among countries, four factors (at least) are often addressed in assessing the appropriate level -- the seriousness of the offence in terms of the effects on competition; the intent of the firms involved, the profits accruing to them as a result of their offence as well as their ability to pay the fines. Some countries also impose fines on individual while others are pursuing the potential for fining individuals as well as companies, and the potential to employ compensation for damages.

47. Under the legislation in most countries a role is prescribed for both public and private enforcement of competition laws, though the scope for each varies considerably from country to country. In most countries, however, enforcement is primarily the responsibility of the public authorities on the grounds that much anti-competitive conduct has repercussions beyond the parties engaged in such conduct or their victims, raising broader issues of the impact of such conduct on the economy as a whole or on the public interest. Thus, private actions in these countries are relatively limited as a means of remedying such behaviour. However, there appears to be a growing desire in many countries to increase the role of actions in competition law enforcement brought by the parties who have been injured by anti-competitive conduct, since it permits a direct mechanism for private parties to obtain compensation and increases deterrence. In some countries indeed, the number of private actions brought exceeds the number of public enforcement actions. There does not, however, appear to be a consensus about the scope of such actions. For example, should private remedies include single or treble damages provisions both to deter anti-competitive conduct and to encourage private actions? Should private actions be limited to certain generally prohibited conduct or also to mergers and acquisitions?

International Enforcement

48. As regards enforcement of domestic legislation against anti-competitive practices which have an international dimension, some countries recognize the legitimacy of taking action against practices which have an effect on the domestic market, subject to international comity considerations. There are, however, differences of view as to the legitimacy of taking action which may involve the jurisdiction and sovereignty of another country.

49. In practice, as well as in theory, there are difficulties in enforcing laws when essential information is held within another jurisdiction or when the enterprises engaging in such behaviour are not located on national territory.

Information Sharing and Mutual Assistance

50. All countries agree on the usefulness of international cooperation in the exchange of information, subject to the constraints of confidentiality and foreign sovereignty which may inhibit such exchanges. Much of the CLP's work in the past has been concerned with encouraging exchanges of information.

51. Because of the legitimate concerns of private parties regarding the protection of commercially sensitive information, there have long been confidentiality provisions in Member countries' statutes.

52. While recognizing the need to protect commercially sensitive information, effective enforcement of competition laws in a global economy would be facilitated if appropriate mechanisms existed for the sharing of confidential information among competition law enforcement officials. Such mechanisms already exist in other policy fields, including taxation, money laundering and securities regulation.

53. Information sharing and mutual assistance is also often necessary for effective enforcement in almost all areas of competition law enforcement but is particularly important for the successful prosecution of international cartels, bid-rigging and similar anti-competitive practices which are covert, have highly negative economic effects and can correspond closely to criminal fraud. These issues are to be further explored as part of the CLP Committee's medium-term work programme on convergence (see section 4.0, paragraph 14 above).

NOTES

1. [SG/Press(91)31, pages 7-8].
2. [SG/PRESS(92)43, page 7].
3. See COM/DAFFE/CLP/TD(94)4.
4. Although some competition authorities may disagree, trade policy specialists are particularly concerned that the emphasis on domestic efficiency allows vertical and other business arrangements to impede market entry by foreign companies through imports, direct investment or alliances with domestic firms.
5. Each country must have the latitude to test and refine alternative approaches to competition law and enforcement. Like the market itself, competition policy requires innovation in order to respond to the rapidly changing global economy and changing economic thinking.
6. Recent and upcoming topics include the objectives of competition policy, the evaluation of vertical and horizontal arrangements, the identification of barriers to entry, market definition, the evaluation of efficiencies and the collection of evidence.
7. This point is particularly important to the convergence process. Because competition law is heavily fact and analysis based, more common approaches in how competition authorities collect and evaluate information can pay important dividends in reducing the compliance and administration costs of reviewing international transactions and practices, and could go some way in alleviating any burdens of differences in law and process among jurisdictions. For some enforcement cases, if two jurisdictions can agree on what is the relevant market, the key products from a competition perspective and the major barriers to entry, questions of whether (for example) a total efficiency or market integration approach are applied may take on less importance.
8. The Committee has published an extensive series of monographs over the years which have had some influence over policy development. For example, the analysis recommended in the Committee's 1989 report Predatory Pricing can be found to an important degree in the subsequent Canadian enforcement guidelines on the same subject. Other major Committee reports in recent years include Competition and Trade Policies: Their Interaction (1984), Competition Policy and the Professions (1985), Competition Policy and Joint Ventures (1986), International Mergers and Competition Policy (1988), Deregulation and Airline Competition (1988), Competition Policy and Intellectual Property Rights (1989), Competition Policy and the Deregulation of Road Transport (1990), Regulatory Reform, Privatisation and Competition Policy (1992) and Competition Policy and a Changing Broadcasting Industry (1993). Still other reports have been discussed within the Committee during these years but were subsequently published under the responsibility of the Secretary General.
9. For example, a number of Member and non-Member countries have recently drawn upon the expertise of CLP Delegates when drafting new competition laws.

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10. Too much detail runs the danger of highlighting differences between jurisdictions which may be of limited importance to international economic integration and competition cooperation. Further, international benchmarks at a fairly conceptual or general level best convey the Committee's view that there should be considerable latitude for individual countries to develop their own competition laws, policies and practices consistent with their needs, current stage of economic and institutional development, legal systems and competition history and experience.
11. Merger Cases in the Real World - A Study of Merger Control Procedures (1994).
12. Allocative efficiency in the sense of a better use of resources would seem to be the major type of efficiency which competition laws are designed to achieve. But the achievement of productive or dynamic efficiencies is also an objective of some countries' laws in order to give clearer recognition to the importance of technological research and innovation as a means of obtaining better products and processes.
13. Council Recommendation on Competition Policy and Exempted or Regulated Sectors of 25th September 1979 [C(79)55(Final)].
14. This is measured theoretically by the cross-elasticity of demand, which measures how demand for a given product changes in response to a change in the price of a second product. The greater demand increases the more substitutable the products are.
15. Sunk costs are the fixed and irrecoverable costs of entering or exiting a market. Their existence increases an incumbent's commitment to the market and may signal a willingness to respond aggressively to entry. See OECD Glossary of Industrial Organisation Economics and Competition Law, 1993, p. 82.
16. See Competition and Trade Policies: Their Interaction, OECD, Paris 1984, paragraphs 12 & seq. for an analysis of export cartels, their trends and effects.
17. Predatory Pricing, OECD, Paris 1989. In this report the Committee on Competition Law and Policy notes the usefulness of a two-tier approach towards predatory pricing. The first involves looking at market structure and entry conditions to ascertain whether the alleged predator would be able to exercise market power. The second phase would involve a detailed examination of the firm's costs and prices if it survived the first test. As regards non-price forms of predation, the report notes that these practices may be more pervasive than predatory pricing. However care needs to be taken to distinguish pro-competitive product innovation from raising rivals' costs.
18. Transparency is seen as important regardless of variations in substantive rules. However, as clear per se rules are replaced in some jurisdictions and for some provisions by rule-of-reason/case by case approaches, Member countries are becoming even more transparent in sharing with their business and legal communities information on their enforcement policies and practices and on their analytical methods. Increasing transparency can involve the publication of enforcement policies and guidelines, information bulletins, comfort/advisory

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letters, individual and block exemptions under E.C competition rules, etc. depending on the jurisdiction.