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HARD CORE CARTELS -- RECENT PROGRESS AND CHALLENGES AHEAD

Attached is a background document for Session II of the Joint Global Forum on Trade and Competition to be held on 15-16 May 2003.

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TABLE OF CONTENTS

Boxes

HARD CORE CARTELS – RECENT PROGRESS AND CHALLENGES AHEAD(*)

1. Introduction

1. "Hard core cartels are the most egregious violations of competition law." This conduct, which includes agreements among competitors to fix prices, restrict output, submit collusive tenders or share markets, "injures consumers in many countries by raising prices and restricting supply." It "distorts world trade" by creating "market power, waste and inefficiency in countries whose markets would otherwise be competitive." These are conclusions from the 1998 Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels.[1]

2. The Council Recommendation calls upon Member countries to ensure that their laws adequately prohibit such cartels and provide for effective sanctions, enforcement procedures and investigative tools with which to combat it. The Recommendation also urges Member countries to co-operate with one another in prosecuting hard core cartel conduct, in a manner consistent with countries' laws, regulations and important interests, by

- sharing information, consistent with effective safeguards protecting commercially sensitive and other confidential information,
- acting on requests from another country for information and assistance in cartel investigations,
- engaging in consultations on issues relating to co-operation, and
- facilitating co-operation through bilateral or multilateral agreements or other instruments with other countries.

3. The Recommendation also invited non-Member countries to associate themselves with the Recommendation and to implement it.

4. In 2000 the OECD Competition Committee submitted a Report to the Council on Implementation of the Council Recommendation. The Report noted that in the two years since the Recommendation there had been progress in raising the public consciousness about the harmfulness of cartels and in prosecuting them, but that much remained to be done. The Report explored in depth the topics of international co-operation in cartel investigations and the obstacles to more effective co-operation. It recommended that the OECD conduct an intensified "phase II" anti-cartel programme with further study of the harm from cartels, effective investigative tools in cartel investigations, optimal sanctions against cartels and international co-operation.

5. In the intervening years since the 2000 Report the Competition Committee has had as one of its highest priorities the study of these several topics relating to cartels, with a view toward increasing the knowledge and understanding of this conduct and enhancing efforts to combat it. This Report describes that work. In successive sections it discusses the topics of harm caused by cartels, public awareness of the conduct and reactions to it, effective tools for investigating cartel conduct, effective sanctions against cartels and enhancing international co-operation in cartel investigations. Finally it presents some conclusions and recommendations resulting from the Committee's work.

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2. The Harm from Cartels

6. A principal goal of the Competition Committee in this second phase of its work on hard core cartels has been to enhance public understanding of the harmfulness of cartels. A sustained and concentrated effort against the practice can only be mounted if the harm that it causes is well understood. To this end the Committee conducted an extensive survey of its Members and of some non-Member countries that participated in the OECD's "Global Forum on Competition" in 2001 and 2002. The survey sought information about recent cartel cases prosecuted in the responding countries, and specifically about the economic harm that these cartels caused. The results of the survey are discussed fully in a separate report, published in 2002, entitled "*Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*." The principal findings and conclusions of that report relating to cartel harm are set forth below.

7. Cartels harm consumers and have pernicious effects on economic efficiency. A successful cartel raises price above the competitive level and reduces output. Consumers (which include businesses and governments) choose either not to pay the higher price for some or all of the cartelised product that they desire, thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further, a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these effects harm efficiency in a market economy.

8. It is not easy to quantify these effects, however. It would require comparison of the actual market situation under a cartel to that which would exist in a hypothetical competitive market. Competition officials usually do not undertake to make such a calculation, both because it is difficult to do and because their laws usually do not require it. When an estimate of harm is necessary, most officials employ a proxy, which is the unlawful gain accruing to the cartel members from their activity. In its simplest form, this estimation is the product of the cartel “mark-up” above the competitive price and the commerce affected (in units) by the cartel agreement. Even this calculation can be difficult, as it requires an assessment both of the amount of “affected commerce” and of what the “competitive” price would have been absent the agreement.

9. Responses to the Competition Committee's survey described a total of 133 cartel cases. These were not all of the cartel cases prosecuted in the responding countries during the survey period (1996-2000), as reporting burdens and confidentiality requirements prevented respondents from describing all of their cases. Indeed, these 133 cases represented substantially less than half of the total number of cases prosecuted by OECD and responding non-member countries during the period, although they did include many of the larger ones. Moreover, for the reasons outlined above, the responding countries were unable to provide good estimates of harm in most cases. Thus, a precise estimate of the total world-wide harm from cartels remains an elusive goal. The Competition Committee's survey did provide some illuminating information in that regard, however.

10. The Annex provides information about some of the larger cases reported in the survey. It was possible to estimate the amount of affected commerce in 16 of these large cases. The total for the 16 cases exceeded the equivalent of USD55 billion. In some of the other reported cases it was not possible to provide a specific estimate of affected commerce, but the reporting agency noted that it was surely very large. The Annex also provides estimates of harm, expressed in terms of percentages of affected commerce, that could be derived in 14 of the cases. These estimates range from a low of 3% to a high of 65%. The median is between 15 and 20%.[2] Thus, taking into account: (1) that these reported cases represent only a fraction of all cartels, known and unknown, that existed during the survey period, and (2) the actual loss to consumers caused by cartels is more than just the gain transferred to the cartel, as

discussed above, one can only conclude that the total harm from cartels is significant indeed, surely amounting to many billions of dollars each year.

11. A recent and dramatic development in cartel prosecutions has been the discovery of very large cartels that operated internationally; some of them were world-wide in scope. Their participants were multinational companies headquartered in different countries. Some of these cases are now quite well known within the competition community and beyond, and they include conspiracies in lysine (a chemical feed additive), vitamins, graphite electrodes (used in steelmaking) and carbonless paper. The number of reported international cartels was relatively small – only 14 of the total number of 133 cases. The amount of commerce affected by these cartels was disproportionately large, however, amounting to more than half of the USD55 billion that could be identified. Moreover, even "domestic" cartels can have significant harmful effects on international commerce. For example, as discussed in the 2000 report, Spain's domestic sugar cartel created a competitive disadvantage for all Spanish exporters of products containing sugar.

12. It is difficult to generalise about these international cartels because of their small number, but the markets in which these cartels operated tended to be highly concentrated, to involve homogeneous products and to have at the centre of the conspiracy an industry trade association, which provided opportunities for conspirators to meet and agree. Several of the international conspiracies had devised complex price fixing schemes, which were augmented and made more transparent for their members by market allocation agreements, either in the form of quotas or territorial agreements.

13. By number, the great bulk of the reported cartels were domestic cartels, which operated entirely within a country's borders. The survey provided some interesting information about the general characteristics of these cartels. Domestic cartels occurred in all economic sectors, but they were relatively more common in some sectors, including construction and construction materials (cement, concrete, asphalt), sales to government institutions, bulk food products, electrical equipment, retail sales of petrol and the services sector, including in particular local transportation services, the professions and health care. Within this group of sectors the ones most affected, by a large margin, were construction materials and services and government procurement. It has long been known that these sectors were vulnerable to cartel conduct. There is hardly a country that has actively enforced its competition law that has not prosecuted one or more cement, concrete or asphalt cartels, for example. In the United States, which has long been active in anti-cartel enforcement, there were scores of cartel prosecutions in the construction and public procurement sectors in the 1970s and 80s, and they continue.

14. Domestic cartels also shared certain characteristics, including high concentration (but not necessarily in some service markets), homogeneous products and, as with the international cartels, the existence of an industry trade association that provided "cover" for cartel meetings and facilitated their agreement in other ways. Some of these cartels had existed for many years, especially in countries that had begun prosecuting cartels only relatively recently. A cartel of electric wiring contractors in *Denmark*, for example, had existed for "several decades," and a power cables cartel in *Germany* "had its beginnings date back to 1902." There was less information about the harm from domestic cartels in the responses to the Competition Committee's survey than that from international cartels, and thus it remains difficult to quantify. Such harm is without question very great, however, in light of the large number of these agreements that are sure to exist.

15. The survey confirmed that the parties to cartel agreements, for the most part, are not honest businessmen who inadvertently became involved in a technical violation. Rather, in these cases they fully realised that their conduct was harmful and unlawful, causing them sometimes to go to great lengths to keep their agreement secret. Here are some examples:

- Fire protection devices, Australia: Officials from one of the largest corporate defendants provided detailed evidence of deliberate destruction of incriminating documents after ACCC document demands were received. Two men, with the approval of their superior, loaded two automobiles with bid files and took them to the country, where it took a full day to burn them in "four huge bonfires."

- Driving schools, Denmark: One person remarked: " . . . [I]f we compete on prices at that level, a bit of mental calculation will show that each of us would give away 75.000 DKK each year to our customers instead of earning the money ourselves. That would be a stupid thing to do."

- Lysine, U.*S.* and world-wide: The now widely-viewed videotapes of cartel meetings contain several examples of overt, knowing conspiratorial activity, including some members joking at one meeting about inviting their customers and antitrust officials to sit with them. They also show an executive from Archer Daniels Midland Company, the conspiracy leader, exhorting his co-conspirators at one meeting to support the agreement, in which he says, "I wanna be closer to you than I am to my customer . . ." a sentiment that coincided with the oft-quoted unofficial motto at ADM "Our competitors are our friends; our customers are the enemy."

- Vitamins, U.S. and world-wide: The conspirators went to great lengths to keep track of and destroy incriminating documents, including conducting internal audits to verify that such documents no longer existed. When it was felt necessary to keep certain spreadsheets showing allocations of business among the conspirators, the files were copied onto computer disks and hidden in the eaves of one employee's grandmother's house.

- Graphite electrodes, U.S. and world-wide: Top-level executives from the major producers met at a hotel and agreed to the basic rules of operation of the cartel, which were to become the "London principles." They were that only top executives would set prices, at what would come to be called "top guy meetings"; each company would respect the home market of the others; and there would be working level meetings ("working guy meetings") at which these principles would be implemented. At these meetings, charts of anticipated demand, actual sales and target prices were created for markets world-wide.

16. The survey also revealed that some of the cartels had created elaborate enforcement and punishment mechanisms for the purpose of keeping their members in line with the agreement, much as any unlawful, secret organisation would do.

- Tasmanian frozen foods, Australia: A cartel of 12 participants was dominated by one large company, which threatened the others with predatory conduct if they cheated.

- Power cables, Germany: An elaborate hearing system for cartel members accused of exceeding their quotas was devised; those accused of cheating were called to defend themselves at a meeting of high level cartel managers, and if punished they could appeal to an even higher level.

- Citric acid and lysine, U.S. and world-wide: “Compensation” schemes were devised, whereby a cartel member that exceeded its sales quota was required to purchase excess production from fellow cartel members the following year.

- Retail bread shops, *Spain*: Bread producers “took to the streets,” as reported in their association’s newsletter, and conducted violent actions against their rivals, confectioner shops.

17. There is growing evidence that cartels are especially harmful in developing countries. Many of these countries do not yet have competition laws, and those that do may not yet have acquired the specialised tools and expertise for vigorous prosecution of cartels. Thus, local cartels may operate with impunity in some of these countries. In addition, international cartels can affect virtually every country in the world. One recent study showed that in one year, 1997, "developing countries imported $81.1 billion of goods from industries which had seen a price-fixing conspiracy during the 1990s. These imports represented 6.7% of imports and 1.2% of GDP in developing countries. They represented an even larger fraction of trade for the poorest developing countries, for whom these sixteen products represent 8.8% of imports."[3]

Box 1. Recent International Cartels

The 2000 Cartel Report described in some detail a few notorious international cartels that had been prosecuted in the late 1990s, including cartels in lysine, vitamins and graphite electrodes. (The vitamins and graphite electrodes are also discussed below in Section VI, dealing with international co-operation.) The following are three representative international cartels that have been prosecuted recently.

Carbonless Paper

In 2001 the *European Commission* announced a successful prosecution of a Europe-wide price fixing conspiracy in carbonless (self copying) paper. Eleven firms, including two from France, three from Germany, one from South Africa, three from Spain and two from the United Kingdom, participated in a six-year conspiracy to raise prices and allocate markets for this product. In the last year of the conspiracy (1995), the size of the European market in this product was approximately ECU850 million. In implementing the agreement the conspirators participated in at least 25 secret meetings over the period. Five of these meetings were at a European level, and were attended by the chief executives or other high level executives of the firms. There were at least 20 meetings held at national levels and attended by lower level executives. As with other cartels of this kind, the agreement was facilitated by a trade or professional organisation, in this case, the Association of European Carbonless Paper Manufacturers (AEMCP).

The investigation benefited from a leniency application by the South African firm, which received total immunity from fines. The other participating companies were fined a total of EUR313.69 million.

Fine Art Auctions

In 2001 the *United States* prosecuted a price-fixing scheme involving the world's two leading auction houses, Sotheby's and Christie's. Throughout most of the 1990s the two firms had colluded on the commissions that they would charge to sellers of art, antiques and collectibles who placed their goods with the firms for auction. The agreement was implemented by means of a series of secret meetings between top officials of the two houses, held in Europe and the United States. The prosecution was prompted by a leniency application by Christie's, which pursuant to the U.S. leniency programme was not punished. Sotheby's was fined USD45 million. Its former chairman was convicted in a highly publicised criminal trial and was sentenced to imprisonment for one year and a day and a fine of USD 7.5 million. Sotheby's president and CEO pled guilty and provided important evidence in the trial. She was sentenced to serve six months of home detention and to pay a fine of USD350,000.

Intravenous Solutions

This case involved a conspiracy affecting two Baltic countries, *Lithuania* and *Latvia*. It is an example of how international cartels can affect all countries, including transition and developing countries. A Lithuanian producer of intravenous solutions agreed with a Latvian producer of these products that each would not export to the other’s country. The agreement was discovered during a visit to the offices of the Lithuanian enterprise by staff members of the Lithuanian Competition Office. The case was presented to the Lithuanian Competition Council, which imposed a fine upon the Lithuanian enterprise and issued an order to terminate the agreement.

Box 2. Recent Domestic Cartels

The following are three representative domestic cartels prosecuted recently.

Ready-mix Concrete

This was the largest cartel case prosecuted to date by *Germany's* Bundeskartellamt, involving 62 businesses from 28 business groups, and 42 individuals. The respondents had engaged in a series of quota agreements in the years 1999-2000, affecting Berlin and several other regions in Germany. The conspiracy affected sales of concrete worth about EUR1.3 billion. The estimated overcharges totalled about EUR112 million. The investigation was prompted by complaints about price increases received from construction companies. Later, anonymous information was also provided. Evidence of the cartel included detailed records kept by the participants, specifying in some cases the allocations of sales to the second decimal point. The system even specified who was to provide food and drink for the cartel meetings. Actual sales were regularly compared to the agreed allocations, and those who exceeded their sales quota were punished in the next allocation of contracts.

Fines totalling about EUR153 million were assessed, which amounted to about 137% of the estimated overcharges.

New York Food Brokers

The *United States* Department of Justice obtained convictions of 15 companies and 33 individuals for their participation in massive bid-rigging conspiracies affecting sales of food to New York-area public and non-profit entities, including schools, hospitals, homeless shelters and jails. Contracts valued at more than USD210 million were affected by the cartel. Many of the defendants were charged with and convicted of collateral crimes in connection with their conduct, including tax and conspiracy offences related to the nonreporting of payoffs, kickbacks and "off the books" compensation, obstruction of justice related to document destruction or concealment and fraud offences. A total of 19 individual defendants were sentenced to terms of imprisonment, more than half of whom received terms of 12 months or longer. One individual was sentenced to a jail term of 63 months. The defendants were required to provide restitution to the institutions that were harmed totalling more than USD20 million. A few more defendants await sentencing.

Snow Removal

In 2000, five snow removal companies and a consulting firm in the Greater Montreal area of *Canada* were convicted for conspiring to share the market and unduly lessen competition in snow clearing, removal and transportation. The agreement primarily encompassed major highways on the island of Montreal. The offence concerned an agreement to share government procurement contracts for snow removal for the 1997-1998 season having a total value of about $4.6 million. The six companies were fined a total of $1million. The 2000 prosecution followed on the heels of the 1999 convictions of 8 companies for a similar scheme implemented in the Quebec City area during 1994-1995, affecting snow removal contracts valued in excess of $16 million. Together, the 8 companies were fined almost $3 million and two of the companies also paid compensation to the City for damages suffered as a result of the conspiracy.

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

3. A Growing Public Awareness

19. In the four years since the publication of the Council Recommendation there has been significant progress in the fight against cartels. The public has become more knowledgeable about hard core cartels and is more aware of the threat that they present. The topic of anti-cartel enforcement is regularly highlighted at conferences on competition policy sponsored by governments and educational and private sector organisations. Every year, beginning in 1999, competition enforcement officials from 20-30 countries gather to discuss the latest developments in prosecuting cartels. These conferences have been held in the *United States*, the *United Kingdom*, *Canada* and *Brazil*. The *European Competition Authorities*, a newly-formed organisation whose members are competition officials from the European Economic Area, regularly considers issues of co-operation and co-ordination in anti-cartel enforcement. The effects of cartels on developing countries is an important topic in meetings of the *United Nations Conference on Trade and Development*, and at the *World Trade Organisation* the Working Group on the Interaction between Trade and Competition Policy is discussing the effects of cartels on trade and the appropriate response to this threat.

20. The number of cartel prosecutions by national competition agencies has steadily increased, as has the severity of sanctions imposed against them. New investigative tools for use in uncovering these secret agreements have been authorised, and national competition agencies have stepped up their efforts to co-operate in investigations and prosecutions of international cartels. The following is a list of developments in anti-cartel enforcement since 1998 in OECD member countries and non-Member observers to the Competition Committee.[4] The list is impressive, but it is quite clear that it represents only a good beginning, and that progress across countries is uneven. Following this list, the topics of investigative tools, sanctions and international co-operation are discussed in greater detail.

> *Australia*: Entered into a Mutual Antitrust Enforcement Assistance Agreement with *United States*, providing for exchange of otherwise confidential information in certain circumstances; issued draft leniency programme; prosecuted important cases in vitamins, credit card fees, electrical equipment, among others. The appropriateness of current penalties are being considered by an independent committee chaired by a former Judge of the High Court of Australia (the Dawson Committee). The Dawson Committee will report its findings and recommendations to the Government at the end of January 2003.
>
> *Austria*: Proposed a new competition law providing for higher maximum fines – up to 10% of the total annual turnover of an enterprise; prosecuted an important case in construction services.
>
> *Brazil*: Became the first non-member country to formally associate with the OECD Council Recommendation on hard core cartels; initiated a leniency programme; prosecuted important cases in steel and petrol retailing, among others.
>
> *Canada*: Formalised its a leniency programme; entered into co-operation agreements with the *European Union*, *Mexico* and *Chile* and into a three party agreement with *Australia* and *New Zealand*; strengthened investigative tools in several respects; enacted new legislation providing for the ability to enter into "mutual legal assistance agreements" with foreign agencies in parallel to its existing ability relating to criminal matters; prosecuted several important domestic and international cartels.
>
> *Czech Republic*: Initiated a leniency programme.
>
> *Denmark*: Amended its competition law to eliminate maximum fines for cartel conduct, eliminated certain exemptions for small cartels and enhanced powers to conduct dawn raids;

entered into a three-party agreement with *Iceland* and *Norway* substantially enhancing the ability of these countries to exchange confidential information; prosecuted several important cases in electrical wiring services.

European Union: In 2001, prosecuted ten large cartels, imposing fines on a total of 56 companies totalling EUR1.836 million, a record, and ten times higher than 1998; revised its leniency programme; substantially enhanced the powers of the Commission to conduct inspections (dawn raids), request information and take statements. The new regime on investigations will enter into force on 1 May 2004.[5]

Finland: Established a cartel unit; prosecuted an important cartel case in raw wood.

France: Increased maximum fine for an enterprise for cartel conduct to 10% of global turnover; initiated a leniency programme; prosecuted an important case in the banking sector; targeted cartel conduct in public sector procurement.

Germany: Initiated a leniency programme; prosecuted several important cases, including cases in construction and construction materials.

Hungary: Began enforcing a new competition law in 2001 providing for higher maximum fines for cartel conduct, enhanced investigative powers and the basis for a leniency programme.

Ireland: Initiated a leniency programme and provided for enhanced investigative tools.

Israel: Prosecuted important cases in insurance and diamond dispatching services.

Italy: Prosecuted important cases in petrol retailing and medical imaging services.

Japan: Amended competition law in 2002 to raise the upper limit of criminal fines against a juridical person for breaches of Article 3 (private monopolisation or unreasonable restraint of trade, etc.) from 100 million yen to 500 million yen; prosecuted several important cases, including bid rigging in public sector procurement.

Korea: Initiated a leniency programme; increased maximum fines for cartel conduct; amended its law to make cartel conduct per se unlawful; eliminated several sectoral exemptions to the anti-cartel law.

Lithuania: Prosecuted important cases in meat processing, construction services and construction materials.

Mexico: Prosecuted important cases in citric acid, vitamins and lysine (international conspiracies) and in pasteurised milk; entered into a co-operation agreement with the *European Union*.

Netherlands: Prosecuted several cartels under its new competition law; introduced a leniency programme and guidelines for imposing fines; prosecuted important cases in veterinary products and mobile telephone subscriptions.

New Zealand: Conducted a study of optimal sanctions against cartels; increased maximum fines for cartel conduct and provided for the award of exemplary damages in civil cases against cartels.

Norway: Conducted a study of optimal sanctions against cartels; joined with neighbouring Nordic countries in a liberal information exchange agreement; enacted new competition law.

Poland: Enacted a new competition law, which broadened investigative powers in cartel investigations, providing for inspections of premises and dawn raids, and increased the maximum fines for cartel participants; prosecuted a growing number of cartels, especially those operating on regional markets; is considering proposals for a leniency programme and for a framework for sharing confidential information with foreign competition authorities.

Slovak Republic: Initiated a leniency programme; eliminated some exemptions from the prohibition against cartels.

Spain: Prosecuted important cases in hotels, sugar and medical vaccines.

Sweden: Sponsored a comprehensive report by a commission on fighting cartels, which recommended instituting a leniency programme, strengthening confidentiality in cartel investigations and joining the Nordic agreement on information exchange; prosecuted an important case in petrol retailing.

Switzerland: Prosecuted important cases in several sectors, including construction services, drug distribution and vitamins; recommended changes to the law to permit, among other things, direct (administrative) fines for parties to a hard core cartel (currently permitted only for failure to obey a remedial order or an amicable settlement) and to introduce a leniency program.

United Kingdom: Initiated several cartel investigations under new competition law and penalised the first cartel under that act; initiated a leniency programme, which generated seven applications in 2001; proposed legislation to criminalise cartel conduct, to provide for imprisonment for individuals, to provide for disqualification of directors and to encourage the use of the private damage remedy in cartel cases.

United States: Initiated prosecutions of several very large, international cartels, resulting in total fines of more that USD2 billion over a five year period; aggressively sought sentences of imprisonment for individual cartel participants, resulting in a steady increase in the number and severity of such sentences; entered into co-operation agreements with *Brazil*, *Israel* and *Japan*.

4. Discovering Cartels – Investigative Tools

21. As noted above, cartel operators know that their conduct is unlawful and they operate their conspiracies in secret. In some cases they devise elaborate schemes for concealing their arrangements. When competition authorities do learn of a possible cartel and begin an investigation the conspirators do not willingly co-operate with it. Thus, cartels are unique among the various types of anticompetitive conduct, and unique investigative methods are required to combat them. Competition authorities have developed tools that are proving to be effective in this effort. The past few years have seen significant progress in this regard, but as in all areas in the fight against cartels, more remains to be done.

4.1 Providing incentives for co-operation – leniency programmes

22. Obtaining evidence of a hard core cartel from "insiders," or cartel participants, can often be critical to the success of an investigation. The difficult task for the competition agency, of course, is to encourage such insiders to co-operate when in ordinary circumstances they would not do so. An obvious source for such an incentive is the prospect of an elimination or reduction of the sanction that would otherwise be imposed upon the conspirator in a prosecution of the conduct. Virtually every country's

sanctioning laws do provide for a reduction in sanctions (usually fines) when an enterprise or person has co-operated with the investigation. Within the past few years, however, there has been a much more important development in this area – the "leniency programme." The Competition Committee has studied leniency programmes in depth, and in 2001 it issued a Report on Leniency Programmes to Fight Hard-core Cartels.[6] The principal points in the Report are set forth below.

23. In its basic form, a leniency programme promises to the first - and only the first - business or individual to offer full co-operation with a cartel investigation, complete amnesty or immunity from sanctions for its conduct. Experience has shown that a properly structured leniency programme can dramatically increase the success of an anti-cartel effort. In situations in which cartel operators face potentially heavy sanctions for their conduct, they have some concerns about the instability of their arrangement and they understand that only the first to offer co-operation will receive the full benefit of the programme, a leniency programme can create a powerful incentive to defect from the conspiracy. In recent years leniency programmes have brought about successful prosecutions of many large, high profile cartels that would not otherwise have been discovered. The experiences of the *United States* and the *European Commission* are highly instructive in this regard.

24. The United States was the first country to introduce a leniency programme, doing so in 1978. The U.S. had long been actively prosecuting cartels. Such conduct was prosecuted as a crime, and both business and individual cartel participants were subject to punishment, including sentences of imprisonment (which were then relatively short and infrequent) for individuals. It was already possible for individuals who co-operated to receive immunity or lesser sentences, but there were no comparable benefits for corporations that volunteered to co-operate as an entity. The 1978 programme offered such an opportunity. Specifically, the programme provided that the Department of Justice would consider forgoing all prosecution of a corporation that confessed to participating in, and thereafter co-operated with the investigation of, a cartel of which the Department had no prior knowledge.

25. The new programme was not an immediate success, however. During the following 15 years it generated on average only one application per year. In 1993 the Department made some important changes. Under the original programme corporate leniency was available only in situations in which the Department had no prior knowledge of the possible cartel and had not begun an investigation of it. In the new programme leniency was possible even after an investigation had begun if the Department had not developed enough evidence against the corporate applicant to sustain a conviction for the conduct. Further, under the original programme an applicant could not be certain that it would receive leniency if the necessary conditions were met; the grant was still subject to the Department's discretion. Under the new programme the grant was automatic in the situation in which the Department had no prior knowledge of the conspiracy.

26. Finally, while a corporation could receive leniency under the original programme, its executives who participated in the conspiracy remained personally at risk for prosecution, though they might benefit individually from co-operation as they could have previously. After the 1993 revisions, all executives of a corporation that received automatic immunity (in situations where an investigation had not begun before the application) would also receive leniency if they co-operated fully.[7]

27. These revisions had a profound impact on the programme. The rate of applications jumped from one per year under the old programme to approximately one per month under the new one. Leniency applications were directly responsible for successful prosecutions in several high profile prosecutions by the Justice Department, including conspiracies in vitamins, graphite electrodes, marine construction and fine art auctions. From 1998 to 2002 the fines imposed in cases resulting from leniency applications totalled more than USD1.5 billion, and many individuals were sentenced to terms of imprisonment.[8] There was almost certainly another reason for this dramatic increase in leniency

applications, however: the sanctions that were imposed for cartel violations – corporate and individual fines and jail sentences – had been increasing substantially in that period. There was now a much stronger incentive to co-operate in order to escape these increasingly punitive sanctions.

28. The European Commission introduced its leniency programme in 1996. In substance the programme provided that the first business (individuals are not subject to sanctions for violations of the EU competition law) to provide the Commission with "decisive evidence" of the existence of a cartel before the Commission had undertaken an investigation of it, and which otherwise fully co-operated with the subsequent investigation, would receive a "very substantial reduction" in the fine ultimately imposed of from 75% to 100%. A business that provided such evidence after an investigation had begun would be eligible for a reduction of 50% to 75%, and a business that provided less substantial evidence or at a later time would be eligible for a reduction of 10% to 50%.

29. Like the U.S.' programme, the EC's did not immediately generate a significant number of applications, but by 2001 it had become quite productive. In that year, for the first time under its programme, the Commission granted "very substantial reductions" to leniency applicants in five cases. In two of them complete immunity was granted. 2001 was a banner year for the Commission's anti-cartel programme: it prosecuted ten large cartels and obtained fines totalling EUR1,836 million, a record amount by far.

30. Simultaneously, however, the Commission determined that certain revisions to its leniency programme were in order, and in early 2002 it issued a new Notice on Leniency.[9] The principal changes in the programme were to promise full (100%) immunity from fines to the first corporation to provide evidence before the Commission has begun an investigation. Previously an applicant under those conditions could be assured of only 75%, though 100% was possible at the Commission's discretion. The new programme dropped the "decisive evidence" requirement for receiving full immunity under these circumstances, requiring only that it provide enough evidence to permit the Commission to initiate an investigation on the premises of suspected enterprises. The effect of these two changes was to increase both the rewards that a successful applicant would receive and the degree of transparency and certainty in the programme. A potential applicant now can determine with greater confidence whether its application will be successful and the extent of its reward.

31. The 2002 revision, like the U.S. revision in 1993, extended the programme to applicants that provide information after an investigation has begun. In this case, full immunity is granted if the evidence is sufficient to permit the Commission to establish an infringement of the law, in circumstances in which it did not previously have such evidence. If the evidence provided after the beginning of an investigation does not meet the standard for full immunity, the Commission will still grant a partial reduction of the fine if it determines that the evidence provided "significant added value" to the evidence it already has. Such reductions are possible for succeeding applicants as well, in successively lower amounts.

32. There is another important element that the U.S. and EC leniency programmes have in common: the process is conducted in strict confidence. The fact of a leniency application and the grant of leniency if it occurs, as well as the information that is provided by the applicant, are accorded the maximum degree of confidentiality permitted by law. The need for this confidential treatment is obvious. Without it, would-be applicants would be much less willing to come forward, and it also increases the uncertainty among the conspirators about whether, or when, one of their fellow conspirators might have defected.[10]

33. The U.S. and EC experiences are instructive as to the necessary elements of a successful leniency programme. They could be summarised as follows:

- Complete immunity from sanctions should be awarded to the first applicant. This maximises the reward for co-operation.

- Only the first to apply should receive complete immunity, and if the programme is extended to subsequent applicants, the gap in the rewards should be substantial. This maximises the incentive to be the first to defect, thus destabilising the cartel. If the returns to the second applicant approximate those that would accrue to the first then the result may be that no one would apply.

- The programme should have maximum transparency and certainty. Would-be applicants should be able to predict as accurately as possible what the outcome of their application will be.

- The programme should be available in circumstances in which the competition agency has already begun an investigation. If the members are aware of an investigation and of the possibility that one of them could benefit from leniency, the stability of their agreement is likely to be severely eroded.

- The competition agency should accord confidentiality to leniency applications and the information resulting there from to the maximum extent possible.

34. There is another, overriding aspect to a successful leniency programme, however: there must be a credible threat of severe sanctions for participating in a cartel. Unless cartel operators are at risk for substantial punishment if their agreement is discovered and prosecuted, they will have little or no incentive to enter a leniency programme, even one with all of the other necessary elements in place. That topic, sanctions against cartel conduct, is discussed below.

35. The demonstrable success of the U.S. and EC programmes has prompted several other countries to adopt leniency programmes in recent years. *Canada* first published its programme in 1999 and made revisions to it in 2000. Its programme has already generated some important cases. Other countries that have either recently implemented leniency programmes or are in the process of doing so are *Australia*, *Brazil*, the *Czech Republic*, *France*, *Germany*, *Ireland*, *Korea*, the *Netherlands, Sweden, Switzerland* and the *United Kingdom*. Of these most recent programmes, the UK's appears to be bearing fruit already; it has said that in 2001 the programme generated 13 applications.

4.2 Obtaining documentary evidence – dawn raids

36. Because it is difficult to obtain the co-operation of witnesses in a cartel investigation, documentary evidence is often critical to a successful prosecution of a cartel. The preferred method for obtaining such evidence in virtually every country is the "dawn raid," or surprise visit to the offices of a suspected cartel participant to review and take away relevant files. Indeed, enforcement officials generally consider the dawn raid to be their most important and productive tool in cartel investigations, except for leniency programmes in those countries where they have been successfully implemented.

37. Because of the intrusive nature of a dawn raid, the laws of some countries require that formal approval be obtained from an independent magistrate or judge, satisfying some standard for reasonable probability that a violation has been committed or that relevant evidence exists on the premises. In other countries, however, the competition authority need not obtain such approval beforehand. In any case, because dawn raids are resource-intensive for the competition agency and disruptive for the target business, the decision to conduct one is not made lightly. In making that decision several countries employ the principle of "proportionality," in which such factors as the seriousness of the suspected

offence and the risk that documents would otherwise be compromised or destroyed are weighed against the disruptive aspects of the exercise.

38. Conducting a dawn raid requires careful planning and execution. Enforcement officials make meticulous preparations in advance, such as obtaining information about the target firm's organisational structure and its business locations and preparing a detailed scenario for the search. If more than one premises is to be searched it is usually necessary to arrive at these locations simultaneously and to co-ordinate the activities at each of them through a central command. Documents or materials that are carried away must be carefully preserved and catalogued. In most countries the competition authority can call upon the police or other law enforcement authority for assistance in enforcing the search order, but such assistance is seldom required, as businesses usually co-operate with the order.

4.3 Obtaining evidence in electronic form

39. The "information revolution" has had its impact in the conduct of competition investigations, especially cartel investigations. Important evidence is just as likely, perhaps more so, to be in electronic form as on paper. When conducting dawn raids it is now customary for investigators to search electronic records as well as written files. These records are most commonly found in desktop computers or local area networks on a company's premises, but they may exist in other devices as well, including laptop computers, personal digital assistants and mobile telephones.

40. Most competition agencies have developed specialised procedures for searching and reproducing electronic files in dawn raids. They may work through an information technology specialist of the target company, but the investigators must be prepared to take over the search themselves if the target is not co-operative. There are alternate ways of making and retaining copies of files that are seized. Files may be printed or copied electronically. Electronic copies are generally more complete and more informative. It may be necessary to make backup copies of entire hard disks, or in extreme cases, to take away hardware on which files are located for analysis and copying. In light of the portability of electronic devices and the prevalence of personal computers in the home, increasingly there is a need to consider whether grounds exist to conduct residential raids in tandem with searches of corporate offices.

41. Acquiring and using such information requires special skills and procedures. Teams that conduct dawn raids must therefore include information technology experts to assist in conducting this aspect of the search. Some competition agencies have access to special IT units from law enforcement bodies within their governments when it is necessary. Others establish specialised units within their own organisations. In either case, it is necessary that the experts conducting a dawn raid be fully current with the technology in this dynamic field.

4.4 Obtaining oral testimony or statements from witnesses

42. In many cases there is insufficient evidence in documentary and electronic files to prove the existence of a cartel agreement. In these cases it is necessary to obtain oral testimony or statements from witnesses to the illegal conduct if the agreement is to be proven. In most countries, but not all, the competition agency has powers to require natural persons to submit to interviews and provide statements. In cartel investigations, however, such witnesses are likely to have been cartel members themselves, and thus they probably would not co-operate willingly with the investigators. In many countries this source of evidence – oral testimony or statements – is not well developed, and yet as cartel operators become more sophisticated and avoid leaving a "paper trail" of their activities, it is becoming more important.

43. A threshold question is to what extent natural persons who are involved in a cartel can be required to provide evidence. If cartels are prosecuted as crimes, and if natural persons can be prosecuted

for such crimes, then they enjoy a privilege against self-incrimination and can refuse to testify. In countries where such a privilege would attach there are procedures that would permit a person to be required to respond to questions, in exchange for which the evidence that he or she gives could not be used in a prosecution against that person. But in most countries violations of the competition law – even cartel conduct – are not crimes, though individual perpetrators may be subject to administrative fines. In some countries, only businesses are subject to sanctions for violations of the competition law; natural persons may not be sanctioned, except possibly those who operate sole proprietorships. In these circumstances, natural persons might be required to give testimony.

44. *Australia* has such procedures that are more defined than in most other countries. The Australian competition agency can require witnesses to appear before it and give testimony prior to initiating proceedings in court. This power is now supported by criminal sanctions. The hearing is conducted before a commissioner; a barrister is retained to pose questions to the witness, who can have a legal advisor present. The witness cannot refuse to answer a question on the basis that the answer may incriminate him or her, but the answer cannot be used against the witness in a subsequent criminal proceeding. The agency has the power to prevent a legal advisor from representing at a hearing more than one witness or both a witness and a subject. Having the ability to prevent such "multiple representation" can prevent conflicts of interest from arising, in which a lawyer represents two or more persons whose interests in the investigation differ. For example, an employee or officer of an enterprise could benefit from offering to co-operate with the prosecutors, which would not be in the interest of his employer or other co-conspirators. Preventing multiple representation has another distinct benefit for the investigators; it could impede the ability of subjects to co-ordinate their defences in an investigation. Australia reports that it uses these powers often, and that they have been productive.

45. An issue that could affect the utility of such a procedure, however, is the existence in some countries, notably in the European Union, of a privilege against self incrimination that extends to enterprises or businesses, as well as to natural persons. Under such a privilege a person might legitimately refuse to provide evidence that would incriminate his employer even if the evidence could not be used in a criminal proceeding against that person.

46. In any case, it would appear that as countries become increasingly aggressive in prosecuting and punishing cartels, cartel operators will become ever more secretive. They will leave less written and electronic evidence of their agreement where investigators can find it. It will therefore become necessary to develop other sources of evidence. Leniency programmes, coupled with stiffer sanctions, discussed elsewhere in this report, are one such new tool. More aggressive efforts at obtaining oral testimony and statements from knowledgeable witnesses, while fully observing legal and constitutional protections, are another.

4.5 Electronic eavesdropping

47. In the well-known lysine case in the United States, the Department of Justice used electronic eavesdropping techniques to great advantage, obtaining videotapes of secret cartel meetings that provided conclusive evidence of the conspiracy. While such techniques could have a dramatic impact in an appropriate case, it would seem that the opportunities for their use are limited. Electronic eavesdropping is practical only when a cartel is ongoing at the time of the investigation and the competition agency has access to confidential information about the cartel's operations, usually provided by an inside informant, sufficient to permit the targeting and monitoring of meetings or conversations. Moreover, national laws impose strict limits on the use of this tool. Such procedures may be permitted only in criminal investigations, and in most countries cartel conduct is not considered a crime. Where it is both legal and practical to obtain such evidence, however, it is without doubt persuasive and compelling.

5. Sanctions against Cartel Conduct

5.1 Providing an effective deterrent

48. The principal purpose of sanctions in cartel cases is deterrence. To achieve deterrence, sanctions should be swift, sure and substantial. The Competition Committee has studied this topic in depth, and its findings were published in 2002 together with its work on harm, in the report referred to above, "*Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws.*" The conclusions of that report are summarised below.

49. Fines against organisations are the principal form of sanctions against cartels in most countries. For effective deterrence such fines should be at least equal to the gain that the organisation realises from the cartel. If the fine is less than the gain it will still have been profitable for the organisation to participate in the conduct even if it is caught and prosecuted. As noted above in the discussion of harm, the gains from cartel conduct can be very large indeed, which requires that the fines for such conduct must be correspondingly great.

50. But further, not all cartels are detected and prosecuted. Thus, if someone were contemplating entering into a cartel, that person would take into account not only the amount of expected gain but also the likelihood that the cartel would be discovered and sanctioned. Many experts contend, therefore, that in the cases where there is successful prosecution, the total fine against the participating organisations should exceed the gain that they realised from the cartel. If, for example, the chances that any given cartel would be discovered and punished were one in three, then a fine that would provide an adequate deterrent would have to be three times the actual gain realised by the cartel. Some believe that as few as one in six or seven cartels are detected and prosecuted, implying a multiple of at least six. A multiple of three is more commonly cited, however.

51. In assessing the adequacy of organisational fines as deterrence, there are two questions to be asked: do the relevant competition laws permit the imposition of fines that are sufficiently large for this purpose; and if they do, have the fines that have actually been imposed met the standard of exceeding actual gain by some measure? With regard to the first question, the laws of almost all countries provide for the imposition of very large fines for cartel conduct. In only three countries, however, *Germany*, *New Zealand* and the *United States*, is the maximum fine expressed in terms of multiples of the unlawful gain. In the others the maximum is stated as an absolute amount or as a percentage (often 10 percent) of some measure of total turnover of the enterprise, or both. As to this much larger group of countries, it is difficult to determine in the abstract if the fines permitted by these laws are adequate. That assessment can only be made over time, as fines in actual cases are calculated and imposed. In any event, the limited data that are available suggest that countries are not yet assessing fines that approach optimum levels.

52. The survey conducted by the Competition Committee described above in Section II on harm also sought information on the sanctions that were imposed in the 133 cases that were reported in the responses. In some countries some very large fines indeed were imposed. In three countries there were fines that exceeded the equivalent of USD100 million. In two others there were fines of between USD10 million and 100 million, and in five others fines of between USD1 million and 10 million. These countries were a minority, however. In the majority of countries significant fines had not been imposed in cartel cases, though as noted above in Section III, some countries have recently taken measures to strengthen their cartel sanctions.

53. The survey on sanctions provided a limited amount of information on the question of whether pecuniary sanctions equalled or exceeded the gains from the cartel. In most cases it was not possible to make that calculation, because, for the reasons noted above in the discussion of harm, estimates of gain

are not usually made in cartel prosecutions. In eleven large cases the calculation was possible, and the proportion of sanctions to the gain ranged from 3% to 189%. In four of the eleven cases the sanctions equalled or exceeded the gain, but in none was it as large as three times the gain, which is considered by many experts to be the optimum level.

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

55. In any case, the Competition Committee survey disclosed that sanctions against natural persons have actually been applied in only a few countries. Only four, *Australia*, *Canada*, *Germany* and the *United States*, had imposed fines in the survey period, and only two, *Canada* and the *United States*, had imposed jail sentences. The U.S. was by far the most aggressive of these countries in sanctioning individuals.

56. Finally, a third type of sanction in cartel cases is the recovery of compensatory damages by victims of a cartel. This sanction could also supplement organisational fines as a deterrent to the conduct. Again, the laws of several OECD countries provide for the recovery of such damages, but the remedy is seldom invoked, save in the *United States*. A few countries are studying ways to enhance the use of this remedy. *Japan* recently amended its laws to improve the remedy. Many parties, including public procurement bodies, have brought civil suits for damages after the JFTC took legal measures concerning bid rigging in public sector procurement. *New Zealand* recently amended its law to provide for punitive damages to be awarded in private cases involving cartels, after a study concluded: "Private enforcement of the Commerce Act 1986 is a necessary corollary to public enforcement in achieving an optimal deterrence to would be offenders." Proposed legislation in the *United Kingdom* would enhance the use of this remedy by authorising such private damage cases to be heard in the Competition Appeal Tribunal following a prohibition by the appropriate UK or EU body (currently suits for damages can be heard only in the courts). In addition the proposal would permit representative bodies such as consumer associations to institute damage actions on behalf of groups of named and identifiable consumers.

5.2 Enhancing the effectiveness of investigations

57. There is a second and important role for strong sanctions in the fight against cartels – that of providing incentives for cartel participants to defect and to co-operate with an investigation of their conduct. As noted above, leniency programmes can be effective only if there is a credible threat of strong sanctions for those who do not co-operate with an investigation. Sanctions against natural persons have an equally salutary effect in this regard. They may stimulate one or more individuals to offer their co-operation in circumstances in which their employer is not inclined to enter a leniency programme. In this way, strong sanctions can be thought of as creating a "virtuous circle." They create incentives for cartel operators to co-operate with investigations, which generates more prosecutions, which generate more and heavier sanctions, which both enhances deterrence and prompts offers of co-operation in other cases, and so forth.

58. In sum, an aggressive sanctioning policy is indispensable to an effective anti-cartel programme. It will both deter future cartel activity and enhance the ability of competition agencies to detect and punish those that do exist. There is a clear trend toward the imposition of greater sanctions in cartel cases, but it is uneven. Large fines have been imposed in only a minority of countries, and limited data suggest that even these fines have not reached the optimum level of three times the gain realised by the cartel. Sanctions against individuals can provide an important supplement to organisational fines, but in most countries such sanctions are not imposed.

6. International Co-operation in Cartel Cases

59. It will be recalled that one of the two principal recommendations of the 1998 OECD Council Recommendation on Hard Core Cartels was that countries "co-operate with each other in enforcing their laws against hard core cartels." The need for co-operation is evident. Globalisation and the internationalisation of markets have had a profound effect on competition law enforcement. The transnational merger phenomenon – the dramatically increasing number of mergers that have effects in more than one country – is well known. Perhaps less well documented but equally significant is the growing number of international cartels – cartels that operate across countries, and sometimes world-wide. A U.S. antitrust official recently noted that ten years ago the Antitrust Division filed only two cartel cases against foreign-based companies, both of which involved domestic conspiracies. There were no charges levied against individuals from foreign countries in that year. By contrast, in the most recent year nearly 70 percent of the companies charged by the U.S. in cartel cases were foreign-based firms, and about 33 percent of the individuals charged were foreign nationals. In that same year there were nearly 35 separate investigations of suspected international cartel activity being conducted by the Antitrust Division.[11]

60. International cartels are difficult for national competition agencies to prosecute. Their members may come from several countries; relevant evidence may be scattered across countries as well, beyond the jurisdictional reach of any single competition agency. Participants in these cartels tend to be the most sophisticated of cartel operators; they are careful about keeping their conduct secret. Thus, successful prosecution of these cartels may depend upon the ability of national competition agencies to co-operate in their investigative efforts. It has proven difficult to achieve meaningful co-operation in these cases, however.

61. The Competition Committee conducted two surveys on international co-operation in cartel investigations and cases, one in 1999 and a second in 2001. In the second, questionnaires were issued both to Member countries and to non-member invitees to the OECD Global Forum on Competition. In the 1999 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.

62. The responses 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 that were prosecuted in 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. It was also clear, however, that where co-operation would have been useful it was significantly constrained by the inability of countries to disclose confidential information to foreign agencies.

63. 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 is growing significantly. Several have been signed in the past few years.[12]

64. 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, market information and witness evaluations.

65. The 2001 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, for assistance in obtaining testimony or information from a witness, for information in the files of the requested competition authority, and for 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.

66. Perhaps the most 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, no doubt because it is easier to conduct and it does not confront the legal constraints on the exchange of confidential information that exist in every country. Nevertheless, informal co-operation has proved to be quite useful. One country reported that "in many instances" it had consulted with foreign competition agencies

> ". . . through meetings and telephone or email communications. Subject to statutory limitations regarding the exchange of information, such informal communications can facilitate discussions about:
>
> - the theory of a particular case;
> - description of parties;
> - nature of evidence;
> - role played by parties and
> - potential witnesses.
>
> The information or assistance obtained in these instances can streamline the investigative strategy and focus an investigation. Informal co-operation has contributed to advancing some cases considerably."

67. The country cautioned, however:

> "It is worth noting, however, 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."

68. 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, e.g.:

- "It is fair to state that in virtually all international cases the . . . [agency] could have benefited from information sharing, especially at the beginning of an investigation."

- "The . . . [agency] has experienced situations where simultaneous dawn raids in a number of countries would have been expedient."

- "There are a number of jurisdictions with which we would have liked to have co-operated more closely but did not do so because we do not have mutual assistance agreements with them; we are working to fill these gaps. There have been instances where due to the unavailability of documents and witnesses located abroad we were unable to develop sufficient evidence to prosecute suspected cartel activity."

6.1 Two case studies in international co-operation

69. The Competition Committee studied two well-known international cartels from the perspective of co-operation. The studies showed that these two prosecutions benefited from co-operation, but the benefits were relatively modest. There were substantial constraints imposed by the inability of competition agencies to exchange confidential information. Indeed, the success of the investigation in any given country depended to a much greater degree on the willingness of the conspirators (or one of them) to co-operate than on co-operation among competition agencies.

6.2 Vitamins

70. The vitamins cartel is probably the most significant international cartel to have been discovered and prosecuted in the past several years, in terms of amount of affected commerce and number of affected jurisdictions. It was estimated that global sales of all vitamins (which presumably included some that at any given time were not subject to a cartel agreement) were USD3.3 billion per year during the conspiracy period. Some of the agreements within the conspiracy lasted as long as ten years. The case originated in the *United States*, where important evidence relating to the conspiracy was provided to the U.S. Department of Justice through its leniency programme. Several domestic and foreign corporations and individuals were convicted, and fines of more than USD900 million were assessed, which were by far the largest fines then imposed in the U.S. Several individuals, including some foreign nationals, received jail sentences resulting from their participation in the cartel.

71. Other countries conducting investigations into this cartel included *Australia, Brazil, Canada*, the *European Commission, Japan, Lithuania, Mexico* and *Switzerland. Australia* prosecuted three corporations for their participation in the cartel, imposing record fines totalling AUD26 million. The ACCC's investigation was begun after the prosecutions in the U.S. and Canada had become public and the companies approached the ACCC admitting to participating in the cartel. The parties co-operated

with the investigation and consented to the fines. The ACCC made no formal requests to another jurisdiction for information but engaged in informal discussions about the case with the U.S., EC, Canada, New Zealand and Brazil. These discussions had "varying levels of success and co-operation . . . due to confidentiality restrictions."

72. The case in *Brazil* is still in the investigation stage. The Brazilian authorities began their investigation after reading published reports of the case in the United States. The investigators initially made little progress, however, and they were hampered in their attempts to obtain information from the U.S. because most of the information there was confidential. Some information received informally from North American sources, however, advanced the Brazilian case to some degree.

73. *Canada* prosecuted twelve corporations and three individuals in its vitamins case. The corporations were fined a total of approximately CAD94.9 million, the individuals a total of CAD575,000. As in Australia, Canada's investigation was prompted by offers of co-operation by the parties. Canada and the U.S. exchanged information relating to procedural matters in their cases. The *European Commission* completed a highly successful prosecution of the cartel, fining eight corporations a total of EUR855 million. Like the U.S., Australia and Canada, its case benefited substantially from co-operation by one of the conspirators under its leniency programme. *Japan*, *Lithuania* and *Switzerland* initiated their investigations after reading published reports of prosecutions in other countries. Japan issued a warning and Switzerland entered a consent remedial order, but no fines were assessed. The investigation in Lithuania has not been resolved. Constraints on the exchange of confidential information limited information exchanges involving these countries. Japan exchanged some non-confidential information with the U.S. and the EC, according to the Japan-U.S. co-operation agreement and the OECD Council Recommendation on Co-operation.

74. In assessing the effectiveness of the several prosecutions of this cartel it would be relevant to consider the relationship between the monetary sanctions imposed in these cases (which included private damages in the U.S. and Canada) and the harm caused by the cartel, as discussed above in Section V on sanctions. Unfortunately there is not sufficient information regarding the amount of commerce affected by the cartel and the cartel mark-up above the competitive price to permit a precise analysis of this relationship. By making certain conservative assumptions, however, it could be concluded that the total financial sanctions in these cases approached 100% of the gain to the cartel.[13] Of course, as discussed above, many experts conclude that such sanctions should exceed the gain by as much as a factor of three.

6.3 Graphite Electrodes

75. Graphite electrodes are used in steel making. One source estimated that the amount of commerce affected by this international cartel exceeded USD6 billion during the conspiracy period (approximately five years). The cartel succeeded in raising prices by very substantial amounts, as much as 50 to 65% in the United States and as much as 90% in Canada. Again, this cartel was first uncovered and prosecuted in the *United States* and again it was prompted by information submitted under the U.S.' leniency programme. Seven domestic and foreign corporations were convicted and fined a total of approximately USD425 million. Three individuals (all U.S.) were fined a total of USD12.25 million (one was fined 10 million) and two were sentenced to terms of imprisonment. Several private damage suits were filed. The settlement amounts have not been made public, but are believed to total in the USD hundreds of millions. There was one criminal trial in this case, which resulted in a substantial amount of information about the conspiracy being placed in the public record.

76. *Canada*, the *European Commission*, *Japan* and *Korea* also conducted investigations into this cartel. The Canadian investigation into the graphite electrode cartel continues; to date, three corporations have been fined a total of approximately CAD24 million. Private damage actions were also initiated.

One defendant was required to pay CAD 19 million to Canadian steel companies; the results of other actions are unknown. Canada initiated its investigation upon reading of published reports of search warrants being executed in the U.S. and Europe against suppliers of graphite electrodes. The Canadian and U.S. authorities exchanged information of a procedural, but not substantive, nature. The *European Commission* fined eight corporations a total of approximately EUR 219 million for their role in the conspiracy. The Commission received substantial co-operation in its investigation from two of the respondents under its leniency programme. The *Japan* Fair Trade Commission issued warnings to four companies that they were suspected of having violated the Japanese Antimonopoly Act for their participation in the cartel. The JFTC exchanged some non-confidential information with the U.S. and the EC.

77. *Korea's* experience in the graphite electrodes case is instructive as to the difficulties that can confront a country that does not obtain co-operation from one of the conspirators in an international cartel case. Korea also suffered from perceptions that it was in some sense a developing country, and one that did not have a substantial history of competition law enforcement. The Korean authorities decided to open an investigation of the cartel after reading of prosecutions in North America and Europe. The KFTC concluded that because that country was a major producer of steel, its economy likely was substantially affected by the cartel. It initially attempted to require the suspected cartel participants to provide evidence for the investigation, but because those companies were based abroad, and most had no legal presence in the country, the KFTC found itself unable to enforce the information requests that it had issued.

78. The KFTC then issued requests for information to foreign competition agencies that had prosecuted the cartel. The responses from some of them were positive (Korea had no formal co-operation agreements with any foreign competition agency), but the information that was provided was only that which was on the public record. There was, fortunately, a relatively significant amount of such information resulting from the criminal trial in the U.S., but by itself it did not prove sufficient to sustain a prosecution in Korea. Finally, as a result of pouring "enormous effort and time" into the investigation the KFTC was able to impose surcharges of KRW11.2 billion (USD8.5 million) upon six foreign firms for their participation in the cartel. The KFTC concluded in a report to the Competition Committee, however, that "the KFTC experienced numerous difficulties during the investigation into the international graphite electrode cartel and it experienced the genuine need for international co-operation for overcoming such investigative difficulties in the elimination of international cartels."

79. As with the vitamins case, it is not possible to make a precise comparison of the total financial sanctions imposed on the participants of this cartel to the harm on a world-wide basis, because of the lack of some relevant information. By making certain assumptions, however, one can estimate that while the sanctions were very large indeed, they were substantially less than the total harm, perhaps in the order of 60%.[14] The *Korea* Fair Trade Commission was able to make more informed calculations of the harm that the cartel caused in that country, and it appears that the surcharges that were imposed there amounted to only about 6% of the harm.

80. These two cases have been studied extensively,[15] and they provide an excellent view into how international cartels work, as well as into the most effective methods for prosecuting them. By historical standards the prosecutions must be considered resounding successes. The new investigative tool provided by the leniency programme worked beyond expectations. The sanctions applied by those countries that successfully prosecuted the cases, particularly the *United States*, the *European Commission* and *Canada*, were unprecedented in their size and severity. Still, the successes could not be considered unqualified. The financial sanctions apparently did not reach optimum levels in either case. These conspiracies presumably affected many, if not most, countries world-wide, yet the prosecutions occurred mostly if not exclusively in OECD countries (the European Commission in this instance representing all of the 15 EU

Member states). International co-operation among competition agencies was limited mostly to the exchange of public information, which for countries that did not benefit from co-operation by one or more parties to the cartel was not sufficient to support a prosecution.

81. The two cases illustrate the difficulties that exist in expanding international co-operation. Leniency programmes were directly responsible for the success of the prosecutions in some countries, but a salient and quite necessary feature of leniency programmes – the strict confidentiality that is accorded the information that is derived from a leniency application – prevented those few countries from sharing that information with their foreign counterparts. Moreover, only a few countries benefited from leniency applications. Co-ordination of leniency programmes would be difficult, but it could substantially enhance co-operation against international cartels.[16] The network of bilateral and plurilateral co-operative relationships is expanding, but there are still many countries that are not parties to them, or to many of them, and those countries are less likely to benefit from international co-operation because of it. Perhaps the most important impediment to improved co-operation is the restrictions, again justified to some extent, against disclosure of confidential or protected information developed in the course of a competition investigation. That topic is explored further below.

6.4 Information exchanges and protection of confidentiality

82. The 1995 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade (C(95)130/FINAL) recommends that countries share the following three types of information, when in the interests of the co-operating countries and when permitted by national laws: 1) information in the files of the requested country's competition agency, 2) information obtained by the requested country's competition agency at the request of another country, using compulsory process, and 3) information in the public domain. National competition agencies can and often do share information of the third type. Most national laws do not permit the sharing of confidential information from an agency's investigation files, however, nor do they permit an agency to use its compulsory information gathering powers on behalf of a foreign competition agency.

83. There is a threshold question relating to this topic, which is how to define that class of information about a cartel that is considered "confidential" and subject to national laws restricting its disclosure. As discussed above, competition agencies are increasingly engaging in "informal" co-operation, in which there are discussions about investigative strategies, witness evaluations and the like. It would seem that the permissible boundaries of such exchanges have not been defined, however. Could, for example, an agency that has learned of an international cartel and is investigating it warn other competition agencies about the cartel? How much information could it provide in such a warning? Similar questions exist as to the amount of information that could be shared by two or more agencies that are concurrently investigating a cartel, such as conclusions about affected markets. If competition agencies cannot share specific information derived from an investigation, can they share inferences or conclusions?

84. *Brazil's* investigation in the vitamins case discussed above is a good example of how information exchanges of this kind can advance an investigation. The Brazilian competition agencies received two helpful “hints” from North American sources in that case. One was that the vitamins cartel operated in a fashion similar to another international cartel involving lysine (about which there was a great deal of public information), which suggested that a geographic market allocation scheme was involved and that Brazil was indeed affected by the conspiracy. The second was information about the foreign operations of one of the conspirators that assisted the Brazilian investigators in locating former Latin American regional managers. An interview of one of those managers led to evidence of how the

conspiracy affected Latin America. It will be recalled, however, that Brazil has not yet successfully concluded its investigation.

85. In any case, it would seem that specific information about a cartel that is generated in an investigation would be subject to confidentiality constraints. In most countries those constraints are quite strict, but there are some exceptions. The most notable of these involves the *European Commission* and the *EU Member states*. Member state competition agencies can provide confidential information to the Commission, and the Commission can also require a Member state competition agency to acquire information on its behalf. The Commission also provides confidential information to Member state competition agencies in connection with cases under Articles 81 and 82 of the EC Treaty.[17] In general, Member states are constrained by their national laws from sharing confidential information with one another. In *Canada* the authorities can disclose confidential information to a foreign agency for the purpose of advancing a specific Canadian investigation, and where the foreign agency provides satisfactory assurances regarding the use and confidentiality of such information.[18]

86. Some international treaties provide for sharing confidential information. For example, letters rogatory have been used to obtain confidential information in competition cases. Pursuant to Mutual Legal Assistance Treaties (MLATs), confidential information may be shared in criminal competition cases, and competition authorities can use compulsory process on behalf of a foreign authority. In most countries, of course, cartel conduct is not a crime, and so MLATs are not available in cartel investigations. Cartels are crimes in the *U.S.* and *Canada*, however, and the MLAT between those two countries has been invoked several times for this purpose.

87. The 1999 Australia – United States Mutual Antitrust Enforcement Assistance Agreement[19] provides that the parties can, with certain important exceptions, provide to one another confidential information from investigative files, and also that a party can, upon request, employ its compulsory information gathering process for the benefit of the other. A 1994 bilateral agreement between *Australia* and *New Zealand*[20] also permits the exchange of confidential information. More recently, and of potential significance, was an "Agreement Regarding Co-operation in Competition Cases" reached in 2001 between *Denmark*, *Iceland* and *Norway* permitting the exchange of confidential information.[21] The relevant provisions are as follows:

Article IV

The exchange of confidential information

- The parties agree that it is in their common interest to exchange confidential information. It is a condition for the competition authorities' submission of confidential information that such information:

  - is subject to a duty of confidentiality in the competition authority that receives the information that is at least equal to that of the competition authority that provides the confidential information, and

  - may exclusively be used for the purposes stipulated in this agreement, and

  - may only be passed on by the competition authority that receives the information if it has obtained in advance the express consent of the competitive authority that supplied the information, and that it is only used for the purpose covered by such consent.

88. The agreement provides that new contracting parties (countries) may join.[22]

89. In recent years some countries have liberalised their laws governing the exchange of confidential information in competition investigations. The competition laws of *Denmark*,[23] *France*,[24] the *Netherlands*[25] and *Norway*[26] now permit it under certain circumstances, even in the absence of a bilateral agreement. Similar legislation has been proposed in the *United Kingdom*. In the *United States* the International Antitrust Enforcement Assistance Act[27] permits the exchange of certain types of confidential information in the context of a bilateral "mutual antitrust assistance agreement" negotiated pursuant to its terms.[28] *Canada* has long had legislation in place enabling it to enter into Mutual Legal Assistance Treaties with foreign jurisdictions in relation to criminal matters. More recently, Canada has created a framework to enable similar MLAT agreements in non-criminal competition matters.[29]

90. Thus, there is an incipient trend toward permitting the exchange of confidential information in competition investigations, including those involving cartel conduct. In this context, discussions are intensifying about what types of rules and safeguards should apply to such exchanges. The business sector has a strong interest in this issue, as much of the information that is subject to being shared is alleged to be business confidential information. A dialogue on this subject between the enforcement and business communities, represented by the OECD's Business and Advisory Committee (BIAC), has been taking place within the Competition Committee.

91. The business community stresses the importance of protecting business confidential information from public disclosure, as the unwarranted dissemination of such information could harm legitimate business interests and competition itself, as well as, in the words of one BIAC paper, "imperil the integrity of the investigative process and . . . have a chilling effect on the willingness of businesses to co-operate with both domestic and foreign enforcement agencies. . . ." These concerns are quite real. Enforcement officials urge, however, that confidentiality rules should be no more restrictive than necessary to protect legitimate business interests. They should not be so strict as to unnecessarily hinder legitimate co-operation, especially in the context of cartel investigations, where, as noted above, the ability of competition agencies to co-operate is so important to successful prosecution of this harmful practice.

92. The enforcement community makes the following points in response to the business community's concerns about liberalising information exchanges:

- While exchanges of confidential information in cartel investigations have been infrequent, they have occurred, for example in the context of MLATs and between the European Commission and EU Member states. There is no record of any improper disclosure or misuse of this information in these cases. The same can be said of the more frequent sharing of confidential information in merger investigations, in which, it must be said, such exchanges take place only with the consent of the merging parties.

- There is a strong record of successful international information exchanges in other law enforcement contexts, such as securities and taxation, and there is no apparent reason why these successes could not be duplicated in the competition context.

- The business information generated in cartel investigations is not likely to be particularly sensitive to the ongoing operations of the enterprises affected, as it is for the most part historical – about conduct that has occurred in the past – rather than prospective – about future business plans.[30]

93. The discussions have become increasingly focused, however, on specific aspects of confidentiality protections in the cartel context. Below is a brief elaboration of some of the major issues and of the positions that one or more interested parties have taken on them.

- Requirement for a treaty or agreement. BIAC urges that because there continue to be significant differences in both substantive and procedural aspects of national competition laws, exchanges of confidential information for purposes of competition enforcement should be conducted only pursuant to binding treaties or agreements between the participating countries. It argues that such agreements ensure both that the participating countries have conducted adequate investigations into the laws and procedures of one another and that there are adequate enforcement mechanisms in place to ensure compliance with the terms of an exchange. This is the approach taken in the United States' International Antitrust Enforcement Assistance Act, for example. As noted above, however, the laws of a few other countries, including Denmark, France the Netherlands and Norway do not have such a restriction, though they require that before sharing confidential information the agency ensure that adequate procedures exist in the requesting country, which arguably satisfies the underlying concern of the business community.

- The standard for "downstream protection" of confidential information. It is agreed that a requested country should assure itself that adequate means exist in the requesting country for protecting the information against unauthorised disclosure. Somewhat different formulations for the proper standard have been articulated – "comparable," "substantially equivalent," or "at least equivalent" to those in the requested country – but it would appear that these differences are not significant. A separate question is whether the requested country should make a determination of adequate downstream protection both in a general sense, through a review of the requesting country's laws on the issue, and on a case-by-case basis, as to the specific information that is to be provided. BIAC takes the more conservative approach, and would require both the general and specific determinations. It is not clear that such a restrictive approach is necessary.

- Limitations on use of the information. It is generally agreed that confidential information that is exchanged between competition agencies should be used by the requesting country only for purposes of enforcing its competition law. Many hold the view that downstream use of confidential information should be permitted only in the investigation or proceeding that is specified in the request. This is the standard in the Australia – U.S. co-operation agreement, though that agreement provides that information can be used in other competition and non-competition cases upon the prior written consent of the requested country, and in the case of a non-competition case, upon a showing by the requesting country that such use is "essential to a significant law enforcement objective." BIAC would strictly limit use of the information to the matter specified in the request, requiring the requesting country to make another formal request if it wanted to use the information for another purpose.

- Downstream disclosure of information. It may be necessary to disclose confidential information in the course of a competition proceeding, for example in a hearing or trial of the matter, and a question arises as to whether, and how, a requested agency should exercise control over such disclosures of information that it provides. National laws differ in their requirements in this area. Third parties with interests in a competition case, including third party complainants in agency proceedings or third parties seeking compensatory damages, may claim the right to evidence from the agency's file, including confidential evidence. When a requested agency considers a request for information it cannot then know with certainty to what extent the requesting agency will later be required to make such disclosures.

94. The U.S. – Australia mutual assistance agreement provides in this regard that the requesting country may disclose information that it receives to a defendant or respondent in a proceeding if the law of the requesting country requires it. The agreement requires the requesting party to oppose, to the extent possible consistent with its laws, any application by a third party for disclosure of confidential information. BIAC has opposed disclosure outside the competition case for which the information was provided, but it is unclear what position it takes on the limits that should apply to disclosure within those case proceedings.

- Notice to the providing party. BIAC takes the position that the requested country should give notice of a request for confidential information from a foreign agency to the provider of that information prior to the exchange. The provider should have the opportunity to oppose or discuss modifying the exchange and, if necessary, to appeal a decision to provide the information to an independent authority, such as a court. BIAC would not require prior notice if it "would jeopardize an investigation into a naked hard core cartel," but in that event there should be a retroactive right of review and appeal. BIAC's position is not shared by the enforcement community. The view has been expressed that there is no evidence of misuse or unauthorised disclosure of confidential information by competition agencies that would justify such a restrictive rule, and that such a notice requirement, even after the fact, could seriously interfere with the investigatory process.

95. There seems to be broader agreement that if confidential information is disclosed in an unauthorised manner by the requesting country, it should notify the requested country of the breach, and that competition agency, in turn, should notify the providing party.[31]

96. The Competition Committee intends to continue to examine these issues and others, and to continue its dialogue with the business community, in the hope of resolving the differences that do exist and agreeing on procedures that would facilitate international co-operation and information exchanges in cartel investigations.

7. Conclusions and Recommendations

7.1 Harm

97. Within the past few years there has been a significant increase in awareness throughout the world of the importance of fighting hard core cartels, but much remains to be done in that regard. It is known that cartels cause great economic harm, but quantifying that harm continues to be difficult. Putting real numbers behind allegations of harm in cartel cases would strengthen the anti-cartel effort considerably. Toward the goal of enhancing public support for the anti-cartel effort, responsible officials should consider

- conducting expanded and vigorous "public relations" campaigns designed to inform consumers, businesses and governments of the nature of cartels and the dangers that they pose;

- focusing on quantifying and publicising the harm that results from the cartels that they prosecute, even if such calculations are not necessary to prove their case.

7.2 Investigative tools

98. Cartels are conducted in secret, and are difficult to discover. Specialised investigative tools are required for this purpose. Dawn raids and other means of obtaining documentary evidence continue to be one of the most important investigative tools in cartel investigations, but as cartel operators become more

sophisticated and avoid leaving "paper trails" of their conduct, other information gathering techniques must be developed. Responsible officials should consider

- adopting new leniency programmes or restructuring existing ones, taking advantage of experience with such programmes both domestically and in other countries where they have been most successful;

- as office and communication technology evolves, developing techniques for obtaining and evaluating evidence that is in electronic form;

- developing more effective means of securing oral statements or testimony of individuals with knowledge about possible cartel conduct, consistent with legal and constitutional safeguards

- establishing a "best practices" clearinghouse for the sharing of evidence-gathering techniques, methods, strategies, tools, experts and contacts.

7.3 Sanctions

99. An indispensable part of an anti-cartel programme, and probably the most important, is a policy of imposing strong sanctions for cartel conduct, sufficient both to create a deterrent against future cartels and to provide an incentive for cartel participants to offer co-operation with a cartel investigation. There is a clear trend toward heavier sanctions in these cases, but it does not exist in all countries and it appears that sanctions are not yet at optimal levels. Thus, responsible officials should consider

- increasing fines that are imposed against organisations for participating in cartel to a level that approaches three times the gain to the cartel;

- introducing and imposing sanctions against natural persons, which would serve both to augment organisational fines as a deterrent and to encourage individuals to defect from the cartel and offer co-operation;

- introducing criminal sanctions in cartel cases in countries where it would be consistent with social and legal norms, which would enhance both deterrence and the effectiveness of leniency programmes;

- exploring means for permitting cartel victims to recover monetary damages from cartel operators, consistent with a country's legal norms and in a way that would avoid unnecessary and vexatious litigation.

7.4 Domestic cartels

100. It is likely that cartels exist in virtually every country. Most of these, by number, are domestic cartels, operating solely within and affecting only one country. The harm from these cartels is not known precisely, but it is without a doubt significant. Experience across countries has shown that such cartels can occur in any economic sector, but they are more likely to exist in some sectors than in others. Responsible officials should consider enhancing their efforts against domestic cartels by

- targeting sectors known to be more susceptible to cartel activity for special attention, including by alerting participants in these markets to the dangers posed by cartels and to means of detecting suspicious activity.

7.5 International co-operation

101. International cartels are increasing in number, in their effects and in their sophistication. Because their participants and evidence of their existence may be located in several countries, they are difficult for any single national competition agency to discover and to prosecute. Co-operation among competition agencies may be critical to the success of an investigation of such a cartel. Responsible officials should consider means of enhancing international co-operation in cartel investigations, including by

- expanding co-operative relationships to more countries;
- examining ways of permitting more exchanges of confidential information with foreign competition agencies and of obtaining relevant evidence on behalf of a foreign competition agency, with appropriate safeguards against unauthorised or harmful disclosure;
- considering ways of co-ordinating leniency programmes, especially encouraging leniency applicants to apply in as many other countries as possible;
- in countries that prosecute cartel conduct as a crime, explore ways of making more effective use of mutual legal assistance treaties (MLATs).

8. Next Steps

102. The Competition Committee will continue to consider the anti-cartel effort as one of its top priorities. This report suggests several topics that are worthy of further study by the Committee. In the next phase of its work it will build on its work in the following principal areas: articulating the harm that cartels cause, strengthening the sanctions that are applied against cartel conduct, enhancing the effectiveness of investigative tools and strengthening international co-operation. It will

- generate more information on the harm caused by cartels, in both developed and developing countries;
- monitor progress across countries in imposing harsher sanctions against hard core cartels;
- articulate best practices for developing more aggressive investigative tools, including closer co-ordination with other government investigative bodies and the use of investigation methods traditionally used in other contexts against harmful and fraudulent practices;
- in light of the new and dramatic successes resulting from leniency programmes, explore means of co-ordinating such programmes across countries;
- continue to promote the enhancement of international co-operation in cartel investigations and cases, in particular, by inquiring into means by which more countries, including developing countries, can actively engage in co-operation; and
- explore means of enhancing the ability of national competition agencies to share sensitive information while simultaneously observing necessary confidentiality safeguards, including by working on best practices for the exchange of information.

NOTES

1 This Recommendation and all reports of the OECD Competition Committee, as well as many other OECD documents relating to competition policy, can be found at the competition page of the OECD web site, at www.oecd.org/competition.

2 These results are broadly consistent with the approach taken by the United States in its Sentencing Guidelines (United States Sentencing Guidelines, §2R1.1 cmt. n. 3).

3 Levenstein and Suslow, Private International Cartels and Their Effect on Developing Countries (Background Paper for the World Bank's World Development Report 2001, 9 January 2001) (available on the Internet at http://www-unix.oit.umass.edu/~maggiel/WDR2001.pdf). The study also cited another possible harmful effect of cartels on developing countries: measures taken by cartel members to block or frustrate new entry. In this way cartels could prevent the creation of domestic producers in countries that historically rely on imports from developed countries. Cartels can have an offsetting effect on entry as well, however, that of setting a price umbrella that could encourage new entry.

4 Much of this information is available in greater detail in the annual reports on competition enforcement activities that Member and observer countries file with the Competition Committee and which are available on the OECD Competition web site, at www.oecd.org/competition.

5 Inspections: As regards inspections of business premises the Commission will be empowered to seal any premise or part thereof for the period and to the extent necessary for the inspection. The Commission will also have the power to ask oral questions to any member of staff. The undertaking can be fined for incorrect answers, if it does not correct the reply given by the member of staff in question. There is no power to impose sanctions on individuals. There will be a new power for the Commission to inspect non-business premises, including private homes. In several cases inspectors have found evidence that incriminating documents have been kept in private premises. The new power aims at addressing this reality. Decisions ordering inspections of private premises can only be executed upon prior authorisation by a national court. Moreover, there must be a reasonable suspicion that documents related to the business and to the subject-matter of the inspection are kept in the premises in question and that these documents may be relevant to prove a serious violation of Articles 81 and 82.

Requests for information: The new regulation does not maintain the current approach whereby the Commission must in all cases first issue a simple request for information before it can adopt a formal decision ordering the undertaking to produce information. In the future, the formal decision can be adopted immediately, which is of particular relevance in cartel cases.

Power to take statements: The Commission is granted a new power to interview persons and record the answer. However, the Commission has no means of compelling persons to be interviewed nor of penalizing incorrect statements. The new instrument is thus of limited scope, merely allowing the Commission to draw up minutes that become part of the file. In the present system the Commission would have to request the same information again by a request for information.

6 DAFFE/CLP(2001)13. Available on the OECD Competition web site at http://www.oecd.org/pdf/M00020000/M00020228.pdf. Subsequent to the publication of the report the *European Commission* revised its leniency programme in several important respects. The new 2002 European Commission Notice on Leniency can be found at OJ(2002/C 45/03).

7 There are other conditions that a corporate leniency applicant must satisfy, including: the applicant has taken action to terminate its part in the cartel; the applicant makes restitution to parties injured by the cartel, where possible; and the applicant did not coerce another party to participate in the cartel and was not the leader or originator of the conspiracy. These aspects and others relating to successful leniency programmes are explored fully in the Competition Committee's report on leniency programmes referred to above.

8 See "A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program," presentation by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, before the Conference Board's 2002 Antitrust Conference, March 7, 2002, available at http://www.usdoj.gov/atr/public/speeches/10862.htm.

9 See note 6 above.

10 In most cases that are ultimately prosecuted or punished the fact of a leniency application does become public, either as a result of a disclosure by the firm itself or because the laws of a jurisdiction require such a disclosure during the prosecution or at the time of sanctioning.

11 See note 8 above.

12 For a comprehensive list of existing international agreements providing for co-operation in competition law enforcement, see United Nations Committee on Trade and Development, *Experiences Gained so far on International Co-operation on Competition Policy Issues and the Mechanisms Used*, TD/B/COM.2/CLP/21/REV1 (2002), available at http://www.unctad.org/en/docs/c2clp21r1.en.pdf.

13 It was estimated that annual world-wide turnover of the relevant products during the conspiracy period was USD3.3 billion. Agreements on some of the products within the conspiracy, but not all, lasted as long as ten years. Not all products were subject to cartel agreements during this period, however. Thus, the total amount of affected commerce is something less than USD33 billion. Assume, conservatively, 20 billion. The total fines and recovery of damages in the countries that prosecuted the cartel were approximately USD2.8 billion, or 14% of 20 billion. It is not known what the cartel mark-up was. As noted above in Section III, the median cartel mark-up in 14 cases in which it was possible to calculate it was between 15 and 20%. Thus, the monetary sanctions imposed by the prosecuting countries could be slightly less than 100% of the harm. They could be much more or less, of course, depending on the actual gain that resulted from the conspiracy.

14 According to one estimate the affected world-wide turnover during the cartel period was about USD6 billion. The total fines and surcharges imposed to date by all prosecuting countries are approximately USD700 million. Substantial damages have been recovered in private cases in the U.S. Their amount is unknown, but one estimate indicated that they could be of a magnitude similar to the aggregate U.S. criminal fines of USD437 million. Assuming damage recoveries in the U.S. of USD500 million, the total financial sanctions world-wide would amount to about USD1.2 billion. The prices of the affected products increased by 50-65% in the U.S. during the conspiracy period and by as much as 90% in Canada. Assume conservatively a cartel mark-up (exclusive of increases in costs) of 50%, which yields a total cartel mark-up of USD2 billion. The financial sanctions, then, amount to about 60% of the cartel gain.

15 See, e.g., Levenstein and Suslow, *supra* note 3.

16 The European Competition Authorities (ECA) is an informal organisation of, as its name indicates, competition authorities from European countries. It has studied leniency programmes and in September 2001 it published some "Principles for Leniency Programmes." The principles are available on the web site of the Netherlands competition authority, at http://www.nma-org.nl/. One of the principles states, with reference to co-ordination across countries:

> An application for leniency in one jurisdiction does not count as an application for leniency under another jurisdiction. However, without prejudice to the applicant's responsibility for securing lenient treatment, the authority involved shall, at the outset, make applicants aware of the possibility of applying for leniency under programmes in other jurisdictions. If so requested, the authority may introduce applicants to the appropriate contact point of the other authority.

17 See, EEC Council: Regulation No 17.

18 Competition Act, Section 29.

19 Available at http://www.usdoj.gov/atr/public/international/docs/usaus7.htm.

20 Available at http://www.accc.gov.au/fs-international.html.

21 Available on the website of the Danish competition authority, at http://www.ks.dk/.

22 Article VI. It has been proposed in *Sweden* that it join the agreement.

23 Section 18a.

24 Article 83.

25 Article 91. The Netherlands has already exchanged information with Denmark and Germany pursuant to these provisions. It is also in the process of negotiating a formal co-operation agreement with Denmark.

26 Section 1-8.

27 Available at http://www4.law.cornell.edu/uscode/15/ch88.html.

28 To date, one such agreement has been negotiated, that with Australia, which is described above.

29 Statutes of Canada, 49-50-51 Elizabeth II, Ch. 16.

30 The Competition Committee's 2000 Cartel Report discusses these points in greater detail.

31 The U.S. International Antitrust Enforcement Assistance Act contains such a requirement.

ANNEX A

SELECTED CARTEL CASES AFFECTED COMMERCE, ESTIMATED HARM AND SANCTIONS APPLIED

Country	Case	Affected Commerce[1]	Estimated Harm[1]	Sanctions[1] (including damages to private parties, where applicable)	Fines as % of Affected Commerce	Fines as % of Estimated Harm
Australia	Distribution Transformers	900 million	NA	14.9 million	1.7%	NA
Australia	Power Transformers	720 million	NA	7.3 million	1%	NA
Australia	Frozen foods, Tasmania	NA	10 – 12% price increase	1.245 million	NA	NA
Australia	Installation of fire protection devices	More than 500 million	5-15% price increase	15.386 million	3%	31%
Canada	Lysine	89 million	NA	17.57 million	19.74%	NA
Canada	Citric acid	104.6 million	NA	11.575 million	11%	NA
Canada	Sorbates	37 million	NA	7.39 million	19.97%	NA
Canada	Vitamins	Up to 750 million	NA	95.475 million	12.7%	NA
Canada	Graphite electrodes	440 million	90% price increase	24 million (incomplete at time of response)	NA	NA
Denmark	Electric wiring services	NA (many billions over "several decades")	20-30%	Some cases pending; largest find to date DKK 3.2 million	NA	NA
European Commission	Graphite electrodes	More than 2 billion	Up to 50%	218.8 million	11%	22%
European Commission	Lysine	NA	NA	110 million	NA	NA
European Commission	British sugar	NA	NA	50.2 million	NA	NA
European Commission	Pre-insulated pipe	More than 2 billion	NA	92.210 million	5%	NA
Finland	Purchases of raw wood	NA	NA	1.5 million	NA	NA
Germany	Ready-mix concrete	2.5 billion	220 million (9% of affected commerce)	300 million	12%	136%
Germany	Road markings	More than 750 million	"Hundreds of millions" (more than 13% of affected commerce)	25.6 million	3%	NA
Germany	Power cables	Many billions	As much as 50%	249.5 million	NA	NA

[1] All monetary amounts stated in national currency (euros in eurozone countries).

Country	Case	Affected Commerce[1]	Estimated Harm[1]	Sanctions[1] (including damages to private parties, where applicable)	Fines as % of Affected Commerce	Fines as % of Estimated Harm
Japan	Ductile iron pipe	NA	NA	230 million	NA	NA
Korea	Military fuel	USD 548.3 million	NA	USD 14.6 million	3%	NA
Korea	Graphite electrodes	USD 553 million	USD 139 million	USD 8.5 million	2%	6%
Mexico	Lysine	NA	NA	1.699 million	NA	NA
The Netherlands	Veterinary products	58.5 million	NA	10.5 million	18%	NA
The Netherlands	Mobile telephone subscriptions (on appeal)	NA	NA	88 million	NA	NA
Norway	Hydro-electric power equipment	1.6 billion	140 million (9% of affected commerce)	75 million	5%	54%
Slovak Republic	Flour	NA	200-300/ton	2.24 million	NA	NA
Slovak Republic	Beer	4 billion	NA	1 million	Less than 1%	NA
Spain	Hotel association	1 billion	30 million (3% of affected commerce)	1.1 million	Less than 1%	3.3%
Spain	Sugar	Many hundreds of billions	3%	1.455 billion	NA	NA
Switzerland	Drug distribution, industry-wide	NA	NA	Id.	NA	NA
United States	Lysine	1.4 billion world-wide	78 million in U.S.	147.48 million; imprisonment for three executives	NA	189%
United States	Citric acid	4.8 billion world-wide, 320 million U.S.	100 million in U.S. (31% of affected commerce)	141.89 million	44%	142%
United States	Graphite electrodes	6 billion world-wide, 1.7 billion U.S.	As much as 65%	410 million; imprisonment for two executives	24%	NA
United States	Cairo wastewater construction	300 million U.S.	100 million (33% of affected commerce)	87.7 million;	29%	88%
United States	Marine construction	1 billion world-wide, 107 million U.S.	NA	49.3 million; confinement for one executive	46%	NA
United States	Sodium Gluconate	NA	NA	32.95 million	NA	NA
United States	Sorbates	2.2 billion world-wide, 1 billion U.S.	NA	123.2 million	12%	NA

Country	Case	Affected Commerce[1]	Estimated Harm[1]	Sanctions[1] (including damages to private parties, where applicable)	Fines as % of Affected Commerce	Fines as % of Estimated Harm
United States	Vitamins	Up to 33 billion world-wide	NA	1 billion in fines, 1 billion in damages; imprisonment for eight executives	NA	NA

ANNEX B

RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS

(ADOPTED BY THE COUNCIL AT ITS 921ST SESSION ON 25 MARCH 1998)

THE COUNCIL,

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

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

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

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

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

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

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

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

I. RECOMMENDS as follows to Governments of Member countries:

A. CONVERGENCE AND EFFECTIVENESS OF LAWS PROHIBITING HARD CORE CARTELS

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

   - effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and

   - enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

   - a "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;

   - the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

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

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests.

2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:

   - the common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country's laws, regulations, and important interests;

   - to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential

information, Member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;

– a Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;

– Member countries should agree to engage in consultations over issues relating to co-operation.

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

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

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

II. INSTRUCTS the Competition Law and Policy Committee:

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

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

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

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