At the 1993 Ministerial meeting, the Committee on Competition Law and Policy and the Trade Committee submitted a joint progress report on trade and competition policies. They agreed that "globalization should produce more efficient production and marketing, lower prices and improved product quality and variety but will fail to do so unless market access and competition can be preserved and enhanced".

In the subsequent Ministerial Communique, Ministers reaffirmed "the OECD governments’ strong commitment to strengthen the open multilateral trading system so as to let it play its central role in promoting further non-inflationary growth and sustainable development around the world, fostering international trade within an agreed framework of multilateral rules covering access to markets and fair competition".

I. Background

1. Increasing globalisation of business may reflect the success of trade policy but also creates new challenges. Traditional trade instruments may not be well adapted to meeting these challenges. Trade policy officials have suggested that business practices and market structures may create barriers to the access of foreign firms to particular markets by means of trade or direct investment and that concepts and instruments available under competition law may prove more effective than traditional trade instruments in overcoming these barriers. Certain business practices may frustrate trade liberalisation and may create barriers to market access which trade policy officials feel might not always be covered by competition laws. Clarification of these issues and of how competition policy approaches might be relevant are among the tasks being addressed by joint work.

2. Competition policy also faces new challenges. National markets are increasingly affected by international factors. Trade liberalisation and globalisation change the basic features of competition in ways that increase the potential benefits to be derived from greater competition policy convergence and greater international cooperation. Developing acceptable mechanisms of cooperation, which ensure that distortions or restrictions which affect competition and international trade are adequately dealt with, is a challenging task for competition offices.

3. Trade policy officials have concerns that there are private barriers to market access (with or without government involvement) that may not be addressed by competition laws. Competition policy officials have concerns regarding the possible market effects of certain trade policy measures.
The 1993 Joint Report identified competition policy issues affecting trade, trade policy issues affecting competition and a third category of issues for which policies other than trade and competition may also be concerned. The joint report also proposed elements of a programme of work.

The remainder of this report sets forth the progress achieved since the last Ministerial in two sections. Section II covers particular issues or themes identified in the 1993 Joint Report which were the subject of discussions in two joint meetings and three roundtables. The joint meetings also considered various contributions to a framework approach of the interrelationships between trade and competition policies and various delegations made proposals regarding the elements which could be considered in this context: this is reflected in Section III below.

II. Main issues considered since the last Ministerial

This section reports on discussions on three main topics: a) vertical relationships and market access; b) horizontal agreements; c) work begun on competition elements in international agreements. Work on vertical relationships and horizontal agreements has advanced to the point where policy orientations can be presented while the discussions on competition elements in international agreements have just gotten underway. These policy orientations and the status of these discussions are set forth below.

a) Vertical relationships and market access

Vertical relationships range from transactions between completely independent enterprises to the integration of two or more levels within a single enterprise. Between these extremes fall contractual arrangements which restrict the freedom of action of the upstream or downstream firm (or both). These contractual relationships can be of particular concern to both trade and competition officials.

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

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

On the other hand, non-price vertical restraints decrease intra-brand competition and may have anticompetitive effects since they may create or enhance barriers to entry by raising rivals’ costs. The risk of anticompetitive effects is increased when these restraints are widespread or
are used by a firm which is dominant in either the upstream or downstream market.

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

12. When analysing the effects of vertical restraints from a trade perspective, a focus on market position, the nature of the market and the duration of the restraint is called for. New entry by a foreign firm may be considerably more difficult if non-price vertical restraints such as exclusive dealing tie up domestic distribution systems. This difficulty is increased if the restraints will run for many years but would be decreased if the market is expanding or alternative distribution systems are being created. Vertical restraints such as exclusive dealing may facilitate new entry, for example a new entrant may find it helpful to offer an exclusive arrangement as an incentive to a potential distributor in a new market.

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

b) Horizontal agreements

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

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

16. Second, agreements may involve co-operation among competitors which may not harm competition in the market overall or in which the harm to competition may be counterbalanced by other considerations. In some jurisdictions, the legality of these agreements depends on the outcome of a potentially extensive case-by-case or "rule of reason" examination. In others, guidelines, regulations or block exemptions are used to give guidance in at least a portion
17. Export cartels are often immunised from the application of competition law in the exporting country. There is growing consensus that export cartel exemptions, at least with respect to naked restraints, may be inappropriate beggar-thy-neighbour policies. At the same time, it is recognised that even with the exemption eliminated, the exporting country may find it difficult or lack the incentive to assert jurisdiction over an export cartel whose anticompetitive effects are felt only in foreign markets.

18. There is consensus that export arrangements which fall outside the category of hard core cartels are appropriate for case-by-case treatment. Trade and competition officials agree that this case-by-case analysis will approve many instances of export co-operation; such co-operation is often required particularly for small and medium-sized enterprises if they are to be able to export at all. In the course of discussions, the trade community expressed its interest in increased convergence of the criteria used under national competition laws for the treatment of co-operation among competitors.

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

20. With the conclusion of the Uruguay Round, officially sanctioned Voluntary Export Restraints (VERs) are prohibited and must be phased out. The beneficial effects of such prohibition would be undermined if private VERs (in effect, hard core cartels by another name) were to be permitted to replace them. Private VERs should therefore be vigorously challenged with the full co-operation of competition and trade officials in both exporting and importing countries. It should be taken into consideration that VERs impede free trade, decrease welfare and harm the consumer interest of the importing country.

21. Voluntary import expansion arrangements (VIEs), conceived by their proponents as a means of opening certain markets, are a new area of attention. There are concerns that they may undermine multilateral approaches and the MFN principle as well as possibly distort trade and/or competition.

c) Competition elements in international agreements

22. In their 1993 Joint Report, both Committees agreed that "a comparative analysis of the relevant provisions in international, bilateral, regional and multilateral agreements and instruments should be undertaken". As a first
step, a joint roundtable was organised in April 1994 to identify "competition elements in international agreements". This roundtable surveyed these agreements and analysed selected competition elements in selected agreements. The objective was to focus on common elements found throughout these agreements. This exercise is ongoing and will continue under the mandate to explore the desirability and feasibility of integrating competition rules into a multilateral framework as requested by the 1993 Ministerial.

III. Identification of the main elements of a common approach to frictions and synergies between the two policies

23. The main elements of a common approach to frictions and synergies between the two policies relate to the categories below. These categories are illustrative of some of the issues for further joint work (see the proposed joint programme of work, Section IV below):

-- Efforts to improve the mutual understanding of the terminology, objectives, methods and tools of analysis of competition and trade policies are needed to increase the complementarity of both policies as well as to avoid frictions and to establish whether policy instruments of one set of rules can assist in the achievement of the objectives of the other;

-- Differences among countries in the scope, coverage and enforcement of competition laws are an important area for investigation (see further work) as they may account in some instances for difficulties in international trade. Besides coverage, certain differences in other substantive provisions or enforcement practices may also constitute an issue;

-- Basic principles such as transparency, non discrimination and national treatment are key issues in the context of both policies;

-- International co-operation in enforcement appears to hold considerable potential for better achievement of the objectives of both areas as well as for reducing frictions;

-- Additional frictions are attributed to the way in which antidumping and other trade remedies, intended to limit unfair trade practices, may limit market competition. These matters will need to be reviewed in light of the outcome of the Uruguay Round.

IV. Proposed joint programme of work after the 1994 Ministerial

24. The above overview of issues goes well beyond what can be accomplished in the near term. In light of the limited number of meeting days and staff resources available in 1994 and the coming year, the remainder of this note details the programme of work following the 1994 Ministerial meeting.

25. This programme should continue to follow a balanced approach. The aim continues to be to identify ways in which competition policy approaches can be used to ensure that business practices do not unduly impede market access and
to analyse the potential benefits of tighter disciplines regarding government intervention in trade having anti-competitive effects on national and international markets.

26. Work following the 1994 Ministerial will include the following themes in furtherance of the mandate given in the 1993 Joint Report:

1. A synthesis note will be drafted on the joint roundtable on competition elements in international agreements. It will not draw policy conclusions but could be used in subsequent work, e.g. exploring the question of the desirability and feasibility of integrating aspects of competition policy in a multilateral framework. Such subsequent work might also draw upon work by trade or competition authorities in other fora. This work will remain of an exploratory nature and will aim to identify several possible approaches;

2. A review of the competition implications of the revised disciplines contained in the Final Act of the Uruguay Round will be conducted;

3. The study of the interrelations among trade, competition and investment policies will be deepened through a Trade Committee workshop on the meaning of market access in the post Uruguay Round period;

4. The CLP Antidumping Study, which focuses on the economic effects of antidumping, will be continued and completed. The policy implications of this study will be discussed following its completion;

5. A comparative study of the coverage, scope and enforcement of certain Member countries’ competition laws, including exemptions and derogations will be conducted. The study will include a survey of sectors covered by competition laws, partial exemptions for certain activities and the treatment of state and state-conferring monopolies. In addition, it will review the treatment of export and import agreements (including VERs, VIEs). Exemptions and derogations identified as affecting trade or competition will be jointly discussed. Both communities would try to build a consensus for eliminating or narrowing exemptions and derogations wherever possible;

6. Roundtable discussions of enforcement issues will be organised by the CLP with Trade Delegates’ attendance.

27. Further work: if progress and resources permit, additional activities might be undertaken following the 1995 Ministerial. They will be drawn from the list of issues in Paragraph 23 above.

28. The two Committees will keep each other informed of work of mutual interest, including on the possible trade implications of the CLP ongoing work on convergence.
NOTES

1. OECD/GD(93)101, Paragraph 1. Both Committees also agreed that "the question of the desirability and feasibility of integrating competition rules into a multilateral framework will be explored". Idem, Paragraph 23.

2. Paragraph 10 of the Communique C(93)87 adopted by the OECD Council at its 806th Session on 3 June 1993.

3. OECD/GD(93)101, Paragraph 23.

4. Idem.