

**COMMUNICATION FROM THE EUROPEAN COMMUNITY
AND ITS MEMBER STATES**

The following communication, dated 24 June 2002, has been received from the Permanent Mission of the European Community and its member States with the request that it be circulated to Members.

International Hardcore Cartels and Cooperation under a WTO
Framework Agreement on Competition

Introduction

1. In its previous submission to the Working Group - WT/WGTCP/W/184 - the European Community and its member States outlined their thinking on the possible modalities for international cooperation under a WTO framework agreement on competition, including the specific assistance to be provided to developing countries both in respect to actual investigations, exchanges of certain information, as well as through targeted and coordinated technical assistance for capacity building purposes. Such assistance would include help in drafting a domestic competition law and accompanying regulations, as well as in the establishment of a domestic competition authority or other enforcement agency.

2. This submission will address the nature and extent of international hardcore cartels, the added value of establishing multilateral disciplines to restrain such cartels, and will then illustrate in concrete terms how the proposed international cooperation modalities could function with regard to such cartels, including through the exchange of non-confidential information and notice of cartels detected.

1. Nature of international hardcore cartels

3. By "hardcore cartels" we refer to cases where would-be competitors conspire to engage in collusive practices, most notably bid-rigging, price-fixing, market and customer allocation schemes, and output restrictions. These practices can appear in a number of shapes and combinations.

4. In essence, hardcore cartels are characterized by would-be competitors voluntarily and deliberately refraining from competition and rivalry between themselves, all in pursuit of profits and at the expense of consumers and other firms victims of the cartel. The now infamous statement by one of the executives participating in one recently investigated cartel¹ – "Our competitors are our friends, our customers are the enemy" – shows that such cartels are in stark contradiction with the

¹ The so-called lysine cartel.

proper functioning of a competitive market-place, have an adverse impact on international trade and deserve unequivocal international condemnation.²

5. The damaging effects of hardcore cartels are widely understood by now and have led to a strengthening of the fight against such cartels in developed economies, including the European Community and its member States. In 1998, on the occasion of the creation of a special unit dedicated to fighting such cartels, then EC Competition Commissioner Karel van Miert stated that:

*"Time and time again over the last years and yet again on the recent occasion of the pre-insulated pipes cartel (...), again I have emphasised that **the Commission shall continue its staunch fight against cartels, which are one of the most harmful restraints of trade.** To this effect, it seemed necessary to me to create a new unit (...) charged exclusively with unveiling, pursuing and eliminating cartels for any product and service related activities. Its creation confirms in concrete terms the Commission's priority to fight such practices."*(emphasis added)³

6. The Commission's leniency programme was recently amended in order to create better incentives for parties to cartels to come forward under the leniency measures. Also, a number of EC member States have recently established - or are now in the process of establishing - national leniency programmes. Under such programmes incentives are provided to encourage cartel participants to come forward and provide information regarding the cartel activities. In return, leniency applicants qualify for reduction in the fines and/or are granted immunity from fines or criminal prosecution.⁴

2. Damage caused by international hardcore cartels

7. The 1990s saw a considerable increase in the detection, investigation and punishment of international hardcore cartels in industrialized countries generally. Based on these cartels a number of studies have been made which contain illuminating findings on the economic damage caused by such cartels.

2.1 OECD Hard Core Cartel Report (2000)

8. The Organisation for Economic Cooperation and Development (OECD), the Members of which adopted the so-called "Hard Core Cartel Recommendation" in 1998⁵, notes in its 2000 report on hardcore cartels that in the *citric acid cartel*:

- prices increased by as much as 30 per cent; and
- the collected overcharges are estimated at almost US\$1.5 billion.

9. In another cartel, the *graphite electrodes cartel*:

- prices rose by 50 per cent; and
- the cartel extracted monopoly profits on an estimated US\$7 billion in world-wide sales.⁶

² For a useful description of the actual functioning and methods of international **hardcore** cartels, see OECD document CCNM/GF/COMP/WD(2002)1, "*An inside look at a cartel at work: common characteristics of international cartels*", by the US Department of Justice.

³ See press release IP/98/1060 of December 3, 1998. Further press releases on the subsequent cartel investigations of the EC, including the vitamins and graphite electrodes cartels can be found at http://europa.eu.int/comm/competition/press_releases/.

⁴ For the text of the revised Commission notice on immunity from fines and reduction of fines in cartel cases, see http://europa.eu.int/eur-lex/en/dat/2002/c_045/c_04520020219en00030005.pdf (visited April 8, 2002)

⁵ OECD document C(98)35/FINAL.

⁶ "*Hard Core Cartels*" (2000), Organisation for Economic Co-operation and Development, p. 5.

10. The OECD report further notes that recently exposed hardcore cartels have:

- cost individuals and businesses many hundreds of millions of US dollars in the United States alone;
- have affected more than US\$10 billion of United States commerce; and
- have led to global overcharges in the billions of US dollars.⁷

11. What is clear by now is that hardcore cartels are by no means an evil confined to the developed country economies. Rather, it is a global phenomenon which affects a range of important products used and consumed globally, in developed and developing countries alike. In addition to this, there are strong indications that once detected, investigated and punished, cartels – if not already operating in developing and transitional economies – will then seek to direct their activities at those jurisdictions.⁸

2.2 World Development Report 2001 background paper

12. As regards the damage caused to developing country consumers and producers by international hardcore cartels, research recently undertaken by three economists (which is also the basis for a background paper for the World Bank's World Development Report 2001) provides valuable data and conclusions on this issue.⁹ Based on available trade data as well as enforcement agencies' press releases and speeches, court records, general business press and industry publications, that study seeks to quantify "the order of magnitude of the consequences of these cartels on developing countries as consumers".¹⁰

13. The study looks in considerable detail at five specific cartel cases, namely the cartels operating in the product markets of bromine, citric acid, graphite electrodes, steel tubes, and vitamins respectively. More specifically, the study concludes that in 1997, the last year for which trade data was available:

- developing countries imported US\$81.1 billion of goods from industries which had suffered from a price-fixing conspiracy during the 1990s;
- those imports represented as much as 6.7 per cent of imports and 1.2 per cent of GDP of the developing countries;
- the fraction of trade for the poorest developing countries as regards the 16 products in question was even greater, namely 8.8 per cent of imports.¹¹

⁷ *Ibid.* p. 12.

⁸ It should be noted that some argue that the cartels recently detected are only the tip of the iceberg and only represent a small number of the global cartels actually operating. For different views on the incidence of international cartels, see. e.g. the Final Report of the International Competition Policy Advisory Committee (ICPAC), p. 175 ff., available at <http://www.usdoj.gov/atr/icpac/icpac.htm> (visited April 4, 2002).

⁹ See "*Private International Cartels and Their Effect on Developing Countries*" by Margaret Levenstein and Valerie Suslow. The study is available at the following web site address <http://www-unix.oit.umass.edu/~maggiel/WDR2001.pdf> (visited April 4, 2002).

¹⁰ *Ibid.* p. 2.

¹¹ The study further notes that certain techniques have been applied in order to block entry into the industries in question, such as attempts to restrict information about technology (steel beam and graphite electrodes) and that such techniques, if successful, may harm developing country producers.

14. Other findings arising from the study presented at the WTO Symposium on 22 April 2002¹² show:

- that the effect of merely 16 cartels on developing country imports was an estimated US\$81.1 billion and that this amount was likely to be an underestimate;
- that in terms of overpayment this would amount to 20 to 40 per cent of US\$81.1 billion, i.e. between US\$16 to 32 billion;
- that once cartels have been broken up price falls of 20-40 per cent were noticed;
- that following enforcement action against cartels, many of the cartel members seek to consolidate themselves through mergers and acquisitions, strategic alliances, or joint ventures and that some degree of post-enforcement monitoring might therefore be needed;
- that in terms of comparison with international aid flows to developing countries, the harm done by cartels to developing economies was three to six times the recent increase in US aid, and that overcharges by cartels were equal to at least one-third of aid received by developing countries.

15. The presentation made at the WTO Symposium further brought to the attention of the participants the fact that international cartels tend to have a diverse international membership. The cartels analysed by the economists Evenett, Levenstein, and Suslow included a total of 31 economies of which eight were developing country economies.

16. Another presentation at the Symposium¹³ focused on two international cartels which had been in operation over a considerable time-period. An analysis of the International Heavy Electrical Equipment cartel had found:

- the existence of a near-global coverage of the cartel;
- the leading role of developed country firms;
- that this cartel succeeded in persuading Japanese firms in joining the cartel, after unsuccessfully trying to eliminate them through predatory pricing;
- that most importing countries were developing countries with either little or no domestic manufacturing capacity for heavy electrical equipment;
- that one of the practices applied by the cartel was a limitation on transfer of technology to developing countries;
- that the cartel covered some US\$2 billion of sales annually;
- that the cartel directly harmed importing countries due to the mark-up on cartelized sales and the limitation on transfer of technology to non-producing countries;
- that on the basis of one product section, an estimated price increase of 15 to 25 per cent above the competitive rate was the result;

¹² Presentation by Simon J. Evenett of the World Trade Institute.

¹³ Presentation by Professor Frédéric Jenny.

- that given such price increases - if they held for all products covered by the cartel - annual overcharges would range from US\$300 to 500 million per year;
- that such overcharges would ultimately be reflected in the cost of electric power and all products dependent on electricity.

2.3. Conclusion

17. In conclusion, developing countries are harmed by these international cartels at least as much if not more than developed countries – moreover developing countries' domestic firms have been found to participate in cartels as active partners, which increases further the damage done to developing country consumers and users of the products involved.

3. How a WTO agreement could address hardcore cartels

18. Given the global nature of hardcore cartels, the EC concurs with the conclusion in the OECD hardcore cartel report that this is "a problem that cannot be addressed effectively without increased cooperation from the over 50 non-Members with competition laws and the many others that are considering them".¹⁴

3.1 An international ban on hardcore cartels

19. The EC believes that a global competition concern such as the fight against pernicious hardcore cartels is best addressed by a firm response in the form of an international commitment to ban such practices. Such a ban should be included in a WTO competition agreement as nowhere else would it have the backing of a sufficient number of countries. Any alternative would run the risk of cartels seeking to shift the focus of their illegal behaviour to countries not adhering to the ban, in an attempt to escape the jurisdiction of those countries which do prohibit cartels. The main consequence of this "forum shopping" would be greater damage to the countries not adhering to the ban. Furthermore, countries which adhere to the ban will increasingly enforce their domestic rules against cartel members located in territories where the ban is not enforced.

20. The multilateral ban on hardcore cartels would be implemented by means of corresponding domestic legislation and policies. The introduction of clear and predictable leniency programmes to encourage whistle-blowing among cartel participants, thus facilitating the detection of such cartels and leading to successful investigations could also usefully be considered.

21. Consequently, a provision regarding hardcore cartels in a multilateral agreement on competition would need to lay down the essential elements that domestic law provisions on this issue should contain:

- The key element of this provision would be a clear statement that they are prohibited.
- Further, it would be necessary to provide a definition of what types of anti-competitive practices could be qualified as "hard-core cartels" and would be covered by the multilateral ban. Providing a precise definition of "hardcore cartels" for the purposes of a multilateral WTO agreement on competition is beyond the utility and goal of the present submission to the Working Group. This will be a difficult exercise and, typically, one that will be the object of negotiation. However, the OECD Recommendation of 1998¹⁵ could serve as a starting-point without limiting in any way the discussion that will take place in the Working

¹⁴ *Op.cit* footnote 6., pp.5-6.

¹⁵ Recommendation of the Council concerning Effective Action against Hard Core Cartels, C(98)35/FINAL, 27-28 April 1998.

Group or any options available during negotiations. Article IA2a) defines "hardcore cartels" as "anti-competitive agreements, anti-competitive concerted practices, or anti-competitive arrangements", "by competitors" in order 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". For WTO purposes this list of elements is necessarily indicative and may be supplemented by further elements or practices. It is also conceivable that some of the elements/practices figuring in the list could be omitted in a definition destined for a multilateral agreement. Beyond this first guidance, the European Community and its member States considers it useful to provide (in Annex to this submission) descriptions of concrete examples of hardcore cartels against which it has taken action in the past. In selecting these examples care has been taken to choose those with particular international relevance as well as examples which give a better idea of the nature of such cartels.

- Equally important would be to describe accurately the limits of the concept of hardcore cartels, in order to be able to decide which practices should not be covered by the multilateral ban. The long debate within the OECD Competition Committee on this particular issue may be of help, again as a starting-point and without prejudging discussions between WTO Members for WTO purposes. According to Article IA2b) of the 1998 OECD Recommendation "the hardcore cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realization 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 authorized in accordance with those laws". Such exceptions, and further ones that Members may envisage as part of the discussion in the Working Group, are possible elements of the provision on the multilateral ban on condition that they are identified in the domestic competition rules in a transparent and predictable manner.
- The multilateral ban on hardcore cartels would not be effective in the absence of a commitment by WTO Members to provide for deterrent sanctions in their domestic regimes. Domestic rules prohibiting hardcore cartels should aim at dissuading potential offenders and having a strong deterrent function. Therefore it would be of the essence that they include suitably effective sanctions. There is a variety of such sanctions available: some WTO Members have rules that provide for criminal sanctions (prison sentences, fines for both physical and legal persons, etc). Others, such as the EU, sanction hardcore cartels by means of considerable administrative fines imposed upon corporate entities, examples of which are given in the Annex. Other options exist both regarding the type and the severity of the sanction. Without going so far as to prescribe a certain type/severity of sanction, it could be desirable that the multilateral provision on hardcore cartels goes beyond a simple requirement for "effective sanctions" and gives some guidance on which sanctions have proven deterrent and could be available for WTO Members wish to use them in their domestic rules. This could be an issue for further debate within the Working Group.

22. By agreeing on an international ban on hardcore cartels coupled with the necessary flexible modalities for voluntary international cooperation as laid out in the previous EC submission, WTO Members would be taking a major step towards effectively curbing such cartel activity and eliminating their adverse impact.

3.2 Exchange of information and cooperation regarding hardcore cartels

23. In order to be fully effective, the proposed approach should provide for appropriate procedures in the field of voluntary cooperation and exchange of information. Indeed, transparency is an essential element of a framework of competition. Provisions have therefore to be developed on

notification, information exchange and cooperation between competition authorities. These would include provisions regarding exchange of information and more generally, cooperation procedures, e.g. when authorities are launching parallel investigations into the same practice. Negative and positive comity instruments could also be addressed.

24. More specifically, meaningful information exchange is the core element of cooperation between competition authorities. However, one should be mindful of the fact that certain business information is subject to strict legal protection in all jurisdictions and it would therefore be difficult to imagine confidential documents being exchanged between competition authorities as a routine matter. At the same time, it is clear that there is a range of non-confidential information, not in the public domain, which could be of great benefit to other competition authorities. Consequently, a WTO agreement should, at least, provide for the exchange of non-confidential business information between countries affected by a given cartel. This would not preclude WTO Members from considering whether exchanging information of a more detailed nature bilaterally on the basis of consent.

25. Exchange of information may take a number of forms, including notifications, by which a Party notifies one or several other Parties, as the case may be, whenever its competition authorities become aware that their enforcement activities may affect important interests of these other Parties. Enforcement activities as to which notification ordinarily will be appropriate include those that:

- are relevant to enforcement activities of the other Party(ies); or
- involve anti-competitive activities carried out in significant part in the other Party's territory.

26. In order to be effective, notification should take place as early as possible within the enforcement process.

27. In those notifiable cases it is in the common interest of all Parties to share information that will facilitate effective application of their respective competition laws. In such cases, each Party will provide either on its own initiative or upon request the other Party(ies) with any significant information that comes to the attention of its competition authorities about anti-competitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

28. The exchange of non-confidential information, i.e. information for which confidentiality and protection has not been or may not be claimed by any of the parties involved in a given anti-competitive practice, allows for a substantial amount of key information to be exchanged such as:

- the nature and scope of the suspected anti-competitive practice;
- the market involved and the key players in that market;
- the procedural steps already undertaken by the informing authority and the subsequent procedural steps foreseen;
- any document related to the case that is public or became available to the public in the course of the procedure.

ANNEX

**Selected International Hard Core Cartel Cases
investigated by the EC Commission**

Case No. 1: Vitamins Cartel

Product market :

The cartels concerned bulk synthetic substances which belong to the following groups of vitamins and closely related products: A, E, B1, B2, B5, B6, C, D3, Biotin (H), Folic Acid (M), Beta Carotene and carotinoids.

Geographic coverage :

The European Economic Area (EEA = the fifteen EU Member States plus Norway, Iceland and Liechtenstein) and elsewhere. The market for the products covered in the EC Decision was worth around €800 million in 1998.

Type of illegal activities :

The participants in each of the cartels fixed prices for the different vitamin products, allocated sales quotas, agreed on and implemented price increases and issued price announcements in accordance with their agreements. They also set up a machinery to monitor and enforce their agreements and participated in regular meetings to implement their plans.

Duration of cartel :

September 1989 till February 1999.

Date of EC Decision and Press Release Reference :

21 November 2001, IP/01/1625

Companies fined a total € 855.22 million (The Commission fined 8 out of the 12 cartel agreements as 4 were time-barred) :

- Hoffmann-La Roche AG (Switzerland): €462 million
- BASF AG (Germany): €296.16 million
- Aventis SA (France): €5.04 million (for 1 of the 8 cartels)
- Solvay Pharmaceuticals BV (Netherlands): €9.10 million
- Merck KgaA (Germany): €9.24 million
- Daiichi Pharmaceutical Co Ltd (Japan): €23.4 million
- Eisai Co Ltd (Japan): €13.23 million
- Takeda Chemical Industries Ltd (Japan): €37.05 million

Leniency grants :

Aventis (formerly Rhône-Poulenc): 100% for 7 of the 8 cartels; Hoffmann La Roche: 50%; BASF : 50%; all other participants: smaller reductions in view of various degrees of cooperation

Case No. 2: Carbonless Paper Cartel
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Product market :

Carbonless paper - also known as self-copying paper -, intended for the multiple duplication of documents and made from a paper base to which layers of chemical products are applied.

Geographic coverage :

The European Economic Area (EEA). Between 1992 and 1995, the market for the products covered in the EC Decision was worth around €850 million a year.

Type of illegal activities :

Cartel members (carbonless paper producers or distributors) agreed collective price increases and set the timetable for implementing them.

Duration of cartel :

January 1992 till February 1995.

Date of EC Decision and Press Release Reference :

20 December 2001, IP/01/1892

Companies fined a total €313,7 million :

- Arjo Wiggins Appleton Plc – “AWA” (United Kingdom): €184,27 million
- Papierfabrik August Koehler AG (Germany): €33,07 million
- Zanders Feinpapiere AG (Germany): €29,76 million
- Bolloré SA (France): €22,68 million
- Mitsubishi HiTech Paper Bielefeld GmbH (Germany/Japan): €21,24 million
- Torraspapel SA (Spain): €14,17 million
- Papeteries Mougeot SA (France): €3,64
- Distribuidora Vizcaina de Papeles S.L. (Spain): €1,75 million
- Carrs Paper Ltd (United Kingdom): €1,57 million
- Papelera Guipuzcoana de Zicuñaga SA (Spain): €1,54 million

Leniency grants :

Sappi Limited (South Africa): 100%; Mougeot: 50%; AWA: 35%; Bolloré: 20%; Carrs, MHTP and Zanders: 10% each.

Case No. 3 : Graphite Electrode Cartel

Product market:

Graphite electrodes are ceramic-moulded columns of graphite used primarily in the recycling of scrap steel into new steel in electric arc furnaces, also referred to as 'mini-mills'. The electric arc process accounts for some 35 percent of steel production in the European Union.

Geographic coverage:

The European Economic Area (EEA) and elsewhere. The market at stake in 1998 was worth €420 million in the EEA.

Type of illegal activities:

The participants held regular meetings to agree concerted price increases usually triggered by the "home producer" or market leader and then followed in other parts of the world. In the period in which the cartel operated, prices of graphite electrodes increased by as much as 50 percent.

Duration of cartel :

From 1992 till 1998.

Date of EC Decision and Press Release Reference :

18 July 2001, IP/01/1010

Companies fined a total €218.8 million :

- SGL Carbon AG (Germany): €80.2 million
- UCAR International Inc. (United States): €50.4 million
- Tokai Carbon Co. Ltd (Japan): €24.5 million
- Showa Denko K.K. (Japan): €17.4 million
- VAW Aluminium AG (Germany): €11.6 million
- SEC Corp. (Japan): €12.2 million
- Nippon Carbon Co. Ltd (Japan): €12.2 million
- Carbide Graphite Group Inc. (United States): €10.3 million

Leniency grants :

Showa Denko : 70%; UCAR: 40%.

Case No. 4 : Citric Acid Cartel
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Product market :

Citric acid is one of the most widely used additives in the food and beverage industry both as an acidulant and preservative. It is found in non-alcoholic beverages as well as in jams, gelatine-based deserts and tinned vegetables and fruit. Citric acid is also used in household detergent products especially as a substitute for phosphates considered harmful for the environment.

Geographic coverage :

The European Economic Area (EEA) and elsewhere. During the infringement period, the annual market was worth around €320 million in the EEA.

Type of illegal activities :

The cartel pursued four main objectives: i) allocation of specific sales quotas for each member and adherence to these quotas; ii) fixing 'target' and 'floor prices' for citric acid; iii) exchanging specific customer information, and iv) eliminating price discounts.

Duration of cartel :

March 1991 till May 1995.

Date of EC Decision and Press Release Reference :

5 December 2001, IP/01/1743

Companies fined a total €135.22 million :

- F. Hoffmann-La Roche AG (Switzerland): €63.5 million
- Archer Daniels Midland Company Inc – “ADM” (United States): €39.69 million
- Jungbunzlauer AG –“JBL” (Switzerland): €17.64 million
- Haarmann & Reimer Corp. – “H&R” (Bayer AG) (United States/Germany): €4.22 million
- Cerestar Bioproducts B.V. (Netherlands): €0.17 million

Leniency grants :

Cerestar Bioproducts: 90%; ADM: 50%; JBL: 40%; H&R: 30%; Hoffmann-La Roche: 20%.

Case No. 5 : Sodium Gluconate Cartel

Product market :

Sodium gluconate is a chemical mainly used to clean metal and glass, with applications such as bottle washing, utensil cleaning and surface treatment.

Geographic coverage :

The European Economic Area (EEA) and elsewhere. During the infringement period, the market was worth €18 million annually in the EEA.

Type of illegal activities :

The participants held regular meetings, where they agreed on individual sales quotas, fixed “minimum” and “target” prices and shared out specific customers.

Duration of cartel :

From 1987 till June 1995.

Date of EC Decision and Press Release Reference :

2 October 2001, IP/01/1355

Companies fined a total €57.53 million :

- Archer Daniels Midland Company Inc. – “ADM” (United States): €10.13 million
- Akzo Nobel N.V (Netherlands): €9 million
- Avebe B.A (Netherlands): €3.6 million
- Fujisawa Pharmaceutical Company Ltd. (Japan): €3.6 million
- Jungbunzlauer AG –“JBL” (Switzerland): €20.4 million
- Roquette Frères S.A. (France): €10.8 million

Leniency grants :

ADM: 40%; Roquette: 40%; Akzo: 20%; Avebe: 20%; Jungbunzlauer: 20%.
