

**COMMUNICATION FROM THE ORGANISATION FOR ECONOMIC  
CO-OPERATION AND DEVELOPMENT (OECD)**

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**HARD CORE CARTELS**

A Contribution by the OECD Secretariat\*

**I. INTRODUCTION**

1. Hard core cartels, or agreements among competitors to fix prices, restrict output, submit collusive tenders or share markets, are the most serious and harmful form of anti-competitive conduct. It is now widely recognized that such conduct merits condemnation because it generally is not associated with any legitimate economic or social benefits that would justify the harm it causes. As a result, in recent years, countries have become increasingly aware of the need to combat this conduct. In OECD countries and elsewhere in the world, prohibition against hard core cartels is now considered to be an indispensable part of a domestic competition law. The OECD has played a leading role in contributing to a greater understanding of hard core cartels and to the growing consensus that they must be detected, punished and deterred. This paper will briefly describe some of the work at the OECD on this subject and the findings that have resulted, and will highlight some issues that must be addressed as the effort against hard core cartels continues.

**II. HARMS CAUSED BY CARTELS**

2. Hard core cartels cause significant economic harm. They injure consumers and businesses that purchase cartelized products by raising prices and restricting supply. As a result, some purchasers elect not to purchase the cartelized product at the higher price, or they may purchase less of it. Purchasers pay more for that quantity that they do purchase, thereby unknowingly transfer wealth to the cartel operators. Moreover, cartels create waste and inefficiency. They shelter their members from full exposure to market forces, reducing pressure to control costs and to innovate, which leads to the lessening of international competitiveness of a nation's economy. Buying side cartels have similarly pernicious effects, but instead of increasing prices they decrease prices, i.e., the prices paid by cartel members to third party sellers, below levels that otherwise would be paid for the products. In the developing world, this can have a particularly devastating effect on small businesses, poor farmers and others.

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\* This contribution does not necessarily reflect the views of OECD Member countries.

3. Quantifying the precise harm from cartels is difficult, however. Data collected in a recent OECD survey<sup>1</sup> provide some additional information on the magnitude of cartels' harm. This survey addressed cases investigated by competition agencies in OECD Member countries and in about 20 non-Member countries between 1996 and 2000, in an attempt to learn more about the harm from cartels. The responding countries described a total of 145 cases, but in many of these it was not possible to estimate harm. Still, the amount of commerce affected by just 16 large cartel cases reported in the OECD survey exceeded an estimated USD55 billion world-wide. The survey showed that the cartel mark-up above a competitive price can vary significantly across cases, and that in some it can be very large, as much as 50% or more. Thus, it is clear that the magnitude of harm from cartels is many billions of dollars annually.

4. The harm from cartels falls on developed and developing countries alike. In recent years, several cartels that operated world-wide have been discovered and prosecuted. These cartels directly harmed consumers in developing countries by raising the prices of products that those countries imported. One study of international cartels found that in one year, 1997, developing countries imported goods valued at USD81.1 billion from industries in which there had been a price fixing conspiracy in the 1990s.<sup>2</sup> International cartels can also have another, equally pernicious effect on developing economies: by a variety of means they can inhibit new entry, by both foreign and domestic firms, into the cartelized markets.<sup>3</sup>

5. International cartels have received a great deal of public attention in recent years because of their size and visibility. But probably more harmful, and perhaps more difficult to quantify, are the effects of purely domestic cartels. This is almost certainly true in developing countries, where there has not yet been aggressive prosecution of cartels. Most of the 145 cases reported in the OECD survey described above were domestic cartels. Some of these had lasted for decades, had involved dozens, or even hundreds, of participants and had affected commerce valued in the billions of national currency. The OECD report established that these cartels occurred in all economic sectors, but were more common in some, including construction, construction materials, sales to government institutions, bulk food, electrical equipment, the services sector particularly local transport, professional services and health care. These sectors are important for both developed and developing economies. In addition to the direct harm that these cartels have on local consumers and businesses, they severely undermine the ability of those businesses to compete in regional and global markets.

6. If there is a lesson for developing countries from these findings, it is that they should concentrate on effective action against cartels occurring within their borders, which cause a great deal of damage and over which they have relatively greater control. To help build support among key constituencies for such action, consideration should be given to developing and implementing a substantial public relations campaign designed to increase awareness of the harm caused by hard core cartels.

### III. THE 1998 OECD RECOMMENDATION

7. On 25 March 1998, the OECD Council approved a Recommendation Concerning Effective Action Against Hard Core Cartels [C(98)35/FINAL - see Annex]. The Recommendation's preamble condemns hard core cartels – price fixing, bid rigging (collusive tenders), output restrictions, quota agreements and market division or sharing – as the most egregious violations of competition law

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<sup>1</sup> See, OECD Competition Committee, Report On The Nature And Impact Of Hard Core Cartels And Sanctions Against Cartels Under National Competition Laws, available at <http://www.oecd.org/pdf/M00028000/M00028445.pdf> and in a publication *Fighting Hard- Core Cartels – Harm, effective sanctions and leniency programmes*, OECD 2002.

<sup>2</sup> Levenstein, Margaret, Valerie Suslow (2001) Background Paper for the World Bank's World Development Report 2001 "Private International Cartels and Their Effect on Developing Countries."

<sup>3</sup> Id.

because they raise prices and restrict supply. The preamble notes that further action to enhance the effectiveness of anti-cartel enforcement is particularly important to the global economy, since cartels severely distort world trade and create waste and inefficiency. It also notes that success in the anti-cartel effort is particularly dependant upon international co-operation, because cartels operate in secret and important evidence may be located abroad.

8. The Recommendation calls upon countries to take two sorts of actions. First, countries are urged to ensure that their competition laws effectively halt and deter hard core cartel conduct. This requires that sanctions and investigatory powers are adequate and that exclusions and authorizations of what would otherwise be hard core cartels are both necessary and no broader than necessary to achieve their overriding policy objectives. Second, the Recommendation urges countries to co-operate with one another in enforcing their laws against cartels. The Recommendation then sets forth several principles and practices that contribute to effective co-operation in the anti-cartel effort. The Recommendation, which also invites non-Member countries to associates themselves with it and to implement it, is provided in its entirety in the Annex to this note.

#### **IV. ISSUES OF IMPLEMENTATION**

##### **(1) *Definitional problems***

9. There is a consensus that competition laws should prohibit hard core cartels, but there is also agreement that it is difficult to define hard core cartel conduct in terms that are not over-inclusive. Not all agreements among competitors are competitively harmful. Thus, for example, it is not sufficient simply to decree that all agreements among competitors that have the effect of "fixing prices" are unlawful. In some cases, two competitors may co-operate for the purpose of creating a joint venture through integration of a part of their operations. The joint venture could provide efficiencies that the partners could not achieve independently, the result of which is to enhance competition. To achieve the pro-competitive benefits of the venture it may be necessary for the partners to agree, in an appropriately limited fashion, on the prices for the venture's output. Such an agreement, though it involves a form of "price fixing", would be legitimate.

10. The OECD Recommendation recognises this issue. The Recommendation does not attempt to precisely define "hard core cartels". It lists the types of agreements that are traditionally considered to constitute hard core cartel conduct, but it excludes from the concept agreements "that are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies." (Paragraph I.A.2.). As noted above, the types of agreements generally considered to constitute hard core cartel conduct include agreements which have as their primary object the fixing of prices; rigging of bids (collusive tenders); establishment of output restrictions or quotas; and the sharing/division of markets by allocating customers, suppliers territories or lines of commerce. Agreements that do not have these types of conduct as their primary object, but which simply have ancillary adverse effects on prices, output, customers, suppliers, territories or lines of commerce, may or may not be anti-competitive and therefore may not be appropriate to condemn *ex ante*.

11. There is another definitional issue that is recognised in the Recommendation: countries may, for reasons of national policy, provide for exclusions of certain types of agreements from laws against hard core cartels, or for the authorisation of such agreements. The Recommendation states that hard core cartel conduct does not include agreements so excluded or authorised, but it urges that such exclusions or authorisations be transparent and that countries review them periodically to ensure that they are both necessary and no broader than necessary to achieve their overriding policy objectives.

##### **(2) *Investigative tools***

12. Cartels are usually conducted in secret. Their members generally know that their conduct is unlawful, and so they attempt to conceal it from their customers, the competition agency and the

public. The responses to the aforementioned OECD survey provided numerous examples of the types of elaborate and creative mechanisms that can be adopted in an attempt to maintain the secrecy of a cartel. This characteristic of cartels requires special investigative tools. The OECD's Competition Committee has studied this subject in some detail. In their fight against cartels, competition agencies must have, among other things, the ability to acquire quickly and with the element of surprise documentary and electronic evidence (computer files) that may contain evidence of an unlawful agreement. Competition agencies have found the "dawn raid," whereby investigators conduct a surprise visit to the offices of suspected cartel operators, to be an effective tool in this regard. Less well developed in many countries is the ability to obtain oral testimony or statements from cartel participants who would not otherwise co-operate with the investigation. This tool becomes more important as cartel operators become more sophisticated, and eliminate "paper trails" of their agreement.

### **(3) *Leniency Programs***

13. A new and dramatically successful investigative tool against cartels is the "leniency programme." Such a programme promises amnesty from punishment or sanctions to the first cartel participant (and only the first) who comes forward to offer co-operation with the competition agency. These programmes may also offer some form of leniency short of full amnesty to other cartel participants who subsequently approach the enforcement authority to offer their co-operation in relation to the investigation and the prosecution of the unlawful conduct. The availability of such programs creates uncertainty within the cartel, and can provide a powerful incentive for its members to "defect."<sup>4</sup> Indeed, jurisdictions that have adopted the most refined leniency programmes have experienced a substantial increase in the number of cartels uncovered, the number of successful prosecutions and the level of average fines since the implementation of such programmes. This suggests that leniency programmes play a critical role in the discovery of many cartels that otherwise would go undetected. These programs also help to make ensuing investigations more efficient and effective. Leniency programmes do not work, however, unless there is: (i) a high degree of certainty regarding the nature of the leniency that will be granted, and (ii) a credible threat of strong sanctions for those who do not co-operate.

### **(4) *Sanctions***

14. Strong sanctions against hard core cartels are a necessary component of an effective leniency programme, but they have an even more important purpose: deterrence against future activity of that kind. At a minimum, an effective deterrent should take away the prospect of gain from the cartel activity. Thus, cartel operators should face the prospect of heavy fines if their agreement is detected and prosecuted. The fines should at least equal the amount of the unlawful gain that the cartel members realised from their conspiracy. Many experts believe that the fines should exceed the gain, to take into account the fact that not all cartels are detected and punished. Studies have shown that as few as one in two or three cartels, or even one in six, are prosecuted and punished. Thus, the fines against those that are prosecuted should be at least two or three times the gain, to reflect the fact that potential cartel participants will tend to discount the expected costs of penalties by some factor that represents their view on the likelihood of detection and punishment.

15. The OECD has conducted a study of sanctions imposed by Member and observer countries against cartels.<sup>5</sup> The competition laws of most countries provide for the imposition of large fines against cartels, and some countries have imposed fines in excess of the equivalent of USD one million, or even 10 million. In three OECD countries, the largest fines imposed in the period 1996-2000 were

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<sup>4</sup> See, OECD Competition Committee, Report on Leniency Programmes to Fight Hard Core Cartels, available at <http://www.oecd.org/pdf/M00020000/M00020228.pdf>; also published in *Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Programmes*, OECD, 2002.

<sup>5</sup> See note 1 above.

in excess of USD 100 million. These countries are a minority, however. Most countries have not yet begun to impose such large fines. Moreover, even the largest fines in most cases have not reached what many experts think is the optimum level of two or three times the unlawful gain, to achieve effective deterrence. Part of the difficulty has been that courts have been reluctant to impose fines at or near the maximum levels permitted under domestic laws. To address this issue, efforts have been made in some jurisdictions to educate courts on the importance of large fines in achieving deterrence, and to signal to courts the desirability of imposing higher fines.

16. Some countries have encountered difficulty with sanctions because they have been based on measures that are difficult to prove in a court, such as the amount of the actual over charge. Other measures, such as a percentage of profits, are problematic because of the ease with which cartel members can manipulate their profits. The most successful approaches include those that have been based on the cartel members' total turnover or gross revenues, or on the volume of commerce affected by the cartel.

17. An important supplement to fines against organisations for cartel conduct is sanctions against natural persons for their participation in the conspiracy. These sanctions can take the form of substantial fines or, in a few countries, the criminal sanction of imprisonment.<sup>6</sup> There is a distinct trend toward individual sanctions, as jurisdictions that traditionally have imposed sanctions only against enterprises have realised that the prospect of individual liability can be very important in achieving greater levels of deterrence. Moreover, individual sanctions also have another beneficial effect – they create an incentive for culpable individuals to defect from the cartel and to co-operate with the investigation, in order to avoid punishment. This is particularly the case where imprisonment is a possibility. It may be noted that in three OECD countries, the largest fines imposed on individuals during the period covered by the above-noted survey exceeded USD 100,000.

18. A third type of sanction that is also currently employed in only a few OECD countries but which can also provide additional deterrence is the recovery of money damages from cartel operators by the victims of their unlawful conduct.<sup>7</sup> The essential conclusion of the OECD study on sanctions, however, is that in most cases these private remedies have not reached optimal levels.

#### **(5) *International co-operation***

19. As noted above, the 1998 OECD Recommendation calls for enhanced international co-operation in the fight against hard core cartels. The number of cartels that have cross-border effects is growing. National competition agencies often find it difficult to prosecute such agreements, because some or all of the cartel participants, as well as important evidence, may be located abroad, not subject to a country's jurisdiction. It may not be possible for any single national competition agency to successfully prosecute such a conspiracy without co-operation from one or more other countries.

20. Such co-operation is difficult to achieve, however, principally because the laws of virtually all countries impose strict limits – for legitimate reasons – on the ability of competition agencies to disclose confidential information to their foreign counterparts. Since most evidence that is developed in the course of a cartel investigation is considered confidential, competition agencies often find it difficult to co-operate effectively in the international context. Nevertheless, international co-operation is growing. Several countries have developed close relationships with their neighbours and significant trading partners, pursuant to which they have developed mechanisms to facilitate the exchange of a substantial amount of useful information. These mechanisms also permit one country

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<sup>6</sup> In nine OECD countries, cartel conduct can be prosecuted as a crime, but in recent years a sentence of imprisonment has been imposed in only two countries.

<sup>7</sup> Recovery of money damages by cartel victims is possible in several OECD countries, but the practice is common in only a few.

to request another to gather information on its behalf, using compulsory process if necessary. In addition, the more advanced international cooperation frameworks incorporate several safeguards and protections which strictly limit the circumstances in which information may be exchanged and the use which may be made of such information within the recipient jurisdiction. These types of measures have been very helpful in increasing the level of comfort of businesses and individuals who may be inclined to co-operate with enforcement authorities.

21. These international co-operative relationships, which often are formalized in bi-lateral co-operation agreements, are country-specific, however. The international competition community faces a challenge in finding the means to broaden international co-operation in the fight against cartels, especially in involving competition agencies from developing countries or countries that are just beginning to enforce anti-cartel laws, and in establishing legal frameworks to facilitate international cooperation and safeguard confidential business information. As noted above, international cartels harm developed and developing countries alike, and the enhancement of the ability to co-operate across all countries will contribute to effective prosecution of such agreements. Based on the experience to date among OECD Member countries, it appears that enforcement authorities tend to co-operate most closely, if at all, with counterparts abroad with whom they have established a close working relationship and a certain level of trust. This suggests that it may take several years before enforcement authorities in many countries will have established sufficiently rigorous and credible legal rules, practices and procedures to be in a position to engage in extensive international enforcement co-operation in respect of hard core cartel activity. In the meantime, important experience with "softer" co-operative arrangements can be built.

**ANNEX**

**RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION  
AGAINST HARD CORE CARTELS  
[C(98)35/FINAL]**

**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" [C(86)65(Final)]; and that "anti-competitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries" [C(95)130/FINAL];
- Having regard to the Council Recommendation that exemptions from competition laws should be no broader than necessary [C(79)155(Final)] 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" [C/MIN(97)10];
- Having regard to the Council's long-standing position that closer co-operation is necessary to deal effectively with anti-competitive 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 [C(95)130/FINAL];
- 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:

- (a) effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and
- (b) 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) a "hard core cartel" is an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive 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;
- (b) 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 anti-competitive 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:

- (a) 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;



- (b) 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;
- (c) 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;
- (d) 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.**

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