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

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MODALITIES FOR VOLUNTARY COOPERATION

A Contribution by the OECD Secretariat (*)

1. "Modalities for voluntary co-operation" is one of the topics identified by Paragraph 25 of the Doha Declaration for further clarification by the Working Group on the Interaction between Trade and Competition Policy. The OECD is a forum for voluntary co-operation on economic issues generally, and since 1967 its Council Recommendations concerning Co-operation between Member Countries on Anti-competitive Practices affecting International Trade [1] have been both the leading international instruments governing co-operation in competition law enforcement and the model for bilateral co-operation agreements. The OECD Secretariat hopes that this description of the Recommendations and other aspects of OECD co-operation will help clarify modalities for voluntary co-operation as they might operate within a WTO multilateral framework on competition.

2. The term "voluntary co-operation" is a general one that can apply to the entire range of actions by which one or more jurisdictions may assist, co-ordinate or even just liaise with each other. In this general sense, the principal modalities include: (i) informal co-operation relating to analytical issues, practices, policies and procedures, as well as obtaining feedback on proposed laws and regulations, or on potential amendments to existing laws or regulations; (ii) case-specific co-operation; and (iii) co-operation typically considered to fall under the broad umbrella of capacity building and technical assistance. This note does not address the latter type of co-operation, because it was already discussed in an OECD Secretariat contribution to the last Working Group meeting in April 2002. [2] Rather, it begins by generally discussing how the OECD has facilitated the first general type of voluntary co-operation, for example by discussing the processes used to promote mutual understanding and – sometimes – informal "best practices" and official Recommendations. The note then discusses case specific co-operation by reference to one of the most successful outputs of these "internal" co-operative processes: OECD Recommendations that relate to

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

[1] The current Council Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, [C(95)130/FINAL], dates from 1995. The Recommendation was first adopted in 1967 and subsequently revised in 1973, 1979 and 1986.

[2] Review of technical assistance/capacity building programmes by OECD Member countries and the OECD *Secretariat*, Note by the OECD Secretariat submitted at the WTO/WGTC meeting of 23-24 April 2002.

"external" voluntary co-operation among jurisdictions in dealing with specific instances of alleged anti-competitive conduct.

I. VOLUNTARY CO-OPERATION AT THE OECD

3. The OECD is fundamentally a forum for voluntary co-operation in the form of policy dialogue. First and foremost, this co-operation occurs at meetings of OECD committees, including the Competition Committee. During these meetings, high-level officials from different countries share their experiences, seek advice, and receive feedback and recommendations through informal "peer review" mechanisms. Sometimes, OECD Committees also identify "best practices" for dealing with a particular issue, but these too are very informal and wholly voluntary. As discussed below, even official OECD "Recommendations" are also voluntary.

4. There are four general points about voluntary co-operation within the context of OECD meetings that merit emphasis here. First, most of the co-operation consists of "roundtable" and other general discussions of matters relating to competition law enforcement and to the competition policy aspects of economic regulation. This policy dialogue is an opportunity for all to learn about others' policies and practices, to explain their own, and to exchange views about these policies and practices. However, the Committee's discussions do not seek to resolve disputes among Members concerning particular policies or cases. During the late 1970s and early 1980s, the informal exchanges within the Committee were instrumental in creating voluntary convergence on competition policy principles that underlie what is today considered "competition advocacy" and "regulatory reform." More recently, exchanges within the Committee have led to significant convergence regarding various analytical issues, practices, policies and procedures. Furthermore, the Committee has developed numerous recommendations and best practices concerning specific enforcement issues. For example, in the fall of last year, it held a productive discussion of the "Portfolio Effects Doctrine" doctrine by focusing on Members' views of the doctrine itself without specifically discussing the application of the doctrine to a prominent case.[3] It may be noted that some OECD Recommendations provide that Committees may be used for conciliation concerning their application, but at least in the Competition Committee those provisions have never been invoked.

5. Second, the OECD's experience over the last forty years shows that voluntary co-operation can produce very substantial benefits by helping to achieve consensus where a more formal agreement might not be attainable and by assisting Members to avoiding conflict. In the latter regard, it is useful to recall that in 1960, most OECD Members lacked competition laws and/or competition law enforcement programs, and even among OECD countries with competition laws there was not only a lack of consensus, but periodic open conflict. Indeed, for about 25 years a main goal of OECD co-operation in competition law enforcement was to avoid conflict, not to promote mutual assistance. Today, it is widely recognised that voluntary co-operation may be preferable to attempting to reach a more formal agreement when (for example) it is difficult for one or more parties to protect their interests fully through the text of an agreement. Such situations are more common when some parties have substantially less expertise than others, but may also occur in other contexts. For example, since co-operation under the 1998 OECD Council Recommendation on Effective Action against Hard Core Cartels is voluntary[4], Members were able to reach agreement without facing the problem of trying to develop the kind of objective, "multinational" definition of hard core cartel that would be needed if countries had enforceable obligations with respect to such cartels.

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[3] *Portfolio Effects in Conglomerate Mergers*, Series Roundtable on Competition Policy, Number 37 [DAFFE/COMP(2002)5].

[4] (C)98(35)FINAL. See separate OECD Secretariat contribution to the July 2002 WTO/WGTC meeting on the 1998 Council Recommendation: *Hard Core Cartels: A contribution by the OECD Secretariat*.

6. Third, the OECD's experience with peer review may be of assistance in considering how this form of voluntary co-operation can be incorporated into the WTO in the competition area. However, it is important to note that there is no single OECD peer review system. Committees choose the mechanisms best suited to their purposes and the mechanism may vary over time.

7. The current Competition Committee system has existed only since 1998. Under this system (known as "regulatory reform review"), the OECD Secretariat prepares a comprehensive report on a Member country's competition regime and this report serves as the basis for questions by other Members. This system contains benefits (*e.g.*, in terms of comprehensiveness and consistency), but as pointed out, for example, in UNCTAD's Consolidated Report, *Closer Multilateral Co-operation on Competition Policy: The Development Dimension*, 15 May 2002, the system may need to be adapted to be suitable for the WTO, which has many more members and may want to use peer review as a means of resolving disputes. Similar views were expressed within the OECD Joint Group during talks in the first phase of the Joint Group's programme of work on peer review.[5] For example, in addition to noting the significant costs associated with the current type of peer review process used by the Committee, the point was made that the rhythm of 2 to 4 country examinations a year for regulatory reform reviews seemed hardly realistic in a WTO context, given its much higher number of Members. Nevertheless, a paper prepared in the Joint Group and issued this June outlines "a number of potential merits to peer review of competition policy within the WTO". It has also highlighted that "the various peer review systems currently in use have potential strengths and weaknesses and thus may provide lessons for any future mechanisms".[6] This suggests that while some features of the approaches reviewed in the paper may be potentially suitable for the WTO, some refinements likely will have to be made. [7]

8. In light of the potential inapplicability of the Competition Committee's current peer review system to the WTO, it is important to note that the peer review system that yielded so much convergence in the OECD's first forty years (and is still used in many Committees) was more informal and less costly. That approach primarily consisted of questioning a member based on its own description of its laws and policies.[8] The experience with that approach demonstrates that even less thorough and costly reviews can be very productive if there is a climate of confidence and a willingness on all sides to co-operate in a positive manner for the benefit of all.

9. In sum, peer review should not be seen as a precise process but as a flexible concept with potential for use both to encourage convergence generally and to provide transparency that could facilitate the voluntary resolution of disputes.[9] As an example only, consider the oft-stated desire by a number of WTO

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[5] This work is released as a general distribution document under the responsibility of the Secretary-General in *Peer Review: Merits and Approaches in a Trade and Competition Context*, OECD, 2002. Among others, the reader will find in this paper more discussion on the OECD Peer Review Process. The OECD Joint Group on Trade and Competition will pursue Phase II work on Peer Review this autumn. The Joint Group had already emphasised the merits of peer review, in particular in *Trade and Competition Policies: Options for a Greater Coherence*, OECD, 2001.

[6] *Peer Review* in note 5 above, OECD Joint Group on Trade and Competition, 2002, para. 63.

[7] *Peer Review* in note 5 above, OECD Joint Group on Trade and Competition, 2002, para. 68.

[8] Until the early 1990's, the Competition Committee' peer review system was that every Member drafted and presented an annual report, and other Members could ask any questions they wanted. Because this process was mostly limited to the issues raised by the reporting country, a so-called "in-depth examination"system was adopted. Under this system, one country was examined at each meeting, again on the basis of a report prepared by the country itself, but the examination was done by two countries chosen in advance for their particular interest and knowledge of the competition law and policy of the reviewed country. The examiners prepared themselves in advance, in order to question possible weaknesses of the competition law and policy of the reviewed country. The current "regulatory reform review" replaced the "in-depth examinations" and is more in depth, but Members also present their own annual reports, and the discussion is valuable even though it is less in depth.

[9] See also *The Potential Contribution of a WTO Peer Review System as a Complement to Current Technical Assistance Efforts*, presentation made by William Kovacik of the United States Federal Trade Commission, expressing personal views at the WTO Symposium on Trade and Competition Policy, 22 April 2002.

members to have an effective ban on hard core cartels. The most productive means of reaching this goal might be to make the specific anti-cartel laws adopted or proposed by WTO Members "reviewable" only by peer review that could be invoked on a mandatory basis but would not lead to a formal decision on the law's adequacy. Such an approach would avoid the difficulties associated with a more rigorous approach while achieving important benefits that can result from receiving a positive or negative review by one's peers. This type of approach also would make use of two of the advantages of voluntary co-operation – no clear definition would be required (see above), and the review could produce more substance and less defensiveness.

10. Fourth, while OECD voluntary co-operation has focused primarily on Members, the Organisation's meetings and other activities place increasing emphasis on including non-Members. The OECD's 1999 Ministerial meetings for the first time included a special dialogue with non-Members because in a globalizing world, "the OECD could not appropriately take on its tasks without having a substantial dialogue with these countries." [10] The Competition Committee now has six regular non-Member Observers[11], and meetings of the OECD Global Forum on Competition – organised under the auspices of the Centre for Co-operation with Non-Members ("CCNM") – have included representatives from about 25 other countries. It may be noted that the next Global Forum on Competition in February 2003 will include a "peer review" of a non-Member (South Africa) and that several other non-Members also have expressed an interest in being peer reviewed in future meetings of the GFC. Moreover, non-Members have made use of the Committee's *Framework for Notification of Transnational Mergers.* The Cartel Recommendation invites non-Members to associate themselves with it, and the means to do so are published on the Competition Division's website.[12]

II. OECD RECOMMENDATIONS CONCERNING VOLUNTARY CO-OPERATION IN COMPETITION LAW ENFORCEMENT

11. In 1967, the OECD issued the first of a series of Recommendations on voluntary co-operation as a means of reducing conflict and promoting mutual assistance in competition law enforcement. The current version is the 1995 Recommendation concerning Co-operation between Member Countries on Anti-competitive Practices Affecting International Trade.[13] The 1998 Cartel Recommendation expands on some of the 1995 Recommendation's provisions in the context of cartel investigations (and addresses the kind of legislation that is important for individual jurisdiction's enforcement activities and international co-operation).[14]

12. Before describing the forms of co-operation encouraged by these Recommendations, two general observations are noteworthy. First, the voluntary nature of the Recommendations stems not merely from the fact that they are non-binding, but also from provisions to the effect that no country is expected to co-operate in situations where doing so would be contrary to its laws or important interests. This often overlooked distinction is important to understand when considering co-operation because even binding agreements are truly voluntary when containing a general national interest exception. (The co-operation agreement between Canada and the United States is an example of a binding instrument that has a significant voluntary dimension). Such an exception is a standard means of providing a degree of flexibility that is considered necessary to protect the interests of parties that are requested to co-operate. For example, in recommending acceptance of the far reaching co-operation agreement it had negotiated with the United States, the European Commission explained to the Council of Ministers that given the

[10] Special Dialogue at Ministerial level with Invited Countries, Proceedings, DIAL/MIN(99)5, at 4.
[11] Argentina, Brazil, Israel, Lithuania, Russian Fédération, Chinese Taipei
[12] *See* http://www.oecd.org/competition.
[13] [(C)95(130)/FINAL]. See footnote 1 above.
[14] See footnote 4.

essentially voluntary dimension that the national interest exception added to the agreement, the Commission would not be required to co-operate when it decided that doing so would not be in its interests.[15]

13. Second, although one benefit of the 1995 Recommendation – for both Members and non-Members – has been its availability as a model for bilateral co-operation agreements,[16] the Recommendation is far more than a model. It is, in fact, an operational international agreement on voluntary co-operation that may be invoked by any Member country and actually provides the basis for most OECD Members' existing co-operation. Most OECD countries have no bilateral co-operation agreements, and few have more than one or two. Thus, co-operation among most OECD Members is based solely on the Recommendation, under which any OECD Member may request co-operation by any other.

14. The 1995 Recommendation, which is attached as Annex A, contains the ingredients identified by OECD Members as key to voluntary co-operation in dealing with alleged anti-competitive activity. It is not the most user-friendly document, in part because its basic structure and terminology have not changed since 1967 even though its emphasis has moved from conflict avoidance to mutual assistance. Indeed, the 1995 version did not change the text of its (1986) predecessor, but rather added an Appendix that follows its structure and contains guiding principles, definitions and examples. The Recommendation encourages Member countries to take account of these guiding principles in approaching matters falling within the ambit of the Recommendation, and in general the Appendix is more user friendly.

15. The kinds of voluntary co-operation encouraged by the Recommendation are further explained in the Competition Committee's 1999 *Report on Positive Comity).*[17] Part II of that Report, which is attached as Annex B, describes the three basic forms of voluntary co-operation as follows:

1. The first, based on traditional comity concepts, encourages jurisdictions to conduct their investigations in a manner that respects the interests of other jurisdictions – "Paraphrasing Part I.B.5 of the OECD Recommendation, negative comity may be described as the principle that a country should *(i)* notify other countries when its enforcement proceedings may have an effect on their important interests, and *(ii)* give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests."

2. The second and third – investigatory assistance and positive comity - are the two basic means by which the OECD Recommendation contemplates that a jurisdiction in which anti-competitive conduct may be occurring can co-operate with a country that perceives itself as being harmed by that conduct.

    - "Paraphrasing Part I.A.3 of the OECD Recommendation, investigatory assistance may be described as co-operation with another country's law enforcement proceeding. Such assistance may include gathering information on behalf of the requesting country, sharing information with the requesting country, and discussing relevant facts and legal theories."

[15] Commission communication to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition, 18 June 1997, at 4.

[16] The co-operation among the three Baltic countries -- Estonia, Latvia, and Lithuania -- is modeled on the OECD Recommendation.

[17] Making International Markets more efficient through "positive comity" in competition law enforcement, OECD J. Competition L&P, Vol. 1, No. 3, page 38 (1999).

- "Paraphrasing Part I.B.5 of the OECD Recommendation, positive comity may be described as the principle that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests."

16. A detailed summary of the provisions of the 1995 Recommendation is beyond the scope of this note. For the present purposes, it suffices to state that Part A of the document, which deals with notification, the exchange of information and co-ordination of action, articulates three general principles.

- When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations.

- Where two or more Member countries proceed against an anti-competitive practice in international trade, they should endeavour to co-ordinate their action insofar as appropriate and practicable;

- Through consultations or otherwise, the Member countries should co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with anti-competitive practices in international trade - in this connection, the Recommendation specifies certain types of co-operation, including investigatory assistance.

17. Part B of the Recommendation introduces the concepts of "traditional" and "positive" comity. It also contains various provisions designed to encourage consultation and conciliation in various circumstances, including by giving full and sympathetic consideration to the views expressed by the other Member country.

18. In practice, OECD Member countries regularly notify each other when their investigations may affect each other's important interests, and they sometimes ask for and provide assistance subject to their applicable laws and important interests, including resource limits. For additional information regarding how this co-operation operates, readers are referred to a wealth of material that can be found on the website of Competition Division's or that of the OECD Global Forum on Competition. For example, Secretariat notes on co-operation in cartel and merger cases were prepared for the October 2001 and February 2002 meetings of the OECD Global Forum.[18]

19. Responding to an OECD Secretariat questionnaires, 13 Members and 12 non-Members contributed information to the February 2002 Global Forum on Competition concerning various issues of co-operation in cartel cases, for example, exchanging non-public but non-confidential information. Participants also discussed the types of requests they usually receive, such as being asked to make initial contact with potential witnesses. One theme that the Competition Committee has stressed in the past is that co-operation currently is frustrated because most OECD competition authorities are forbidden to share information that is deemed "confidential", regardless of the actual sensitivity of the information and no matter how great the safeguards against improper disclosure or use. Therefore, a Secretariat note contained an extensive discussion of these and other information-sharing issues, including an assessment of the areas

[18] Available at: http://www.oecd.org/competition.

in which certain protections sought by the business community may be unwarranted.[19] Non-Members joined Members in expressing frustration over the inability to share confidential information pursuant to adequate safeguards.

20. Concerning co-operation in merger cases, for the October 2001 Forum meeting the Secretariat prepared an Issues Paper and a somewhat revised version of its Note and Members' submissions from a 2001 roundtable discussion in the Committee's Working Party No. 3.[20] For the February 2002 Forum meeting, the Secretariat submitted a note analysing the contributions made by Forum invitees to a Secretariat questionnaire.[21] These materials discuss, for example, the areas in which co-operation has been most useful (market definition, competitive effects, and remedies), and the increasingly common practice of obtaining waivers from the merging parties to permit sharing confidential information.

21. In addition to referring WTO Members to these OECD materials concerning voluntary co-operation, the Secretariat also wishes to comment briefly on various points of ongoing discussion relating to voluntary co-operation. In Forum meetings and elsewhere, some small economies expressed the concern that large economies may not be interested in voluntarily co-operating with them. It appears that this may have led some to conclude that a multilateral agreement on competition may be useful for small economies seeking redress for damages if the agreement has a binding force - through a dispute settlement mechanism (DSM) or otherwise. In this regard, the Secretariat is not aware of any proposals under which a multilateral agreement would provide redress for damages. Moreover, it seems clear that the kind of WTO agreement being considered would make co-operation voluntary and therefore would not be subject to binding dispute resolution in this respect. The OECD's experience suggests that this is not necessarily a negative - the very reason why co-operation currently is working quite well in the competition field is because it is voluntary.

22. The debate about voluntary co-operation in the context of a multilateral agreement on competition has also generated confusion about two other important points. First, it has been suggested that "formal" bilateral co-operation agreements might be preferable to "voluntary" agreements in that they might permit sharing confidential information. In fact, however, even formal co-operation agreements are voluntary (see above); moreover, the current bilateral agreements that permit the sharing of confidential information are both formal and voluntary. Second, it has been suggested that if a multilateral agreement were adopted, a country without a competition law or a competition authority could not make or receive co-operation requests. In fact, co-operation agreements are normally government-to-government instruments, and it is not unusual that co-operation requests are agreed to by governments, with the co-operation being provided by an agency or Ministry other than the competition authority. Therefore, although a country without a competition law would presumably have no basis for requesting case-specific co-operation, the country could receive and respond to co-operation requests.

23. Finally, and more generally, work in the OECD so far has shown that mandatory and voluntary agreements both have advantages and disadvantages from both national and global perspectives. When it comes to case specific co-operation, even economies with long histories of working together have been unwilling to give up the advantage of being able to decline requests contrary to their national interests (for example, because the requested authority lacks the necessary resources or regards the requesting authority's investigation as fundamentally misguided). In fact, as noted in the Committee's *Report on Positive* Comity,

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[19] *Information Sharing in Cartel Cases – Suggested Issues for Discussion and Background Material*, CCNM/GFC/COMP(2002)2, 24 January 2002; available at: http://www.oecd.org/competition.

[20] Merger Enforcement and International Co-operation, CCNM/GFC/COMP(2001)1, 12 September 2001; available at: http://www.oecd.org/competition.

[21] International Co-operation in Mergers: Summary of Responses to Questionnaire to Invitees and Suggested Issues for Discussion, CCNM/GFC/COMP(2002)6; available at: http://www.oecd.org/competition.

various OECD Member countries expressed real concern that even increased use of *voluntary* positive comity would take away their ability to control their own enforcement agendas.[22] Moreover, there is no reason to believe that a voluntary approach is not preferable from an overall global perspective. In order to respond to the concern of some smaller economies that their requests to large economies may be ignored, and to do so without sacrificing the advantages permitting actual co-operation decisions to be voluntary, one possibility that has found favour in some quarters is to provide for mandatory bilateral consultations in cases when a requesting country believes that its request has been unreasonably denied.

[22] Report on *Positive Comity* mentioned footnote 17, page 53.

ANNEX A

REVISED RECOMMENDATION OF THE COUNCIL

Concerning Co-operation between Member Countries on Anti-competitive Practices affecting International Trade

27 and 28 July 1995 - C(95)130/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 the fact that international co-operation among OECD countries in the control of anti-competitive practices affecting international trade has long existed, based on successive Recommendations of the Council of 5th October 1967 [C(567)53(Final)], 3rd July 1973 [C(73)99(Final)], 25th September 1979 [C(79)154(Final)] and 21st May 1986 [C(86)44(Final)];

Having regard to the recommendations made in the study of transnational mergers and merger control procedures prepared for the Committee on Competition Law and Policy;

Recognising that anti-competitive practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries;

Recognising that the continued growth in internationalisation of business activities correspondingly increases the likelihood that anti-competitive practices in one country or co-ordinated behaviour of firms located in different countries may adversely affect the interests of Member countries and also increases the number of transnational mergers that are subject to the merger control laws of more than one Member country;

Recognising that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned;

Recognising the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anti-competitive practices;

Recognising that anti-competitive practices investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries;

Considering therefore that Member countries should co-operate in the implementation of their respective national legislation in order to combat the harmful effects of anti-competitive practices;

Considering also that closer co-operation between Member countries is needed to deal effectively with anti-competitive practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade;

Considering moreover that closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning anti-competitive practices, as may arise;

Recognising the desirability of setting forth procedures by which the Competition Law and Policy Committee can act as a forum for exchanges of views, consultations and conciliation on matters related to anti-competitive practices affecting international trade;

Considering that if Member countries find it appropriate to enter into bilateral arrangements for co-operation in the enforcement of national competition laws, they should take into account the present Recommendation and Guiding Principles:

I. RECOMMENDS to Governments of Member countries that insofar as their laws permit:

A. NOTIFICATION, EXCHANGE OF INFORMATION AND CO-ORDINATION OF ACTION

1. When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anti-competitive practices;

2. Where two or more Member countries proceed against an anti-competitive practice in international trade, they should endeavour to co-ordinate their action insofar as appropriate and practicable;

3. Through consultations or otherwise, the Member countries should co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with anti-competitive practices in international trade. In this connection, they should supply each other with such relevant information on anti-competitive practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests.

B. CONSULTATION AND CONCILIATION

4.(a) A Member country which considers that an investigation or proceeding being conducted by another Member country under its competition laws may affect its important interests should transmit its views on the matter to or request consultation with the other Member country;

(b) Without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding;

5.(a) A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in anti-competitive practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the Member countries concerned;

(b) Any Member country so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the anti-competitive practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country;

(c) The Member country addressed which agrees that enterprises situated in its territory are engaged in anti-competitive practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on anti-competitive practices or administrative measures, on a voluntary basis and considering its legitimate interests;

6. Without prejudice to any of their rights, the Member countries involved in consultations under paragraphs 4 and 5 above should endeavour to find a mutually acceptable solution in the light of the respective interests involved;

7. In the event of a satisfactory conclusion to the consultations under paragraphs 4 and 5 above, the requesting country, in agreement with, and in the form accepted by the Member country or countries addressed, should inform the Competition Law and Policy Committee of the nature of the anti-competitive practices in question and of the settlement reached;

8. In the event that no satisfactory conclusion can be reached, the Member countries concerned, if they so agree, should consider having recourse to the good offices of the Competition Law and Policy Committee with a view to conciliation. If the Member countries concerned agree to the use of another means of settlement, they should, if they consider it appropriate, inform the Committee of such features of the settlement as they feel they can disclose.

II. RECOMMENDS that Member countries take into account the guiding principles set out in the Appendix to this Recommendation.

III INSTRUCTS the Competition Law and Policy Committee:

1. To examine periodically the progress made in the implementation of the present Recommendation and to serve periodically or at the request of a Member country as a forum for exchanges of views on matters related to the Recommendation on the

understanding that it will not reach conclusions on the conduct of individual enterprises or governments;

2. To consider the reports submitted by Member countries in accordance with paragraph 7 of Section I above;

3. To consider the requests for conciliation submitted by Member countries in accordance with paragraph 8 of Section I above and to assist, by offering advice or by any other means, in the settlement of the matter between the Member countries concerned;

4. To report to the Council as appropriate on the application of the present Recommendation.

IV. DECIDES that this Recommendation and its Appendix cancel and replace the Recommendation of the Council of 21st May 1986 [C(86)44(Final)].

APPENDIX TO ANNEX A

GUIDING PRINCIPLES FOR NOTIFICATIONS, EXCHANGES OF INFORMATION, CO-OPERATION IN INVESTIGATIONS AND PROCEEDINGS, CONSULTATIONS AND CONCILIATION OF ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE

Purpose

1. The purpose of these principles is to clarify the procedures laid down in the Recommendation and thereby to strengthen co-operation and to minimise conflicts in the enforcement of competition laws. It is recognised that implementation of the Recommendation herein is fully subject to the national laws of Member countries, as well as in all cases to the judgement of national authorities that co-operation in a specific matter is consistent with the Member country's national interests. Member countries may wish to consider appropriate legal measures, consistent with their national policies, to give effect to this Recommendation in appropriate cases.

Definitions

2. (a) "Investigation or proceeding" means any official factual inquiry or enforcement action authorised or undertaken by a competition authority of a Member country pursuant to the competition laws of that country. Excluded, however, are (i) the review of business conduct or routine filings, in advance of a formal or informal determination that the matter may be anti-competitive, or (ii) research, studies or surveys the objective of which is to examine the general economic situation or general conditions in specific industries.

(b) "Merger" means merger, acquisition, joint venture and any other form of business amalgamation that falls within the scope and definitions of the competition laws of a Member country governing business concentrations or combinations.

Notification

3. The circumstances in which a notification of an investigation or proceeding should be made, as recommended in paragraph I.A.1. of the Recommendation, include:

(a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;

(b) When it concerns a practice (other than a merger) carried out wholly or in part in the territory of another Member country or countries, whether the practice is purely private or whether it is believed to be required, encouraged or approved by the government or governments of another country or countries;

(c) When the investigation or proceeding previously notified, may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;

(d) When it involves remedies that would require or prohibit behaviour or conduct in the territory of another Member country;

(e) In the case of an investigation or proceeding involving a merger, and in addition to the circumstances described elsewhere in this paragraph, when a party directly involved in the merger, or an enterprise controlling such a party, is incorporated or organised under the laws of another Member country;

(f) In any other situation where the investigation or proceeding may involve important interests of another Member country or countries.

Procedure for notifying

4. (a) Under the Recommendation notification ordinarily should be provided at the first stage in an investigation or proceeding when it becomes evident that notifiable circumstances described in paragraph 3 are present. However there may be cases where notification at that stage could prejudice the investigative action or proceeding. In such a case notification and, when requested, consultation should take place as soon as possible and in sufficient time to enable the views of the other Member country to be taken into account. Before any formal legal or administrative action is taken, the notifying country should ensure, to the fullest extent possible in the circumstances, that it would not prejudice this process.

(b) Notification of an investigation or proceeding should be made in writing through the channels requested by each country as indicated in a list to be established and periodically updated by the Competition Law and Policy Committee.

(c) The content of the notification should be sufficiently detailed to permit an initial evaluation by the notified country of the likelihood of any effects on its national interests. It should include, if possible, the names of the persons or enterprises concerned, the activities under investigation, the character of the investigation or procedure and the legal provisions concerned, and, if applicable, the need to seek information from the territory of another Member country. In the case of an investigation or proceeding involving a merger, notification should also include:

(i) the fact of initiation of an investigation or proceeding;

(ii) the fact of termination of the investigation or proceeding, with a description of any remedial action ordered or voluntary steps undertaken by the parties;

(iii) a description of the issues of interest to the notifying Member country, such as the relevant markets affected, jurisdictional issues or remedial concerns;

(iv) a statement of the time period within which the notifying Member country either must act or is planning to act.

Co-ordination of Investigations

5. The co-ordination of concurrent investigations, as recommended in paragraph I.A.2. of the Recommendation, should be undertaken on a case-by-case basis, where the relevant Member countries agree that it would be in their interests to do so. This co-ordination process shall not, however, affect each Member country's right to take a decision independently based on the investigation. Co-ordination might include any of the following steps, consistent with the national laws of the countries involved:

(a) providing notice of applicable time periods and schedules for decision-making;

(b) sharing factual and analytical information and material, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraphe 10;

(c) requesting, in appropriate circumstances, that the subjects of the investigation voluntarily permit the co-operating countries to share some or all of the information in their possession, to the extent permitted by national laws;

(d) co-ordinating discussions or negotiations regarding remedial actions, particularly when such remedies could require conduct or behaviour in the territory of more than one Member country;

(e) in those Member countries in which advance notification of mergers is required or permitted, requesting that the notification include a statement identifying notifications also made or to be made to other countries.

Assistance in an investigation or proceeding of a Member country

6. Co-operation among Member countries by means of supplying information on anti-competitive practices in response to a request from a Member country, as recommended in paragraph I.A.3. of the Recommendation, should be undertaken on a case-by-case basis, where it would be in the interests of the relevant Member countries to do so. Co-operation might include any of the following steps, consistent with the national laws of the countries involved:

(a) assisting in obtaining information on a voluntary basis from within the assisting Member's country;

(b) providing factual and analytical material from its files, subject to national laws governing confidentiality of information and the principles relating to confidential information set forth in paragraph 10;

(c) employing on behalf of the requesting Member country its authority to compel the production of information in the form of testimony or documents, where the national law of the requested Member country provides for such authority;

(d) providing information in the public domain relating to the relevant conduct or practice. To facilitate the exchange of such information, Member countries should consider collecting and maintaining data about the nature and sources of such public information to which other Member countries could refer.

7. When a Member country learns of an anti-competitive practice occurring in the territory of another Member country that could violate the laws of the latter, the former should consider informing the latter and providing as much information as practicable, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraph 10, consistent with other applicable national laws and its national interests.

8. (a) Member countries should use moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising their investigatory powers with a view to obtaining information located abroad.

(b) Before seeking information located abroad, Member countries should consider whether adequate information is conveniently available from sources within their national territory.

(c) Any requests for information located abroad should be framed in terms that are as specific as possible.

9. The provision of assistance or co-operation between Member countries may be subject to consultations regarding the sharing of costs of these activities.

Confidentiality

10. The exchange of information under this Recommendation is subject to the laws of participating Member countries governing the confidentiality of information. A Member country may specify the protection that shall be accorded the information to be provided and any limitations that may apply to the use of such information. The requested Member country would be justified in declining to supply information if the requesting Member country is unable to observe those requests. A receiving Member country should take all reasonable steps to ensure observance of the confidentiality and use limitations specified by the sending Member country, and if a breach of confidentiality or use limitation occurs, should notify the sending Member country of the breach and take appropriate steps to remedy the effects of the breach.

Consultations between Member countries

11. (a) The country notifying an investigation or proceeding should conduct its investigation or proceeding, to the extent possible under legal and practical time constraints, in a manner that would allow the notified country to request informal consultations or to submit its views on the investigation or proceeding.

(b) Requests for consultation under paragraphs I.B.4. and I.B.5. of the Recommendation should be made as soon as possible after notification and explanation of the national interests affected should be provided in sufficient detail to enable full consideration to be given to them.

(c) The notified Member country should, where appropriate, consider taking remedial action under its own legislation in response to a notification.

(d) All countries involved in consultations should give full consideration to the interests raised and to the views expressed during the consultations so as to avoid or minimise possible conflict.

Conciliation

12. (a) If they agree to the use of the Committee's good offices for the purpose of conciliation in accordance with paragraph I.B.8. of the Recommendation, Member countries should inform the Chairman of the Committee and the Secretariat with a view to invoking conciliation.

(b) The Secretariat should continue to compile a list of persons willing to act as conciliators.

(c) The procedure for conciliation should be determined by the Chairman of the Committee in agreement with the Member countries concerned.

(d) Any conclusions drawn as a result of the conciliation are not binding on the Member countries concerned and the proceedings of the conciliation will be kept confidential unless the Member countries concerned agree otherwise.

ANNEX B

COMPETITION COMMITTEE' REPORT ON POSITIVE COMITY
(EXTRACT FROM PART II, OECD, 1999)

II. SUMMARY OF POSITIVE COMITY CONCEPTS AND POTENTIAL BENEFITS

This Summary is intended as a practical, "user-friendly" guide to the concepts and the analysis set forth in Part I. It consists of general propositions (in normal type) and explanatory materials (italicised).

As noted in Part I, "positive comity" has never been formally defined, but competition officials usually use the term to refer to the form of co-operation that is encouraged by Part I.B.5 of the OECD Recommendation on co-operation. Given the lack of any formal definition and the need for more consistent usage to promote clarity in discussions of this and other forms of co-operation, this Report uses the term in this sense. This Report is not intended to define positive comity formally or to limit any country's ability to (a) formulate policies that condition or otherwise limit the circumstances in which it will give full and sympathetic consideration to positive comity requests, or (b) otherwise define its own positive comity policies. Two other important concepts - negative comity and investigatory assistance - are also used to refer to voluntary principles contained in the OECD Recommendation on co-operation.

A. The Nature of Positive Comity and Related Concepts

1. Positive Comity

Paraphrasing Part I.B.5 of the OECD Recommendation, positive comity may be described as the principle that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests.

- *Positive comity describes a form of law enforcement co-operation - one that has been urged on OECD Member countries by a series of Recommendations on co-operation that date back to 1973. It is a principle of <u>voluntary co-operation</u> in <u>competition law enforcement</u> concerning <u>requests from one country that another country begin or expand enforcement-related activities</u> in order to remedy allegedly illegal anti-competitive conduct. Positive comity is <u>not</u> a general term for co-operation that involves "positive" (affirmative) steps by the requested country or has "positive" (beneficial) results.*

- *Positive comity is a concept of <u>voluntary</u> action. OECD Recommendations are not binding, and countries may choose not to provide the recommended "full and sympathetic consideration." Moreover, a country's choice to provide positive comity's full and sympathetic consideration to another county's request does not in any way detract from its freedom to make its law enforcement decisions as it chooses. Some OECD Member countries have included positive comity principles in co-operation agreements. When such agreements are binding, they may commit countries to consideration of each other's requests, but the countries remain free to make their law enforcement decisions as they choose.*

- *Positive comity relates to the consideration by one country ("the requested country") of a <u>request for enforcement action by another country</u> ("the requesting country"). Positive comity is not involved when a request is not made on behalf of a country or when a*

country makes a suggestion or "tip" rather than a request. Although the OECD Recommendation is directed to Member countries and refers to requests by a "country," this Report does not distinguish between requests made by a country and those made by its competition authority.

- *Positive comity relates to competition law enforcement activities. When positive comity is described as a request to open or expand a "law enforcement proceeding," the term "proceeding" is used to refer to all enforcement-related activities, not merely to requests for action of any particular type or any particular level of formality. The phrase "expand enforcement-related activities" includes investigating additional parties or issues and taking other steps in a proceeding to remedy harm to the requesting country's interests.*

- *A country's request for enforcement action constitutes positive comity regardless of what entities or persons are alleged to be engaging in the illegal conduct. The OECD Recommendation refers to illegal conduct by enterprises, but Member countries may decide for themselves whether to adopt this or other limitations.*

2. Negative Comity, Investigatory Assistance, and Related Concepts

(a) Paraphrasing Part I.B.5 of the OECD Recommendation, negative comity may be described as the principle that a country should *(i)* notify other countries when its enforcement proceedings may have an effect on their important interests, and *(ii)* give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.

- *Both positive and negative comity relate to the impact of a country's law enforcement on another country or countries. The difference between them may be described as follows:*

  - *positive comity involves conducting a proceeding in order to assist another country;*

  - *negative comity involves conducting all proceedings with a view to avoiding harm to other countries.*

(b) Paraphrasing Part I.A.3 of the OECD Recommendation, investigatory assistance may be described as co-operation with another country's law enforcement proceeding. Such assistance may include gathering information on behalf of the requesting country, sharing information with the requesting country, and discussing relevant facts and legal theories**.**

- *Positive comity and investigatory assistance are the two basic means by which the OECD Recommendation contemplates that a country in which anti-competitive conduct may be occurring can co-operate with a country that perceives itself as being harmed by that conduct. The difference between these two forms of co-operation may be described as follows:*

  - *positive comity involves a requested country's enforcement proceeding;*

  - *investigatory assistance involves a requesting country's enforcement proceeding.*

  - *Based on the above distinction, a country's consideration of a request for information to be used in the requesting country's legal proceeding constitutes investigatory assistance, not positive comity, whether or not the requested country would or does initiate a law enforcement proceeding in order to gather the information.*

(c) Paraphrasing Part I.A.2 of the OECD Recommendation, co-ordinated investigation may be described as co-operation between two or more countries in proceedings against the same or related alleged conduct by providing each other investigatory assistance to increase each other's ability to pursue the conduct.

- *Positive comity, investigatory assistance, and co-ordinated investigation may all be described as forms of enforcement co-operation. Enforcement proceedings may involve more than one form of enforcement co-operation, either sequentially or simultaneously. For example, positive comity can be a form of co-ordinated investigation, and requests for investigatory assistance may be made in positive comity investigations and in co-ordinated investigations.*

3. Making and Considering Positive Comity Requests

5. The Recommendation does not suggest procedures for making or considering positive comity requests. Some OECD Member countries have included procedural provisions in their co-operation agreements; otherwise, Member countries are free to take any approach they desire. The Committee notes that it may be possible to reduce the likelihood of misunderstandings between the requesting and requested countries by identifying and following specified procedures or guidelines. For example, a guideline concerning the content of requests might provide that positive comity requests should (a) specify the nature of the request by describing the conduct at issue, its impact on the requesting country, and the desired remedy; (b) provide the factual basis for the allegations, including a description of any investigation and an offer of any evidentiary material it is authorised to provide; and (c) state the requesting country's intention with respect to future investigation of the conduct at issue.

(a) **Prerequisites for a request.** The only requirement for a positive comity request under the OECD Recommendation is that a country believe that the conduct at issue is likely to be illegal under the requested county's laws and is substantially and adversely affecting the requesting country's interests.

- *The requesting country's belief that the alleged conduct, if proved, is likely to violate the other country's law need not be based upon a detailed analysis of that law.*

- *The requesting country's determination that alleged conduct is having a substantial and adverse effect on its interests is made in its sole discretion.*

- *Positive comity requests may be made and granted whether or not the conduct at issue violates the requesting country's laws or is subject to its jurisdiction.*

- *OECD Member countries may make positive comity requests pursuant to the OECD Recommendation and/or pursuant to an applicable co-operation agreement.*

(b) **Criteria for considering a request.** The Recommendation provides that the requested country should give a positive comity request full and sympathetic consideration and that if it concludes that conduct by enterprises on its territory is having a substantial and adverse impact on the requesting country, it should seek a remedy it considers appropriate on a voluntary basis and considering its own legitimate interests.

- *There is no precise standard for deciding whether to take remedial action. Since any remedial action is voluntary and may take into account the requested country's legitimate interests, it is clear the requested country is in any event free to deny the request. The phrase "full and sympathetic consideration" necessarily implies that a*

request should not be automatically rejected merely because of considerations that would exist in all or virtually all such requests. For example, a request should not automatically be rejected merely because the target firms are domestic, or because the necessary resources could provide more short-term benefit for the requested country's economy if spent on another case. The cost/benefit analysis is that of the requested country, but it should take into account the interests of the requesting country and the long-term benefits of more effective competition enforcement.

- *Elimination of any economic benefits to particular economic actors in the requested country that result from illegal conduct in its territory should be considered a benefit, not a cost, to granting a positive comity request.*

- *The likely cost to the requested country of diverting law enforcement resources from pursuing other illegal conduct is relevant to whether a request should be granted. This cost should be weighed against future savings in enforcement costs, other benefits from the reciprocal nature of positive comity, and the benefits of more effective competition law enforcement. When resource constraints would otherwise require declining a request, a requested country may consider the possibility of granting the request in part or may inquire whether the requesting country is willing to contribute financial or staff resources.*

(c) **Implications of denying a request.** Denial of a positive comity request does not waive any objections a requested country may have to an investigation by the requesting country. (1995 Rec. I.A.5.a.)

(d) **The positive comity process.** The positive comity process is not intended to be a formal one, in which there is no interaction between the countries while a request is being considered; by definition, the process is co-operative.

- *Co-operative solutions may be encouraged by opportunities for continuing dialogue after a positive comity request is made and even after a request is denied.*

4. Legal Considerations

(a) **Applicable law.** The requested country's law governs whether a requesting country's allegations are sufficient to open an enforcement proceeding and also governs any proceeding.

- A requesting country may express preferences on matters as to which the requested country has discretion - such as what firms or individuals should be targeted or sued, and what remedies to seek - but the proceeding is controlled by the requested country and its laws.

(b) **Requirement of proof of substantial market effects.** The fact that a requested country's law requires proof of substantial market effects is likely to affect the costs of a requested enforcement proceeding, but is not a legal obstacle to granting a request since the issue at that point is whether the alleged conduct if proved would violate the requested country's law.

- *In principle and in practice, positive comity cases are unlikely to involve conduct with de minimis effects that could be found illegal only through use of a per se rule.*

(c) **Differences in countries' laws.** Differences between two countries' laws, such as differences in investigatory or remedial powers or in the nature of their proceedings (administrative,

civil, or criminal) are likely to affect their analysis of whether to make or grant positive comity requests, but not to affect the availability of positive comity as a legal matter.

- *A positive comity request may be made and granted even if two countries take quite different approaches to the conduct at issue, so long as the requested country can provide a remedy.*

B. Assessment of Positive Comity

8. The OECD Recommendation does not refer to categories of positive comity, but it is useful to identify several categories in order to assess the likely benefits of positive comity. The categories do not reflect fundamental principles of positive comity, and the Report is not intended to endorse the defined categories or to advise against the use of other categories.

- **A case-specific positive comity arrangement** is the understanding between a requesting and a requested country concerning a matter the requested country agrees to investigate.

- **Allocative positive comity** is a case-specific positive comity arrangement under which the requesting country undertakes to defer or suspend action during the pendency of the requested country's proceeding.

- **Co-operative positive comity** is any case-specific positive comity arrangement that does not constitute allocative positive comity.

- *Like other terms or conditions relating to case-specific positive arrangements, whether an arrangement should be allocative is determined by the requesting and requested countries. The 1998 Supplement to the 1991 EC/US co-operation agreement contains a presumption that positive comity will be allocative in certain situations.*

1. Positive Comity and its Alternatives

(a) **The options.** A country that receives credible complaints about alleged competition law violations in another country normally has three general options:

- Suggest that the complainant contact the other country.

- Conduct its own competition enforcement proceeding, unless the alleged conduct would not violate its own competition laws or is clearly outside its jurisdiction.

- Make a positive comity request, after reviewing the complaint's allegations to determine whether they warrant investigation.

(b) **Considerations governing choice among options.** A country's choice among these options is likely to be governed by the following considerations:

- Suggesting that a complainant contact another country is inexpensive and often provides minimal assistance. It could in principle be the optimum response if the country receiving the complaint has substantial confidence in the other country's ability and willingness to take appropriate action. In reality, a country will often consider this option inadequate if it believes that the alleged conduct is substantially and adversely affecting its interests.

- Conducting a competition law investigation permits a country to use its chosen substantive, procedural, and remedial approaches, and despite the costs, countries often prefer protecting their interests through their own proceedings. Jurisdictional problems, however, sometimes make such unilateral action controversial, impractical, or impossible.

- Making a positive comity request requires acceptance that any proceeding will be controlled by the requested country and governed by its law, but a positive comity investigation would provide the most thorough consideration of the facts and deter anti-competitive conduct through co-operation and avoidance of jurisdictional conflicts.

2. Potential Benefits of Positive Comity

(a) **Improved effectiveness.** By invoking a requested country's laws, positive comity can provide a remedy for illegal conduct that the requesting country cannot remedy itself due to jurisdictional problems.

- Positive comity provides a means of remedying illegal conduct:

- over which the requesting country either lacks jurisdiction or, under the negative comity principle, should not assert jurisdiction without considering alternatives;

- when the requesting country has jurisdiction but cannot prove the conduct's illegality because it is unable to conduct a thorough investigation; and

- when the requesting country has jurisdiction and could prove the conduct's illegality but cannot impose an effective remedy.

(b) **Improved efficiency.** Since positive comity results in an investigation by the country in the best position to gather the necessary facts, it can improve efficiency by reducing investigation costs, the risk of error, and the risk of inconsistent orders.
- Potential efficiency benefits are greatest when positive comity reduces the number of proceedings to one, but the benefits may be significant in any event. Costs and risks are likely to be lower if the requested country conducts an investigation and brings the first case, even if the requesting country eventually decides to bring a case in order to vindicate its interests.

(c) **Reducing the need for sharing confidential and other information**. Since the proceeding is handled by the competition authority with the best access to the most facts, there is likely to be less need for sharing confidential and other information, unless the requesting country does not defer or suspend its own action.

(d) **Avoidance of jurisdictional conflict.** Since positive comity invokes a requested country's own laws, it provides a means of avoiding jurisdictional conflicts.

- Positive comity provides a means of avoiding conflicts between countries:

- when the requested country believes the requesting country has no jurisdiction; and

- when the requesting country has jurisdiction over the conduct but its investigation or remedy would face jurisdictional problems.

(e) **Avoiding harm to the requested country's interests.** Since decisions whether to grant positive comity requests are voluntary, there is no risk that a requested country must

investigate a case where it is not in its interests to do so. The voluntary nature of positive comity also provides assurance that requested countries' competition authorities will not lose control of their enforcement agendas. Also, voluntary co-operation systems tend to be self-policing, meaning that countries have an incentive not to make unreasonable requests so that they will not receive unreasonable requests.

(f) **Protecting other legitimate interests of the requested country.** By investigating the alleged illegal conduct itself, a requested country controls the investigation, assures application of its chosen competition policy, and is generally in a position to protect its legitimate interests.

3. Limits of Positive Comity

(a) **Law of the requested country.** Positive comity is available only with respect to conduct that is illegal in the requested country.

(b) **Bans on sharing investigatory information.** If a requested country needs access to information located abroad – in either the requesting country or some other country – it is unlikely to get significant investigatory assistance in obtaining even non-confidential information because of statutory bans on sharing any non public investigatory information.

(c) **Need for experience, confidence, and trust.** Although OECD Member countries have long agreed to Recommendations urging co-operative positive comity, many Member countries lack experience with this process. It is unclear to what extent experience with other forms of enforcement co-operation has created the kind of confidence and trust needed for co-operative positive comity. It is unlikely that many countries have the confidence and trust needed for allocative positive comity arrangements.

- *Case-specific positive comity arrangements require mutual confidence and trust concerning each other's willingness and ability to safeguard confidential information, operate free from political or other outside influence, afford national treatment, conduct effective proceedings in a timely manner, secure effective relief, and engage in appropriate consultations.*

- *Particularly great confidence and trust are needed for allocative positive comity, in which the requesting country agrees to defer or suspend action during the pendency of the requested country's proceeding, because the requesting country foregoes its best opportunity to remedy the conduct on its own and relies on the requested country to protect its interests.*

(d) **Voluntary nature of comity.** A requested country cannot be compelled to co-operate contrary to its perceived interests, even if co-operation would provide the best or only remedy. Despite its voluntary nature, some OECD countries are concerned that positive comity requests might limit their control over their enforcement agendas.

4. Positive Comity's Potential in Particular Categories of Cases

(a) **Export restraint ("market access") cases.** Positive comity seems most likely to be useful in export restraint cases - *i.e.*, cases in which conduct in one country harms another country's exporters but not its consumers. The 1998 Supplement to the 1991 EC/US co-operation agreement contains a presumption of allocative positive comity in such cases.

- Export restraint cases are likely to present the most serious jurisdictional problems for a requesting country. The country in which the conduct is occurring will often dispute another

country's jurisdiction and refuse to assist its investigation. Therefore, positive comity will often be the only available form of enforcement co-operation in such cases.

- Export restraint cases are likely to be relatively attractive to a requested country, since ending export restraints benefits its consumers.

(b) **Acts conducted in and directed at the requested country.** Positive comity may have considerable potential when the conduct at issue is principally conducted in and directed towards the requested country. The EC/US Supplement presumes allocative positive comity in such cases. The scope of this category is currently unclear, however.

(c) **Hard core cartel cases.** Allocative positive comity has limited potential in hard core cartel cases because injured countries are likely to want to impose their own remedies. Positive comity has greater potential when the injured country lacks jurisdiction to act on its own, and co-operative positive comity could be beneficial as part of a co-ordinated challenge in which, for example, a requested country takes the lead initially with the understanding that roles may shift and that there may be multiple challenges.

(d) **Export cartel cases.** Positive comity is unlikely to be available in most export cartel cases because such cartels are seldom illegal in their home countries.

(e) **Merger cases.** The mandatory and differing time frames applicable to many mergers makes allocative positive comity likely to be rare, but in some cases co-operative positive comity could play a role in efficiently allocating the resources of interested countries.

(f) **Other anti-competitive conduct.** In general, allocative positive comity has limited potential in other cases, because countries whose interests are being harmed will often have the incentive and ability to conduct their own investigations and obtain their own remedy. However, co-operative positive comity could be useful in such cases. A positive comity request may alert a competition authority to the existence of anti-competitive conduct of which it was unaware, or to the anti-competitive nature of conduct it knew of but misjudged. Moreover, co-operative positive comity could be useful in allocating resources in co-ordinated investigations.

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