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Working Group on the Interaction between Trade and Competition Policy

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Introduction

In the same way as the interaction between trade and competition policies has been recognised for a long time in the international trade arena, there have been numerous contacts in the past between the OECD Trade Committee and the Committee on Competition Law and Policy (CLP). Examples of OECD Recommendations concerned the effects of trade measures on competition [C(86)65 (Final)] and the need for international antitrust cooperation to tackle anti-competitive business practices affecting trade [C(95)130(Final) (formerly C(86)44 (Final)], attached as Annexes IV and V.

Developments over the last decade have led Ministers to recognise the need for more systematic review of the interaction between trade, investment and competition policies with a view to improving policy coherence and to support the proper functioning of the multilateral trading system. Work on trade and competition issues has been underway in the OECD since the early 1980s in the CLP Committee, the Trade Committee and, in the 1990s, in joint work involving both committees. Recently, the joint work has taken on a new dimension with a specific two year programme of work. The OECD also conducts numerous projects of interest to the issue but of more specific focus.

This note provides an overview of this work. Section I describes the joint work on trade and competition, Section II describes relevant work in the Trade Committee, Section III relevant work in the CLP Committee and Section IV relevant work in other parts of the Organisation. Annexes I, II and III set forth OECD Ministerial reports on trade and competition issued in 1996, 1994 and 1993. Annexes IV and V sets forth the two Council Recommendations mentioned above, Annex VI provides a bibliography and Annex VII provides an overview of work by the OECD with non-Member countries seeking to establish effective national competition authorities.

I. JOINT GROUP'S ACTIVITIES

The Joint Group's activities are based on three premises: that private anticompetitive practices can restrain market access, that trade measures can restrain competition and that government regulation can restrain both market access and competition. Within that framework are the activities set forth below.

(a) Scope and Coverage

The effectiveness of competition law in curbing anticompetitive practices that impede market access depends on a number of factors, one of which is the scope and coverage of competition law. An important study published in 1996 (known as the Hawk study¹) focused on the scope and coverage

¹Antitrust and Market Access: The Scope and Coverage of Competition Laws and Implications for Trade, OECD 1996.

of competition laws in eleven countries or regional groupings and drew attention to existing sectoral and other exceptions/exemptions that can create loopholes in the laws on anticompetitive practices.

A follow-up project aims at further promoting transparency of regulatory exceptions to, or exemptions from countries' competition laws. At the same time this work seeks to assess the importance of such exceptions/exemptions in terms of trade frictions that may be attributable to them e.g. where firms may allege access difficulties on important foreign markets. The joint work has recommended that the entire or partial exclusion of sectors or activities (e.g. where competition law does not apply) should be regularly reviewed and tested against up-to-date analysis of economic and technological factors.²

In a number of OECD countries, legislation regulating a sector or establishing monopolies (e.g. in the case of utilities) may override general competition law. Alternatively, general regulations (e.g. price fixing for certain goods) may limit its application with regard to particular goods or practices. The joint programme of work includes projects to clarify the application of competition law to state owned enterprises in the various member countries. Another area under examination is where competition laws have limited application to government encouraged or sanctioned business practices (an issue which may extend to delegation of regulatory powers e.g. in the standardisation area).

The recent horizontal project within the OECD on regulatory reform may be highly beneficial in encouraging countries to deregulate their economies and correspondingly expand the scope of competition law application and has highlighted the market access dimension of such reform. The regulatory reform project is discussed in greater detail in Section IV below.

(b) Enforcement of law

Even if competition law in principle applies, its degree of actual enforcement is crucial in determining whether it effectively addresses anticompetitive practices.

In this vein a joint brainstorming has been held on the possibility of assessing effective enforcement of the law. This is a complex issue which includes such parameters as discretionary powers of competition authorities to grant case by case exemptions or not to investigate (the absence of cases may also mean that there are no violations; and different competition authorities may place different interpretations on similar facts). Enforcement priorities evolve depending on countries and over time and the range of available enforcement tools also varies greatly. Enforcement indicators have not been defined, although the kind of statistics collected by OECD antitrust agencies has been considered useful in general terms.

As another approach to the issue, a study of rights of foreign and domestic firms under competition laws has been launched to assess transparency, due process and non discrimination in domestic enforcement of competition law. The study based on a questionnaire to which Member countries and observers were invited to reply, enquires into the extent to which there may be any differential treatment as between "foreign" and "domestic" firms under competition law, in such areas as availability of private suit, rights to petition the competition authority, appeal of their decisions, rights to a reply, costs of action etc. This study is ongoing and will be submitted to the private sector for their views. It is considered as a potentially quite substantive contribution.

Related to the above studies, work is scheduled to compare OECD member countries' experience with regard to institutional setting, organisation and powers of antitrust authorities, the role of the judicial

²For this section see 1996 Joint report Annex I paras 17 to 21.

system etc., given that they constitute the basic parameters for ensuring adequate competition enforcement.

(c) Practices to be addressed by national laws and feasibility of core standards/convergence

Work on identifying practices potentially affecting international trade or investment led by the Trade Committee in the course of various brainstormings had singled out such categories as (i) horizontal agreements including international cartels, export cartels, other joint ventures or strategic alliances, mergers (ii) vertical restraints or integration and (iii) abuse of dominance as being of priority interest.

Various joint “roundtables” involving Trade and Competition officials have been held to explore the trade and competition interface in those areas.

- (i) Horizontal agreements, agreements between actual or potential competitors³ can reduce, eliminate or increase competition. The effects on competition can be paralleled by effects on trade. Among the two broad categories of horizontal agreements, that of hard core cartels, (for instance market sharing, bid rigging etc.) elicits a similar enforcement posture in OECD countries, (i.e. prohibition) and trade officials concur on the appropriateness of this treatment. The question of hard core export cartels raises particular enforcement issues, as they are often immunised from the application of competition law in the exporting country. (There is consensus that export arrangements which fall outside the category of hard core cartels are appropriate for case by case treatment). It is recognized that the development of legal mechanisms for international enforcement cooperation against export and other cartels would be necessary, given that the jurisdiction in which the effects are felt may differ from the one in which the information necessary for prosecution may be located. Given the shared interests in curbing such practices world-wide, various options are being examined and explored. These include the possible option of elaborating a common rule prohibiting hard core cartels, complemented by procedural provisions for enforcement cooperation in this respect. (Current work in the CLP Committee on hard core cartels is discussed in Section III below.)
- (ii) A joint roundtable on abuse of a dominant position by firms⁴ explored the circumstances under which abuse of dominance can raise problems of an international or transborder nature and compared trade and competition policy approaches to the issue under certain scenarios e.g. (i) denial of market access by a dominant firm and (ii) leveraging into export markets and price predation. Deepening this work forms part of the future agenda of the Joint Group.
- (iii) A joint roundtable on vertical relationships⁵ between firms focused on contractual arrangements other than resale price maintenance (which is prohibited per se in nearly all OECD countries). Non price vertical restraints such as exclusive territories and exclusive dealing agreements can have a variety of effects on both competition and trade. They may enhance efficiency and have parallel positive effects in increasing market access. Exclusive dealing may for instance facilitate new entry by a foreign firm which may find it helpful to offer such an arrangement as an incentive to a potential distributor in a new market. They may also in other circumstances have anticompetitive

³See 1994 Joint Report (Annex II Section II b.)

⁴See contribution by Prof. Janow in OECD/GD(96)31.

⁵See 1994 Joint Report (Annex II Section II a).

effects since they may create or enhance barriers to entry. New entry by a foreign firm may be considerably more difficult if non price vertical restraints such as exclusive dealing tie up domestic distribution systems.

It is recognized that such arrangements deserve case by case evaluation as the effects depend heavily on the facts, and may vary over time. Even if all the facts are considered, there may be a tension between competition and trade policy perceptions, as the net effect of a restraint may be perceived as having no anti-competitive effects under competition law criteria in a country, while it might be perceived as anticompetitive or trade distortive by another country.

A follow up project under the current joint programme aims at enhancing mutual understanding of how member countries' competition authorities assess similar types of restraints. Relevant assessment factors (such as the need for well defining the market, widespread nature of restraints in a market, whether the firm using them is dominant in the upstream or downstream market, etc) have been highlighted.

A number of case studies (see f) below) have provided empirical backing to the above analyses.

- (d) Studies of available response/need for improved mechanisms or international rules
 - (i) An initial review of provisions in international agreements (whether bilateral, regional, multilateral) was conducted in a 1994 Roundtable on Competition Elements in International Agreements and in a consultant's paper on Competition Aspects of the Uruguay Round. The roundtable surveyed these agreements and analysed selected competition elements in selected agreements. The range of such agreements is broad, and the trade and competition provisions vary greatly depending on the context and nature of the agreements, whether purely cooperative or of a binding nature, and whether of specific focus or aimed at economic integration. The roundtable was an initial step in the light of the mandate given by the 1993 OECD Ministerial to "explore the desirability and feasibility of integrating competition rules into a multilateral framework".
 - (ii) As analytical work developed, a list of options to strengthen the coherence of trade and competition policies in the international context has begun to be identified.

For instance, discussions have taken place to compare how trade and competition policies are related in regional groupings. The EU example provides a unique example of strong integration of market access and competition policies. Attention has been given also to the ways in which various regional groupings or agreements treat antidumping in the context of their regional integration agreements, each case appearing to be somewhat distinct. More generally there are differences due to varied integration, harmonisation and convergence objectives.

There already exist a number of bilateral antitrust cooperation agreements which constitute an approach to address business practices of cross border dimension, while avoiding problems of jurisdiction. A new generation of such agreements containing such principles as positive comity offers scope for enhanced and strengthened cooperation. (Under "Positive Comity", one competition agency can ask another to open a proceeding if the interests of the first country seem to be affected by anticompetitive conduct within the jurisdiction of the second authority.) The prospects offered by such agreements and the eventual limitations (including the extent to which competition authorities will be empowered to exchange confidential information) will be reviewed as one important avenue. Work in the CLP Committee on cooperation among competition authorities is described in greater detail in Section III below.

Finally a range of other options including the elaboration of a comprehensive multilateral framework will be the subject of initial assessment in an open non committal way. The illustrative list of options to be considered is as follows:

Convergence, peer review, expanded Trade Policy Review Mechanism (TPRM) etc.;

Enhanced bilateral cooperation, including the possibility of strengthening bilateral cooperation agreements;

Development of core principles and elements, including the possibility of agreed minimum common standards, e.g. on hard core cartels;

Development of plurilateral agreement on aspects of competition law;

Development of a multilateral framework, including possible relationship to the WTO;

Desirability and feasibility of dispute settlement in competition related disputes;

Institutional setting (who should apply competition law, role of judicial system, rights of firms etc).

- (e) Overview of consistencies/inconsistencies between trade and competition policies, and other conceptual work comparing objectives, key principles and tools of the two policies

Since an early stage in the work, the interrelationships of the two policies have been discussed bearing in mind not only how competition policies may affect trade⁶ but also on the competition effects of trade measures.⁷

A bibliography of academic studies on these consistencies or inconsistencies is being kept up to date. As analyses have progressed, and the degree of mutual understanding has improved, it is intended to resume conceptual work focusing on key principles relevant to both policies.

- (f) Empirical work: case studies

Continuous resort has been made to joint case studies as a means to promote mutual understanding of terminology and of the way in which each policy community would tackle the analysis of given situations. Cases of a real or hypothetical nature have illustrated the trade, competition and regulation interface within the categories of practices covered by the joint roundtables above. A succinct review of the approach appears in the Annex to the 1996 Joint Report. The study of automobile distribution is noted below. Further analysis has continued, covering e.g. practices of private standards and certification bodies, various types of export cartels and vertical relationships. A synthesis of this work is expected to be completed shortly.

⁶Inter Alia, see 1994 Joint Report, (Annex II Section III) which illustrated categories of frictions and synergies between the two policies.

⁷A consultant paper on Trade and Competition Policies: Comparing Objectives and Methods was also published as No 4 in the Trade Policy Issues series, OECD, 1994.

II. TRADE COMMITTEE

The subject matter has been considered by the Trade Committee and its working parties over a number of years including specific work in areas such as safeguards, voluntary export restraints, services and intellectual property. It has also been covered in work with non-member economies such as the workshop held in Santiago in 1995 (“Trade Policy for a Globalising Economy” and in St. Petersburg “Trade Policy and the Transition Process”). This note focuses, however, on more recent work of potential interest,

(a) Work on international market contestability

Work carried out within the Trade Committee on the so-called “new dimensions of market access” has focused on the benefits of policy-makers approaching the issue of market access in a broader manner. This broader approach encompasses the continuum of trade, investment and competition policies as well as the domestic regulatory conduct of nations, its chief focus being on the need to identify, prioritize and progressively roll back a range of government measures and private practices that impair the efficient functioning of markets and restrict the openness of national markets to global competition.

In this context, the Trade Committee has explored in a series of brainstorming sessions the extent to which the objective of promoting more internationally contestable markets could help underpin discussions of the broader policy- and rule-making challenges confronting the multilateral trading system. Promoting international market contestability requires efforts aimed at ensuring that the competitive process prevailing in a domestic market is not unduly distorted by anti-competitive activities whether governmental or private in origin, so that foreign goods, services, ideas, investments and business people can benefit from opportunities to compete in that market on terms equal or comparable to those enjoyed by local producers.

The term “international market contestability” signifies an important qualitative deepening in the nature and degree of openness that should now be sought for international competition. Trade Committee work has made clear that even when most border barriers are removed (which has clearly not yet been achieved despite the market progress registered during the Uruguay Round), genuine market openness, let alone market integration, may still be far from being achieved. A wide range of “behind the border” obstacles may continue to impede or distort the international flow of goods, services, ideas, capital and people. The focus on international market contestability represents a perspective whereby policy-makers could take a balanced and comprehensive approach to the broad range of potential impediments in any one area is informed by, co-ordinated with and complementary to efforts in other areas.

In the context of preparing the ground for possible future policy- and rule-making initiatives, the Trade Committee felt it needed to identify and better understand relevant private anti-competitive practices. The Committee devoted an informal brainstorming session to this subject in the Spring of 1995. Discussions revealed the usefulness of identifying categories of private behaviour most likely to exert significant effects of market access and market presence. Exclusionary practices, predation and foreclosure effects stood out as issues deserving particular attention. Various types of vertical behaviour, particularly when engaged in by firms with market power, were viewed as potentially restraining international competition and distort trade and investment flows. Such conduct includes, *inter alia* exclusive dealing arrangements, restrictions on pricing through resale price maintenance schemes, exclusive territory and tying arrangements.

It was noted that various market structure issues also needed to be considered, including the growing importance of mergers and acquisitions, strategic alliances and joint ventures, especially in high-technology sectors. Attention to interactions between private and government action, including

the operation of public (or state-sanctioned) monopolies, national technical standards, regulatory controls and state aids were also deemed essential in order to ensure that the economy-side benefits of trade and investment regime liberalisation were not nullified or impaired by private or governmentally support anti-competitive conduct.

(b) Specific Analysis of the Automobile Sector

Throughout 1996 and 1997, the Trade Committee undertook studies on several aspects of market access issues in the automobile sector. An overview document was considered covering trade and trade-related policies and business practices which affect access to foreign markets for automobiles and auto parts. Separate analyses covering automobile and auto parts distribution issues were considered in the context of the joint meeting of the Working Party of the Trade Committee and the Working Party No. 1 of the Committee on Competition Law and Policy. Standards and certification procedures in the automobile sector were also assessed in the context of the horizontal work on regulatory reform.

To reflect the relative importance of the automobile sector and trade in automobiles and auto parts, the Trade Committee has agreed to organise a Workshop on market access issues in the automobile sector to be held on 10-11 July 1997. It is planned in the context of the OECD work programme for Emerging Market Economy Forum (EMEF) and will bring together representatives from the 29 OECD Member countries, 15 non-member countries and draw on industry specialists from the private sector. The objective of this Workshop is to deepen understanding of the range of issues arising with respect to international trade and competition in the increasingly globalised automobile industry and the options available for policy-makers.

(c) Regulatory Reform

The Trade Committee work has covered regulatory issues from a trade perspective for many years. More recently, since 1995, the Trade Committee has been engaged in OECD regulatory reform work endorsed by Ministers in 1997. Its purpose has been to deepen the understanding of the behind-the-border obstacles to market access which have become significant especially after the Uruguay Round. The work has identified, and recommended OECD countries to strengthen, international principles to be applied to domestic regulations. Such principles include, *inter alia*, attention to competition principles as contained e.g. in the WTO Agreement on Basic Telecommunication Services. Follow-up work by the Trade Committee will include the further development of this principle.

III. CLP WORK ON TRADE AND COMPETITION ISSUES

Beginning in the early 1980s, the OECD's Committee on Competition Law and Policy (CLP) has examined a number of aspects of the interaction of trade and competition policies. In addition, several other CLP projects, although not "trade and competition" per se, are also pertinent to the debate by showing how various private practices can aid or impede new entry in a market and the effects of various government regulations on entry and competition. The main lines of this work are set out below.

Many of these topics resulted in publications, details for which can be found in the bibliography which appears as Annex VI. In addition, much of the recent work in the Committee is now available for free through the Internet (<http://oecd.org/daf/ccp/>). This Internet site also includes links to a number of other competition policy sites around the world, including both a number of antitrust agencies and academic sites.

(a) The first survey and checklist

In the early 1980s, the CLP Committee did its first survey of the interaction of trade and competition policies. Many of the conclusions of that work remain relevant. In particular, the survey focussed on the impact on competition of trade measures and the impact on trade of competition issues. Topics included measures against unfair trade, voluntary export restraints, export and import cartels. The survey led to an OECD Council Recommendation in 1986 for co-operation in areas of potential conflict between trade and competition policies. This Council Recommendation, attached as Annex V, urged countries to apply a checklist to assess trade policy measures. Under this checklist policy makers would review the benefits of the measure in increasing jobs, government revenues and producer surplus against the costs in terms of decreased consumer surplus and harm to market structure and the competitive process.

(b) VERs and export and import cartels

Two follow-up studies focussed on actions which reduced export activity to the detriment of competition and consumers in the importing countries. The first focussed on VERs then prevalent in the automobile industry and documented the cost to consumers of these VERs. The studies showed that the restraints increased concentration, reduced competition and increased the danger of widespread collusion. The studies also demonstrated that the costs to consumers of these trade restraints far exceeded the value of the jobs saved. The CLP renewed its call for trade restricting measures to be subject to systematic review for their static and dynamic effects on consumers, trade investment, competition and employment.

The second study focussed on the effects of VERs and export and import cartels on competition, international trade and economic welfare. The consultants who prepared this study concluded that the then current standards for the exemption of export cartels are inadequate and inconsistent with the objective of welfare maximization in both the exporting and importing countries, arguing that such cartels should be subject to competition law worldwide, subject to an efficiency defense. Concerning import cartels, the consultants argued that licensing cartels can have negative long-term economic consequences if used to undermine the value of intellectual property rights (IPRs) and that market access for the product in question could limit the power of such cartels. Concerning VERs, the consultants concluded that the coverage of VERs suggested that efficiency based (antitrust-type) policy concerns are not given the same consideration in the formulation and implementation of trade policies. They argued that the OECD checklist (referred to above) provided a sound foundation for introducing efficiency considerations into trade policy.

(c) Predatory pricing

In the late 1980s the CLP reviewed the economic literature and national enforcement practices against predatory pricing. It concluded that competition offices should be wary of complaints by one firm of another's aggressive pricing, that claims of predatory pricing were often unfounded and that giving them too much credence would stifle healthy, vigorous price competition. It recommended that governments screen claims of predation by applying a simple market structure test: if the market structure were not conducive to the creation and exercise of market power in the post-predation period (i.e., if the predator were unlikely to be able to charge monopoly prices later), the conduct should not be challenged.

(d) International mergers

International mergers are now commonly reviewed simultaneously by a number of national antitrust authorities. Because the pre-merger notification requirements of national competition authorities

are not consistent, merging firms face significant compliance burdens. A current project in the CLP examines possibilities for harmonising reporting requirements to reduce this burden.

(e) Vertical relationships

Recent CLP work on vertical relationships has been done in particular contexts, such as patent and know-how licensing and franchising and in particular sectors, such as broadcasting, film distribution and newspaper distribution. Certain themes, however, run throughout this work. The primary theme is that the effect on competition of a particular vertical restraint depends on the market conditions in which it is imposed. Depending on those conditions, a particular vertical restraint such as exclusive dealing or exclusive territories can be either pro- or anticompetitive. Likewise, depending on market conditions, a restraint can either help or hinder new entry. In short, a case-by-case analysis is required examining such factors as the market share of the firm imposing the restraint, the structure of the market, entry conditions and efficiency justifications. In general, vertical restraints pose fewer concerns if they are used by a firm with a lower market share or when entry conditions favor new entry.

This work in the CLP has not focussed on market access concerns per se. Rather, it has looked at the extent to which vertical restraints create barriers to entry for all potential entrants, foreign and domestic. Similarly, the extent to which vertical restraints can promote new entry was examined for all potential entrants, not foreign firms in particular. The discussions in the Joint Group on Trade and Competition discussed in Part I above are focussing on the market access issue.

(f) Law enforcement cooperation

The CLP has long promoted increased cooperation among competition agencies, as reflected in a series of Recommendations by the OECD's governing Council. Several principles come through this work, in particular that competition agencies should:

inform each other of possible violations of the other's law

forwarn each other of cases which may affect the other's interests

request the other agency to act against practices which affect the requesting country's interests

collect and share information to the extent permitted under national confidentiality laws

coordinate investigations

coordinate remedial actions

The current Council Recommendation, revised in 1995, is attached as Annex IV.

Over time, OECD Council Recommendations in the antitrust field have become reflected in bilateral cooperation agreements between competition agencies, in legislation and more generally in closer contacts and cooperation among the staff of national authorities. Such cooperation creates a positive dynamic of better mutual understanding and confidence, analytical convergence, and still closer cooperation.

Currently, the CLP is considering taking these efforts still further in the fight against international cartels, discussed below.

(g) International Cartels

Cartel conduct impoverishes economies, and is prohibited by competition laws in OECD countries. In some countries, the conduct is criminal and typically in others it is subject to heavy financial penalties. International cartels by definition restrict or distort international trade. The CLP is moving to strengthen enforcement against international cartels. In this work, Member countries are considering a call to:

reaffirm their condemnation of hard core cartels

make transparent any remaining exceptions to the cartel prohibition

introduce effective investigative procedures and sanctions against hard core cartels

co-operate effectively in the detection, investigation and prosecution of such cartels, based on principles of positive comity and joint action

review national obstacles to such effective co-operation.

(h) Competition and economic development

In 1989, the CLP held its first major conference with non-Member countries in Africa, Asia and Latin America on the importance of effective competition policies in spurring economic development. That conference focussed on the importance of properly functioning market mechanisms based on genuine competition. Contributions dealt with deregulation, trade liberalisation, technology, and the elements of competition policy, including control of collusion, abuse of dominance and anticompetitive mergers.

In 1994, the CLP held another major session with non-Member countries in Asia and Latin America. This informal competition policy workshop covered the economic rationale for competition policy, its relationship with trade policy and the regulation of specific sectors, the objectives and scope of competition policy including sector coverage and the enforcement of competition laws, including the creation of appropriate institutions. Several themes from the discussion are worth noting:

strong interfirm rivalry promotes economic efficiency and growth

an open economy promotes rivalry, at least in tradeable sectors

domestic competition policy is crucial in maintaining an open economy

- competition authorities should advocate within their governments for deregulation and serve as a countervailing power to the possibility of regulatory capture in particular sectors.

(i) Regulatory reform

Finally, for two decades the CLP has promoted deregulation and privatisation in the pursuit of increased competition and efficiency. During this period, the CLP has conducted studies covering such diverse sectors as the liberal professions, air and road transport, telecommunications, electricity and international satellite organisations. In addition, it has been heavily involved in the OECD's soon-to-be-published study on regulatory reform. That study, presented at the 1997 OECD Ministerial meeting, concludes that governments should establish processes to examine existing and proposed regulations to remove unnecessary restraints on competition, market access and trade. The report further concludes

that competition authorities and trade officials should become effective advocates for deregulation. Follow-up work to the study is currently in the planning process. It is anticipated that competition, market access and trade issues will figure prominently in this future work.

The 1997 study on regulatory reform is described in greater detail in Section IV of this note.

(j) Technical assistance to non-Member countries

The Secretariat, often assisted by CLP Delegates, has conducted an extensive technical assistance programme with non-Member countries since 1990, helping in the drafting of competition laws and their effective implementation. An overview of this work is set forth in Annex VII.

IV. RELATED WORK

(a) Regulatory Reform

The OECD completed in May 1997 a series of studies on regulatory reform that examine, among other issues, various aspects of the links between regulation, market access, and competition policy. A synthesis report, the **OECD Report on Regulatory Reform**⁸, was accepted by Ministers of OECD countries at their meeting in May 1997, and its policy recommendations were endorsed. The OECD report concluded that there is ample evidence that regulatory reform, properly carried out and with an adequate understanding of policy linkages, can improve significantly sectoral and economy-wide economic performance, and at the same time enhance the capacity of governments to protect important public interests such as environmental and consumer protection.

The OECD recommendations are aimed both at speeding up deregulations where it is justified, and at improving the quality of those regulations and administrative formalities that are needed to protect importance public interests. Reform can also include use of market incentives as an alternative to regulation. The recommendations take a broad view to improving the overall environment for economic performance by linking effective regulatory reform with trade policy and with strengthened competition law and enforcement.

In 1998 and 1999, the OECD will carry out reviews of country progress in regulatory reform in Member countries, based on the OECD policy recommendations. These reviews will generate country-specific policy recommendations. The framework and content of these reviews are currently under discussion within the OECD. It is possible, however, that both general issues of competition law and enforcement and some aspects of market openness related to the design and implementation of regulations would be included in these reviews. The OECD Secretariat intend to consult with the WTO Secretariat as the framework for these reviews is developed in coming months.

(b) Maritime Transport

In 1994, the Maritime Transport Committee initiated a review of potential conflicts in competition law or policies applied to international maritime liner shipping (including the maritime leg of multimodal operations).

The rationale for the work was that the lack of compatibility of competition rules can be detrimental both to international trade and to the organisation of international liner shipping, by increasing

⁸**Regulatory Reform: Overview and Proposed OECD Work Plan [OCDE/GD(96)115].**

firms' operating costs and hampering commercial and economic innovations.

The objective of the work is to promote compatibility of competition policy in liner shipping including the maritime leg of multimodal operations through practical solutions. The standardisation of competition rules world-wide is considered not to be a realistic target.

In consultation with other relevant committees of the Organisation and with representatives of the shipping industry, the MTC is considering a set of principles to which Member countries should subscribe. In doing so, the MTC does not attempt to favour any particular legal regime but essentially aims to:

set up a number of general principles which Member countries should observe when reviewing or implement competition rules; and

define rules and methods for consultations among Member countries and between Member countries and the industry when problems linked to the incompatibility of competition regimes arise.

The intention is that the MTC should finalise its work in November 1997 or early 1998.

(c) International Air Transport

The Advisory Unit to the Secretary-General of the OECD recently completed a two year project on the Future of International Air Transport. A high level Steering Group, with participants from governments and the business community (airlines, aircraft manufacturers, airport authorities, fuel suppliers and the tourism sector) accompanied the project. During its latter stages, Ministers of OECD countries at their meeting in May 1996 committed to "further work for liberalising, in the interests of all, international air transport within bilateral and multilateral frameworks in order to ensure that the aviation sector contributes fully to economic development in OECD countries and in the world more generally". The final report was published in 1997.⁹

The aim of the project was to provide OECD member governments, the European Commission and major players in the industry with a comprehensive picture of possible future developments in this field and with a common assessment of the policies needed to ensure that air transport can contribute fully to the sound evolution of the OECD area and of the world economy at large over the coming decades. The focus of the study was on the analysis of the interaction between government policy and economic efficiency - and in particular on the impediments to efficiency in the field of air transport, and on the search for policies that could enhance the adaptability of the air transport sector. Great importance was therefore attached to the analysis of issues of market entry and exit, distortions of competition, and problems of restructuring. Precedence was given throughout to the economy-wide perspective over the more industry-specific viewpoint.

The report proposes, on the basis of this analysis, a set of wide-ranging policy recommendations. It notes that there has been a broad recognition in the recent past, particularly in OECD countries, of the need to shift the focus of aviation policy from protecting existing airlines to enhancing efficiency, responding to consumer interest and as a result, establishing aviation markets which allow for much more use of competitive processes. Thus the policy recommendations include the further liberalisation

⁹The Future of International Air Transport: Responding to Global Change, OECD, Paris, 1997

of domestic and international aviation markets, the reduction of market-distorting subsidies and other state aids, the encouragement of privatisation of airlines as well as the relaxation of restrictions on foreign ownership.

(d) Agro-Food Sector

Last year a study on “Competition Policy and the Agro-Food Sector” was published by the Agricultural Directorate the OECD¹⁰. This was a contribution to the ongoing work on policies and adjustment in the agro-food sector as a whole. The impetus for this overview evolved from earlier work by the Secretariat which highlighted the importance of linking agricultural policy reform initiatives with measures to ensure effective competition.

In the context of the horizontal project on Regulatory Reform, a background study on “Regulatory Reform and the Agro-Food Sector” was prepared by the Agricultural Directorate. The importance of effective competition and the role of competition policy is emphasised - in particular where agricultural policies that aim at ensuring balance of market powers are removed or reformed.

A number of Directorate studies are related to competitive markets - such as work on contracts in the fruits and vegetables markets, reforms of dairy policy as well as country reviews of agricultural markets and policy frameworks.

(e) Other

The Economics Department of OECD reviewed the subject of trade and competition in 1996. It is currently working in two areas which may be relevant to “Trade and Competition”. A Working Paper with the title “Measurement of non-tariff barriers”, by Professors Alan Deardorff and Robert Stern (University of Michigan) will shortly be distributed via Internet. This Working Paper analyses the conditions under which it is possible to calculate tariff equivalents of non-tariff barriers, and lays down a set of rules as to how to do so in practice, depending on the information to hand.

It is hoped also to publish soon an updated version of a 1996 publication “Indications of tariff and non-tariff trade barriers”, a set of calculations of the height of tariff barriers and the frequency on non-tariff barriers. The update gives actual data for 1996, showing how such barriers have evolved since the Uruguay Round.

In recent years, as part of work on product market competition, examination has been undertaken on the impact of international trade on the intensity of domestic competition in selected sectors in OECD countries. Some of this work will be published in the next issue of the OECD “Economic Studies”, no. 27, in articles by Dirk Pilat, and by Joaquim Oliveira-Martins and Stefano Scarpetta.

The OECD Industry Committee has undertaken work on “Globalisation and the changing nature of the firm”. Part of the work will look at the relationships between openness to trade and investment and sectoral performance across manufacturing sectors. It will be extended where possible to “new” industries, including the environment industry, business services, and possibly the health-care industry.

¹⁰Competition Policy and the Agro-Food Sector [OECD/GD(96)81]

**STRENGTHENING THE COHERENCE
BETWEEN TRADE AND COMPETITION POLICIES**

**Joint Report by the Trade Committee
and the Committee on Competition Law and Policy**

JOINT REPORT
STRENGTHENING THE COHERENCE
BETWEEN TRADE AND COMPETITION POLICIES

1. Successive rounds of trade negotiations have increasingly limited the scope for governmental measures that restrict or distort the conditions of international competition. Following the conclusion of the Uruguay Round, the interaction of trade and competition policies has attracted attention and led to some calls for a framework of multilateral rules to be drawn up. There are three key problem areas:

(a) *Anticompetitive private practices can impede effective market access as well as the competitive process.* For example, domestic producers may enter into anticompetitive exclusive dealing agreements that foreclose foreign firms from distributing and/or selling competing products, or engage in a joint boycott of domestic distributors of imports or purchasers of imports. A locally dominant firm can abuse its position, e.g., through loyalty discounts, to exclude competitors. The practical effect is that foreign suppliers of competing products cannot actually sell into the domestic market. Moreover, international cartels may divide up world markets.

(b) *Trade measures can impede the competitive process as well as block effective market access.* For example, tariff peaks, quantitative restrictions and other non-tariff measures which remain may still insulate producers of goods from competition and raise costs to consumers. Measures to combat unfair trade practices may, in the view of some, impair both market access and the competitive process.

Regulations can frustrate both market access and the competitive process. For example, a monopoly position through regulation can be perpetuated although it is no longer justified by the economic characteristics of the market. Product standards can be used to block imports or new entry.

2. Trade and competition authorities sometimes differ on the appropriate role of national competition policies in addressing the market access concerns of trading partners. Despite some different perspectives, the Trade and Competition Policy Committees agree that the core objectives of trade and competition policies are mutually reinforcing. Both seek to enhance welfare through economic efficiency and encourage competitive, market-oriented directions. Further specific progress has been made:

- A major joint study has identified differences in scope and coverage of competition policies;
- The importance of actual enforcement of competition policies has been recognised;
- An initial review has been made of the competition aspects of the Uruguay Round outcome;
- A revised Recommendation on international competition law enforcement co-operation has been adopted;
- The competition policy perspective on the nature of trade remedies and the actions they address was reviewed.

3. It is important to continue building on that work. Many delegations also believe that the Singapore WTO Ministerial in December 1996 should examine the scope for commencing exploratory work. Accordingly, the OECD will, in consolidating and advancing the work already undertaken, play an essential preparatory role in this context. It will provide a sound analytical basis to assist Ministers in making a decision on whether WTO work in this area is warranted.

4. Further work in the OECD will take stock of analysis undertaken so far, and will work to strengthen the coherence between trade and competition policies. It will focus on, and evaluate the feasibility and desirability of, various options that have been put forward for making progress on the problems identified above. Those options, which are not mutually exclusive, may, among other things, include:

- Enhanced bilateral co-operation
- Development of agreed minimum common standards
- Multilateral agreement.

5. To this end the CLP and TC have agreed to create a Joint Group on Trade and Competition and have agreed on a Joint Work Programme in order to enhance the efficiency of their work. It will report as appropriate to OECD Ministerial meetings.

ANNEX

I. Introduction

1. Against a background of globalisation of the world economy, the need to strengthen the coherence between trade and competition policies has been widely recognised. In this light, wide-ranging discussions have been engaged in the Organisation for several years. A joint programme of work between the Trade and the Competition Law and Policy Committees was the subject of reports to the 1992, 1993 and 1994 Ministerials. This report covers the progress achieved since the 1994 report.¹

2. The work of the Joint Meeting between Working Party No. 1 and the Working Party of the Trade Committee concerns the interrelationship of trade policy and competition policy. There are different aspects of the relationship. First, the free flow of trade between countries, and in particular the benefits of trade liberalisation, can be frustrated by anticompetitive practices of the private sector and by the lack of an effective competition policy in importing countries. The study of this matter is an activity of the Joint Meeting. Second, government-imposed restrictions on trade can affect competition in international and domestic markets and so the Joint Meeting also focuses on the anticompetitive effects of trade restrictions. Finally various regulations can frustrate both market access and the competitive process. The aim is to achieve an appropriate balance among these activities.

II. Market Access and Competition Policy

3. Successive rounds of trade negotiations have increasingly limited the scope for governmental measures that restrict or distort the conditions of international competition. Following the conclusion of the Uruguay Round, many analysts have focused on the potential for private anticompetitive practices to keep foreign competitors out of domestic markets -- the potential for private practices to replace governmental barriers. The efficacy of competition policy as a possible remedy, therefore, is a key issue under consideration in this joint work. For this reason, the Trade and CLP Committees strongly support joint analysis of the sectoral coverage, substantive scope and enforcement of national competition laws.

4. Trade and competition authorities sometimes differ on the appropriate role of national competition policies in addressing the market access concerns of trading partners. But they agree that the picture which is emerging from the joint work is more complex and nuanced than either side originally imagined and that any remedies take into account the need to instil confidence in the competition process. They also agree that the core objectives of trade and competition policies are mutually reinforcing. Both seek to enhance welfare through economic efficiency and encourage competitive, market-oriented directions.

5. Case studies in recent years have been particularly enlightening. While market access depends on a number of variables, some cases have indeed shown that effective enforcement of competition law does reduce barriers to market access. Other cases described below have shown that the underlying source of trade friction can lie outside the domain of competition law enforcement for a variety of reasons

6. The Hawk study on scope and coverage, discussed in more detail in Section III below, has shown that there are significant exceptions to competition law coverage. Such exceptions in economically significant sectors may impede effective market access. Follow-up to this study, possibly through case studies, will look at actual enforcement of competition laws, including the substantive norms applied.

7. Efforts have been devoted in the Trade Committee to identifying and possibly ranking the types of anticompetitive practices that may affect market access by creating trade or investment barriers. Both trade and competition authorities concurred that it may not be useful to continue work on the ranking of anticompetitive practices with respect to their effect on trade, unless an empirical basis for such work can be found.

8. A Trade Committee roundtable discussed practices potentially having an international trade or investment impact, e.g.: i) horizontal agreements including international cartels, export cartels, strategic alliances, mergers, etc.; ii) vertical restraints or integration; and iii) abuse of dominance. The Hawk study set out the factors which affect the strength of competition laws. These include coverage, enforcement and substantive rules as they relate to the practices above. Assessment of co-operative or rule making options towards improving policy responses to anticompetitive practices affecting market access has also been given initial attention. This work should continue, with the goal of identifying problems and gaps in prevailing solutions, be they national, bilateral or otherwise and should be discussed with competition authorities.

9. As a follow up to a 1994 Joint round table on competition elements in international agreements, a review of competition policy provisions contained in the Uruguay Round agreements has been prepared for the Trade Committee. Discussions will continue to relate the current international or regional rules and approaches to the interface of trade and competition, including the feasibility and desirability of a unified approach.

10. The work of competition officials has focused on the potential for trade measures to restrain trade and competition. Particular attention was paid to such measures as VERs and the need to ensure that they are not used in the future which may require closer involvement of competition authorities. The CLP has had extensive discussions on the nature of trade remedies in response to "unfair trade" and the actions they address. In regard to trade measures which continue to affect trade and competition in the post Uruguay Round period, the Trade Committee has indicated in its 1995 report to the Ministerial its intent of "monitoring the Uruguay Round Agreements to ensure their full implementation both in letter and in spirit". The assessment of governmental and private barriers to trade and competition is also part of the Trade Committee's programme designed to promote the openness of national markets to global competition.

III. More effective application of competition laws

11. Work proceeds to improve the effectiveness of national competition laws and to enhance their application in international markets. This work should reduce trade frictions while serving to increase economic efficiency. This work is composed of several major elements: (a) improving co-operation among national competition authorities; (b) increasing convergence of competition laws and policies; (c) extending scope and coverage of competition laws; (d) assessing actual enforcement of competition laws; and (e) examining from both trade and competition perspectives, particular cases involving competition and regulatory issues and their possible effect on market access.

(a) Improving co-operation among national competition authorities

12. Efforts to increase co-operation among national competition authorities are intensifying, co-operation which is essential in an era of global business. Major strides are being made. In the joint work, competition authorities have reported on a number of cases in which investigations have been brought jointly by two authorities. In some instances international co-operation in enforcement efforts has allowed national competition authorities to remedy violations of an international dimension that otherwise might not have been addressed as effectively, or possibly at all, without such co-operative

efforts. The OECD's emphasis on this has stimulated increased contact between authorities in individual cases.

13. Sharing confidential law enforcement information is a key to effective international enforcement. Recent years have seen two competition authorities with criminal powers share information under criminal law enforcement co-operation treaties. But, as most competition proceedings are not criminal, mechanisms to share information in civil as well as criminal proceedings must be examined. In other cases, firms have waived confidentiality provisions in national laws in the interests of securing compatible outcomes in separate jurisdictions. The Council's adoption last year of its Revised Recommendation Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade set forth principles for such information sharing.²

14. "Positive comity" is another tool being developed by competition authorities which can help to reduce certain trade frictions. Under positive comity, one competition agency can ask another to open a proceeding if the interests of the first country seem to be affected by anticompetitive conduct within the jurisdiction of the second authority. Principles of positive comity are set forth both in existing bilateral agreements and in the 1995 Recommendation, and the CLP Committee is actively working to promote this concept.

(b) *Increasing convergence of competition laws and policies*

15. The CLP Committee has focused on promoting the convergence of national competition laws and policies for several years now, producing an interim report for the 1994 Ministerial meeting.³ This work continues and has become a central and ongoing feature of the CLP work programme. This effort to move towards consensus benefits national competition authorities but also serves to help clarify inquiries into the effectiveness of competition laws and their enforcement. Discussing the adequacy of competition law enforcement presupposes a common understanding about the nature and objectives of competition law itself. Moreover, since many non Member countries are adopting or considering adopting competition laws this OECD work is likely to have substantial spin-offs to the benefit of trade and competition. Hence, moving forward on the CLP's convergence project is a priority for that Committee and supports the evolution of the joint work.

16. Since the 1994 Ministerial, the CLP has embarked on additional areas of study such as abuse of dominance/monopolisation, access to essential facilities, and procedural and substantive aspects of merger review. The CLP's next interim report on convergence will be provided for the 1997 Ministerial meeting. Trade officials often attend convergence-related discussions, e.g., the recent roundtable on abuse of dominance, at which international trade perspectives were identified.

(c) *Extending scope and coverage of competition laws*

17. Since the last joint report, a major study has revealed the existence of numerous exceptions to the scope and coverage of national competition laws. This study⁴, conducted with the co-operation of 12 competition authorities,⁵ revealed that the legal coverage of competition law is incomplete; sectors are often entirely or partially excluded, creating parallel exceptions in enforcement.⁶ Sometimes, cartels within sectors (for, example, maritime transport conferences) have been legislatively protected from consideration under competition law. One conclusion of the joint work so far is that such exceptions to the legal coverage of competition law should be constantly reviewed and tested against up to date analysis of economic and technological factors with a view to their progressive elimination.

18. Still other exceptions are created by legal principles which dictate that legislation of general applicability, such as competition law, defers to specific legislation. Thus, legislation regulating a sector may override general competition law. In many countries, national regulation of sectors (for

example, air transport, communications) precludes the competition authority from acting against price-fixing or anticompetitive mergers. In this vein, recent moves to reform and narrow the scope of regulations are highly beneficial in that they correspondingly expand the scope of competition law application though in some cases a competition assessment by the regulatory body is substituted for application of competition law.

19. A related source of exception in coverage is that competition laws have had limited application to government-encouraged or sanctioned business practices. This is another area where governments should agree to assess the feasibility and desirability of limiting as much as possible non application of competition law.

20. Yet other exceptions exist due to the limited or non-existent application of competition law in some countries to state-owned enterprises. The coverage of competition laws to state enterprises should be clarified and Member countries should consider whether to apply competition law to such enterprises with the same vigour as it is applied to private firms.

21. The joint work will continue to explore whether, and the extent to which, trade frictions are associated with these exceptions to coverage.

(d) *Assessing actual enforcement of competition laws*

22. Competition laws must not only have broad legal coverage, they must also be applied in fact. Anticompetitive practices should not escape in fact from competition law.

23. Assessing actual application is complex and fact intensive. For example, the absence of cases in a particular sector could mean *inter alia* either that the competition agency is choosing not to investigate or simply that there are no violations of the law. To determine which in fact is the case may require an inquiry into the underlying facts; moreover, different authorities may place different interpretations on similar facts. The joint work has begun to study the methodology of assessing actual enforcement. If a workable methodology can be developed, a study will then be launched.

24. Future work will also include a study of exemption procedures and criteria.

(e) *Examining particular cases involving trade and competition*

25. A theme of the joint work has been to examine the trade and competition interface in the context of particular cases and market access implications of enforcement. The case study methodology has been particularly illuminating since the last joint report.

26. Several case studies demonstrated that where the enforcement of national competition laws takes place in a non-discriminatory and transparent manner, this can remove barriers to market access and help prevent purchasers in other countries from becoming victimised by anticompetitive conduct.⁷ These case studies also showed the importance of factual context when applying competition law.⁸ In addition, there were reports of increasingly successful co-operation among major competition offices, resulting in some cases in joint investigation of conduct potentially affecting consumers in many markets.

27. One standards case illustrated where the application of competition law and policy prompted pro-competitive regulatory reforms.⁹ A case involving regulated monopolies showed that, even where competition law is not violated, competition authorities can play a useful role as advocates for regulatory reform.¹⁰

28. A distribution case revealed the complex interaction between trade and competition policies. Studying the distribution of a product subject to trade measures, the joint work showed how the competitive effects of distribution arrangements can be distorted by limitations on competition imposed by trade measures. The work also showed that exclusive distribution can be an aid to entering a new market. When an exclusive distribution system is alleged to cause trade problems, competition authorities should be attentive and undertake to assess whether the specific arrangements are on balance anticompetitive and violate national competition laws.

29. These cases also served to illustrate more general points such as the criteria used in decision-making and the importance of non-discrimination, neutrality and transparency.

IV. Competition advocacy, regulation and trade

30. The joint work shows that expanding the role of competition principles in government policy-making can reduce barriers to both trade and competition. Competition and trade officials, in addition to their law enforcement roles, can serve as advocates for regulatory reform within governments.

31. Technical standards are one such source of barrier. Standards regimes of all types are an area where competition principles need to be taken into account in efforts to reduce trade- and competition-restricting effects of such regulations. Regulated monopolies are another, not only for competition in the monopolised sector but also for competition among suppliers; regulated monopolies may in some regulatory frameworks have less incentive to shop competitively for inputs than firms subject to competitive pressures. Here, governments can push for change in procurement practices and minimise the scope of monopoly.

32. However, these regulatory cases are not ordinarily areas where improved competition enforcement can reduce trade frictions; the conduct did not violate competition law. But they do show that competition agencies can usefully argue within their governments for pro-competition and trade-liberalising regulatory reforms. Within the Organisation, the CLP Committee already informally works for such solutions in various types of horizontal work and provides expertise in competition-related studies. The advocacy role of competition authorities in capitals should be formally recognised and institutionalised unless it is clear that this role is being performed effectively by other Government agencies. To this end, the CLP Committee will contribute a report on advocacy efforts to the 1997 Ministerial report on regulatory reform.

33. The Trade Committee's work will focus on an exploration of the relationship between domestic regulatory reform and market access. It will seek to document the ways in which the pro-competitive effects of domestic regulatory reform improves the market access and presence of foreign partners.

ANNEX II

JOINT REPORT BY THE COMMITTEE ON COMPETITION LAW AND POLICY AND THE TRADE COMMITTEE

OCDE/GD(94)63

At the 1993 Ministerial meeting, the Committee on Competition Law and Policy and the Trade Committee submitted a joint progress report on trade and competition policies. They agreed that "globalization should produce more efficient production and marketing, lower prices and improved product quality and variety but will fail to do so unless market access and competition can be preserved and enhanced".¹¹

In the subsequent Ministerial Communique, Ministers reaffirmed "the OECD governments' strong commitment to strengthen the open multilateral trading system so as to let it play its central role in promoting further non-inflationary growth and sustainable development around the world, fostering international trade within an agreed framework of multilateral rules covering access to markets and fair competition".¹²

I. Background

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

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

3. Trade policy officials have concerns that there are private barriers to market access (with or without government involvement) that may not be addressed by competition laws. Competition policy officials have concerns regarding the possible market effects of certain trade policy measures.

4. The 1993 Joint Report identified competition policy issues affecting trade, trade policy issues affecting competition and a third category of issues for which policies other than trade and competition may also be concerned. The joint report also proposed elements of a programme of work.

5. The remainder of this report sets forth the progress achieved since the last Ministerial in two sections. Section II covers particular issues or themes identified in the 1993 Joint Report which were the subject of discussions in two joint meetings and three roundtables. The joint meetings also considered various contributions to a framework approach of the interrelationships between trade and competition

policies and various delegations made proposals regarding the elements which could be considered in this context: this is reflected in Section III below.

II. Main issues considered since the last Ministerial

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

Vertical relationships and market access

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

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

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

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

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

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

13. When analysing vertical restraints from either perspective, the distinction between static and dynamic effects should be kept in mind. It may occur, however, that the net effect of a vertical restraint

is perceived as procompetitive under the standards of competition law in one country while it might be perceived as anticompetitive or trade distortive by another country (e.g., when a distribution system is regarded as efficient and duly competitive between brands but it is not possible for potential competitors, including foreign ones, to enter).

Horizontal agreements

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

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

16. Second, agreements may involve co-operation among competitors which may not harm competition in the market overall or in which the harm to competition may be counterbalanced by other considerations. In some jurisdictions, the legality of these agreements depends on the outcome of a potentially extensive case-by-case or "rule of reason" examination. In others, guidelines, regulations or block exemptions are used to give guidance in at least a portion of the cases. Among the kinds of co-operation among competitors which fall into this second category are standard setting, joint research and development, certain joint ventures, and, in most instances, joint purchasing. There is some concern on the part of trade policy representatives that the influence in particular cases of political or other non-competitive factors may not be easily identified.

17. Export cartels are often immunised from the application of competition law in the exporting country. There is growing consensus that export cartel inappropriate beggar-thy-neighbour policies. At the same time, it is recognised that even with the exemption eliminated, the exporting country may find it difficult or lack the incentive to assert jurisdiction over an export cartel whose anticompetitive effects are felt only in foreign markets.

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

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

20. With the conclusion of the Uruguay Round, officially sanctioned Voluntary Export Restraints (VERs) are prohibited and must be phased out. The beneficial effects of such prohibition would be undermined if private VERs (in effect, hard core cartels by another name) were to be permitted to replace them. Private VERs should therefore be vigorously challenged with the full co-operation of

competition and trade officials in both exporting and importing countries. It should be taken into consideration that VERs impede free trade, decrease welfare and harm the consumer interest of the importing country.

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

Competition elements in international agreements

22. In their 1993 Joint Report, both Committees agreed that "a comparative analysis of the relevant provisions in international, bilateral, regional and multilateral agreements and instruments should be undertaken" ¹³ As a first step, a joint roundtable was organised in April 1994 to identify "competition elements in international agreements" ¹⁴. This roundtable surveyed these agreements and analysed selected competition elements in selected agreements. The objective was to focus on common elements found throughout these agreements. This exercise is ongoing and will continue under the mandate to explore the desirability and feasibility of integrating competition rules into a multilateral framework as requested by the 1993 Ministerial.

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

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

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

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

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

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

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

IV. Proposed joint programme of work after the 1994 Ministerial

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

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

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

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

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

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

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

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

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

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

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

ANNEX III

JOINT REPORT BY THE TRADE COMMITTEE AND THE COMMITTEE ON COMPETITION LAW AND POLICY

OCDE/GD(93)101

In their joint report on trade and competition policies submitted last year to the OECD Council at Ministerial Level, the CLP and Trade Committees agreed that "liberal trade and competition policy share a common objective: the use of market-place competition to achieve an efficient allocation of resources and maximum economic growth and welfare benefits".¹¹ This view was echoed in the subsequent Ministerial Communique, which stated that "the functioning of an open multilateral trading system was capable of underpinning an international environment of competition, structural reform and growth".¹²

I. Introduction

1. Over the last twenty years, there has been a remarkable growth in both international trade and investment, a trend referred to as globalization of business. Globalization should produce more efficient production and marketing, lower prices and improved product quality and variety, but will fail to do so unless market access and competition can be preserved and enhanced. Trade and competition officials are well aware of this as well as of gaps in their respective disciplines. They have attempted to counter pressures for greater protection and less rigorous enforcement of antitrust laws. Often their efforts are mutually reinforcing. To increase synergies and to avoid conflict, trade and competition officials have come to appreciate the need for greater mutual understanding and co-operation. They have accordingly begun to carefully examine the interrelationships between their disciplines and the possibility for joint action to eliminate obstacles to market access and competition.

2. At the 1992 meeting referred to above, Ministers recommended that "OECD governments ... seek to:" improve consistency between these policies to enhance competition and market access; provide a foundation for convergence of substantive rules and enforcement practices in competition policy; identify better procedures for the surveillance of trade and competition policies; and enhance the interests of consumers"¹³ This report sets forth progress achieved so far by the CLP and Trade Committees, an identification of issues at the interface of trade and competition policies and a proposed programme of joint work.

II. Joint work by the CLP and Trade Committees

3. Pursuant to the Ministerial mandate, the Trade Committee and the Committee on Competition Law and Policy have proceeded on the basis of the joint programme of work which included:

¹¹*Trade and Competition Policies - May 1992 - OECD, Paris, 1992*

¹²*SG/Press(92)43, OECD, Paris.*

¹³See note (1)

Study of the possibility of a common analysis of the interrelationships between trade and competition policies. Work is proceeding to develop a framework paper on the interaction of the two policy areas.

Discussion of cases submitted by Delegations as illustrative examples of generic issues raised by the interaction between trade and competition policies. A contribution from the TC Chairman categorising these issues and setting out further questions for their analysis has also begun to be discussed jointly. Other contributions from Delegates have been put forward recently to stimulate the two communities' reflections.

More specific exchanges of views. For instance, the experience with the OECD Checklist for the assessment of trade policy measures was reviewed. According to competition officials, there is a growing trend towards a more systematic use of the principles of the checklist. Trade officials observed, however, that the list did not address the effects of competition policy on trade. Suggestions were made to expand and strengthen the systematic evaluation of both trade and competition policies in accordance with the checklist approach. It was agreed that the situation should be reviewed later.

In addition, each Committee, in close co-operation with the other, carried out a number of studies on interrelated trade and competition issues.

III. Areas for consideration at the trade and competition interface

5. The activities set forth above represent the beginning of a broad programme to meet the challenges identified in this report. Discussion between trade and competition officials have already shown that these challenges may result from possible divergences in policy perspectives. In addition, difficulties may result from differences in terminology and analytical approaches. In a number of areas, insufficient coherence between trade, competition and other policies has been asserted to give rise to tensions in world economic relations. There is a need to review the extent to which competition policies can affect trade and market access. In the trade area, the Uruguay Round should alleviate certain of the negative effects of trade measures on competition, but other areas of concern remain. Finally, trade and competition can be affected by other policy issues which are outside the immediate competence of the two policy areas. Some examples are set out below.

A. Competition policy issues affecting trade

{a) Horizontal agreements}

6. Cartel activities can serve as a serious barrier to both trade and competition. Thus, vigorous enforcement against cartels which restrain competition is a priority for competition officials.

7. Export cartels are generally considered to be arrangements between enterprises which have substituted an agreement on price, output or related matters for independent decision-making in relation to goods and services to be exported to foreign markets. These cartels need to be distinguished from pro-competitive arrangements between firms which individually would not be able to market their goods abroad as effectively or economically. The exemption provided to export cartels under many current competition laws is an area that deserves examination. Such cartels are often immunised from attack in the exporting country even though they have anticompetitive effects in other jurisdictions. Further, while such cartel conduct is theoretically actionable by competition authorities in the importing market, practical and legal barriers may exist to effective prosecution, including difficulties in the collection of information in other jurisdictions and in the supervision and enforcement of any eventual judgement.

On the occasion of a joint case discussion, the need for a better transparency of export cartels and an increased co-operation between competition authorities was stressed.

{b) Competition policy towards vertical arrangements}

8. The character of competition rules and their enforcement with respect to vertical arrangements, whether intrafirm (vertical integration through ownership) or between independent firms (vertical agreements or restraints), may have effects on entry or expansion by foreign firms at one or another level of supply, production or distribution. Vertical arrangements affecting the organisation and operation of distribution systems or the supply of intermediate products (producer-supplier relationships) are an area of current examination. In some cases, too permissive an enforcement posture towards existing arrangements may block entry by foreign firms. In other cases, a too restrictive approach may limit the ability of potential entrants to establish distribution networks or producer-supplier relationships.

{c) International mergers}

9. International mergers represent another area of interaction between competition and trade policies. The international merger process may be affected by the burdens of multiple reviews in different countries which would be affected by the proposed merger.¹⁴ Moreover, the review of international mergers may be less effective and efficient due to restrictions on the sharing of confidential information among competition authorities.

B. Trade policy issues affecting competition

{a) Safeguards and grey-area measures}

10. Concern has been raised by the growing tendency in recent years for governments to resort to grey-area measures outside GATT rules in order to address problems raised by import competition. VERs or the prospect of VERs can stimulate collusion among domestic and foreign producers.

{b) Anti-dumping practices}

11. The increasing use of anti-dumping procedures over the last decade has given rise to conflicts between competition and trade policies.

{c) Restrictive trade measures and practices}

12. It is recognised that a range of other trade policy measures may affect competition, e.g. border measures such as tariffs and quotas; rules of origin; administrative procedures; government procurement.

C. Other policy issues affecting trade and competition

Domestic policies in the areas of subsidies, standards or local content

¹⁴The CLP Committee has produced a report on {International Mergers and Competition Policy, OECD, Paris, 1988.

13. It is well known that subsidies, standards or local content rules used for domestic policy purposes may have effects on competition on domestic and foreign markets, thus distorting trade. Certain aspects of these measures are addressed in the Uruguay Round. The competition aspects ought to be considered.

Governmental rules affecting distribution systems

14. Both trade and competition officials can press for changes in laws and regulations outside their immediate areas of competence which restrain competition and hinder market access. Zoning, licensing or pricing rules or sector-specific regulations, for example, may unduly restrict the establishment of new competitors with likely effects on trade and competition.

Abuse of monopoly power

15. Public and government-sanctioned private monopolies can disrupt competition in related competitive markets, particularly if the monopolies are permitted to engage in competitive activities in such markets. The regulations of many but not all OECD Member governments concerning the activities of particular monopolies contain provisions designed to prevent the abuse of monopoly power or the cross-subsidisation of competitive activities with supra-competitive profits generated from monopoly activities. The potentially trade restrictive effect of the abuse of monopoly power has been recognised and various trade agreements including the proposed General Agreement on Trade in Services and a number of free trade agreements include provisions to discipline such conduct. Related issues may arise with firms in dominant or jointly dominant positions.

{d) International agreements between firms}

16. There is concern that new private international arrangements to manage trade may become increasingly prevalent. Such arrangements may be horizontal, i.e. between producers at the same level located in different countries, or, in exceptional circumstances, vertical, i.e. between firms at different stages of production or distribution in different countries. The arrangements may well restrain competition in one or several markets as well as international trade and thus be subject to prosecution under competition law. Cartel provisions, for example, may come into play when two or more competitors in one market become involved in such an agreement. The international aspects of the arrangements cited here may be, however, different from the purely national export or import cartels discussed under A. a) above and need to be studied.

{e) Harassment of competitors}

17. In some cases, violence, intimidation and other acts of harassment have occurred to block the emergence of new competition. Such conduct can raise serious problems for trade and competition.

IV. Proposed joint programme of work

18. Constructive exploratory work has been carried out within the first year. Valuable working methods and approaches were identified and the dialogue between trade and competition authorities is now under way, at both. The broad lines of the future joint programme of work are suggested below.

19. Competition and trade authorities will work together to further evaluate the implications of interactions between the two policies. Particular attention may have to be given to reviewing sectoral exemptions and derogations from the operation of competition law, where they may significantly impact on trade. Further work may also include review of the role of competition policy considerations in dealing with important issues such as state aids and subsidies or procurement policies affecting both trade and competition.

20. In the immediate future, joint meetings will be increased in length to permit more in-depth discussions. The joint dialogue will continue putting emphasis on analytical work in the areas identified in Section III. Generic issues will be analysed using case studies as illustrations and discussion of contributions by Delegations. Roundtables will be organised covering both the competition and trade aspects of subjects of common concern. For the 1994 Ministerial, the Committees will seek to complete a draft analytical framework on the interaction between competition and trade policies. Particular emphasis will be given to those issues which require a common effort by trade and competition authorities to effectively deal with the problems identified. In addition to a review of additional case studies, joint discussion might start after the 1993 Ministerial on comparisons of terminology and concepts such as anti-dumping versus predatory pricing, and market access versus entry barriers.

21. For work under the responsibility of each Committee, exchanges of relevant draft reports by each Committee (or their Working Parties) will continue to be organised at a stage early enough to allow taking fully into consideration the comments received from the other side. Delegates from each Committee will be invited to attend the other Committee's meetings on subjects of mutual interest and some events or discussions will be organised jointly.

22. At the 1994 Ministerial, the CLP Committee will be in a position to present a report on its work to date aimed at achieving greater export and import cartels, antidumping, vertical restraints, international mergers and other areas.

23. A comparative analysis of the relevant provisions in international, bilateral, regional and multilateral agreements and instruments should be undertaken. The question of the desirability and feasibility of integrating competition rules into a multilateral framework will be explored.

24. For the 1994 Ministerial, the Committee on Competition Law and Policy and the Trade Committee will submit a joint report on the progress achieved in the completion of the programme of work described above.

ANNEX IV

ORGANISATION FOR ECONOMIC

GENERAL DISTRIBUTION

COOPERATION AND DEVELOPMENT

COUNCIL

Paris, drafted: 17th November 1986 dist: 21st November 1986
C(86)65/Final

RECOMMENDATION OF THE COUNCIL

for co-operation between Member countries in areas

of potential conflict between competition and trade policies

(adopted by the Council at its 649th meeting on 23rd October 1986)

THE COUNCIL,

Having regard to Article 5 b) of the Convention of the OECD of 14th December 1960;

Having regard to the Decision of the Council of 10th and 11th May 1982 requesting the Committee of Experts on Restrictive Business Practices

"to examine, in particular, possible longer-term approaches to developing an improved international framework for dealing with problems arising at the frontier of competition and trade policies. After consultation with the Trade Committee, the results of the study should be reported to the Council as soon as possible." [C(82)58(Final)];

having regard to the Revised Recommendation of the Council concerning co-operation between Member countries on restrictive business practices affecting international trade [C(86)44(Final)];

Having regard to the Report of the Committee of Experts on Restrictive Business Practices on "Competition Policy and International Trade: Their Interaction" derestricted. by Council Decision of 7th June 1984 and in particular the conclusions contained in Part I of this Report;

Having regard to the Joint Report of the Committee of Experts on Restrictive Business Practices and the Committee on Consumer Policy proposing an indicative checklist for the assessment of trade policy measures [C(85)321 and the resolution of the Council of 30th April 1985 calling upon Member governments to undertake, on the basis of the checklist, as systematic and comprehensive an evaluation as possible of proposed trade and trade-related measures as well as of existing measures. when the latter are subject to review;

Recognising that government actions or policies which limit or distort trade, in particular, through mechanisms or import restrictions of a discriminatory nature, as well as other trade-related measures, may affect competition in domestic and international markets;

Recognising that the 1984 Communiqué of the Council meeting at Ministerial level on 17th and 18th May 1984 acknowledged the importance of issues arising in relation to both competition

and trade policies, such as cartels and voluntary export restraints, which have the effect of inhibiting competition and the proper functioning of markets and called for continued work and improved international co-operation in this area;

Considering that the 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;

Considering the need for increased co-operation between competition and trade authorities at the national and international levels to avoid or minimise conflicts between laws, regulations and policies in the field of trade and competition;

On the proposal of the Committee of Experts on Restrictive Business Practices, after consultation with the Trade Committee:

I. RECOMMENDS to the Governments of Member countries:

A. POLICY PRINCIPLES TO STRENGTHEN COMPETITION IN NATIONAL AND INTERNATIONAL MARKETS

(a) Trade policy measures affecting competition

1. Member governments should undertake, on the basis of the attached checklist, as systematic and comprehensive an evaluation as possible of proposed trade and trade-related measures as well as of existing measures when the latter are subject to review;
2. In the course of negotiations or discussions concerning export limitation arrangements, governments should take into account the interests of their trading partners and give consideration to the effects of such arrangements on competition in the markets concerned, as well as to the applicability of competition laws;
3. They should respond as positively as possible to requests for consultations by other Member countries which express concern about the impact on competition in their markets of measures referred to in paragraphs 1 and 2 above;
4. Because of the potential effects on competition, governments, when supplying or purchasing goods or services or providing subsidies to enterprises, whether privately owned or under government control, should make these practices and policies as transparent as possible'.
5. Care should be exercised that proceedings under laws dealing with unfair trade practices, especially proceedings initiated by enterprises, are not misused for anticompetitive purposes;

(b) Application of competition laws to restrictive practices by enterprises affecting international trade

6. When considering action to approve or otherwise exempt export cartels, export limitation arrangements or import cartels from the application of their competition laws, governments should, as far as possible, within existing national laws, take into account the impact of such practices on competition in domestic and foreign markets. Member countries which have not yet done so should consider the possibility of requiring the notification of export cartels, export limitation arrangements and import cartels to competition authorities or similar procedures to obtain more information about the nature and extent of these practices;

7. While recognising that policies designed to allow interfi M, co-operation in export trade can stimulate trade flows, governments in general should not encourage the exercise of market power in foreign markets through the use of export cartels. Nor should they encourage other restrictive business practices in export or import markets, e.g., export limitation arrangements and import cartels, which restrain competition in these markets;

8. The government of the country where such cartels or export arrangements exist, should, without prejudice to each government's full freedom of action and according to the procedures of the Revised Council Recommendation concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade, be ready to co-operate within existing national laws with the authorities of other countries in any investigation into possible anticompetitive effects of arrangements located in their countries, recognising the jurisdictional difficulties that sometimes arise when information is sought from abroad or where the parties to a restrictive agreement are located abroad;

9. When assessing restrictive business practices of enterprises within relevant markets, the role of imports and the existence of trade barriers should be taken into account.

B. PROCEDURAL ARRANGEMENTS TO AVOID OR MINIMIZE CONFLICTS BETWEEN TRADE AND COMPETITION POLICIES

(a) At the national level

10. Governments should seek to ensure that competition policy considerations are taken into account in the formulation and implementation of trade policies, including laws dealing with unfair trade practices;

(b) At the international level

11. Where a Member country considers that the implementation of a trade measure by another Member country of which it has notice from any source would or may significantly affect the application of its competition laws or policies, the Government of the first mentioned Member country may communicate its concerns to the Government of the other Member country;

12. Where a Member country implements or proposes to implement a trademeasure which may lead to the application of competition laws in or by another Member country, the first mentioned Member country may notify the other Member country;

13. Member countries should respond as positively as possible to requests they may receive for consultations in relation to such measures and their implications for their competition laws or policies, without prejudice to each government's full freedom of action;

14. Where the governments of the Member countries concerned agree, the consultations could be a matter for report and discussion within the Committee of Experts on Restrictive Business Practices, in close co-operation with the Trade Committee;

II. INSTRUCTS the Committee of Experts on Restrictive Business Practices, in relation to its continuing work in analysing the role of competition policy in strengthening the international trading system and in close co-operation with the Trade Committee on all matters relating to trade policy issues,

1. to examine periodically developments in the implementation of the provisions set out in this Recommendation;

2. to report to the Council as appropriate on the implementation of the present Recommendation.

APPENDIX

INDICATIVE CHECKLIST FOR THE ASSESSMENT OF TRADE POLICY MEASURES(*)

- (a) Is the measure in conformity with the country's international obligations and commitments?
- (b) What is the expected effect of the measure on the domestic prices of the goods or services concerned and on the general price level?
- (c) What are the expected direct economic gains to the domestic sector, industry or firms in question (technically, the increase in producers' surplus)?
- (d) What types of jobs are expected to be affected by the measure? What are the net employment effects of the measure in the short and long term?
- (e) What are the expected (direct) gains to government revenues (e.g. from tariffs, import licences, tax receipts) and/or increased government costs (e.g. export promotion, government subsidies, lost tax revenues)?
- (f) What are the direct costs of the measure to consumers due to the resulting higher prices they must pay for the product in question and the reduction in the level of consumption of the product (technically, the reduction in consumers' surplus)? Are there specific groups of consumers which are particularly affected by the measure?
- (g) What is the likely impact of the measure on the availability, choice, quality and safety of goods and services?
- (h) What is the likely impact of the measure on the structure of the relevant markets and the competitive process within those markets?
- (i) In the medium and longer term perspective, will the measure, on balance, encourage or permit structural adaptation of domestic industry leading over time to increased productivity and international competitiveness or will it further weaken and delay pressures for such adaptation? Is the measure of a temporary nature? Is it contingent on, or linked to, other policy measures designed to bring about the desired structural adjustment?
- (j) What will be the expected effect on investment by domestic firms in the affected sector, by potential new entrants and by foreign investors?
- (k) What could be the expected economic effects of the measure on other sectors of the economy, in particular, on firms purchasing products from, and selling products to, the industry in question?
- (l) What are the likely effects of the measure on other countries? How can prejudice to trading partners be minimised?
- (m) How are other governments and foreign firms likely to react to the measure and what would be the expected effect on the economy of such actions? Is the measure a response to unfair practices in other countries?

This checklist applies to all trade policy measures other than laws relating to unfair trade practices.

ANNEX V

C(95)130/Final

**REVISED RECOMMENDATION OF THE COUNCIL
CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES
ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE**

(adopted by the Council at its 856th Session on 27 and 28 July 1995)

THE COUNCIL,

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

Having regard to the fact that international co-operation among OECD countries in the control of anticompetitive practices affecting international trade has long existed, based on successive Recommendations of the Council of 5 October 1967 [C(67)53(Final)], 3 July 1973 [C(73)99(Final)], 25 September 1979 [C(79)154(Final)] and 21 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;

Recognizing that anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries;

Recognizing that the continued growth in internationalization of business activities correspondingly increases the likelihood that anticompetitive practices in one country or coordinated 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;

Recognizing 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;

Recognizing 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 anticompetitive practices;

Recognizing that anticompetitive 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 cooperate in the implementation of their respective national legislation in order to combat the harmful effects of anticompetitive practices;

Considering also that closer co-operation between Member countries is needed to deal effectively with anticompetitive 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 anticompetitive practices, as may arise;

Recognizing 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 anticompetitive 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 anticompetitive practices;

2. Where two or more Member countries proceed against an anticompetitive 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 anticompetitive practices in international trade. In this connection, they should supply each other with such relevant information on anticompetitive 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 cooperation 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 anticompetitive practices

of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognizing 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 anticompetitive 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 anticompetitive 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 anticompetitive 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 anticompetitive 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 21 May 1986 [C(86)44(Final)].

C(95)130/FINAL

APPENDIX

GUIDING PRINCIPLES FOR NOTIFICATIONS, EXCHANGES OF INFORMATION, COOPERATION 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 minimize conflicts in the enforcement of competition laws. It is recognized that implementation of the recommendations 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 authorized 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 anticompetitive, 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 organized 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.

Coordination of investigations

5. The coordination 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 coordination process shall not, however, affect

each Member country's right to take a decision independently based on the investigation. Coordination 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 paragraph 10;
- (c) requesting, in appropriate circumstances, that the subjects of the investigation voluntarily permit the cooperating countries to share some or all of the information in their possession, to the extent permitted by national laws;
- (d) coordinating 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. Cooperation among Member countries by means of supplying information on anticompetitive 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. Cooperation 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 anticompetitive 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 cooperation 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 minimize 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 proceeding of the conciliation will be kept confidential unless the Member countries concerned agree otherwise.

ANNEX VI

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(Revised July 30, 1997)

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ANNEX VII

OECD TECHNICAL ASSISTANCE REGARDING COMPETITION 1990 - 1997

Set forth below are the major technical assistance projects conducted by the OECD in the area of competition policy since 1990. Some of these projects were done jointly with the World Bank and many were done with the assistance of national competition authorities, in particular the competition authorities of Australia, Canada, the European Union, Finland, France, Germany, Ireland, Italy, New Zealand, Sweden, the United Kingdom and the United States. The list also includes projects scheduled for the rest of 1997.

I. Major Conferences

28 June-1 July 1994 - (in collaboration with the World Bank) Conference on *Network Infrastructure Industries* (Electricity, Natural Gas, Railways, and Telecommunications) - attended by competition and regulatory policy officials from Belarus, Bulgaria, Estonia, Latvia, Lithuania, Kazakstan, Romania, Russia, Slovenia and Ukraine.

9-12 May 1995 - *Competition and Regulation in Network Infrastructure Industries* - attended by competition officials and regulators from Czech Republic, Hungary, Poland and Slovak Republic; assisted by the World Bank and the European Bank for Reconstruction and Development.

26-28 September 1995 - (jointly sponsored and principally organized by the Russian Antimonopoly Committee) International Conference on *Competition Policy in Transition Economies* - attended by competition officials from a variety of countries (particularly those of Eastern Europe and the CIS), representatives of several international organisations, scholars, consultants and law practitioners from Moscow firms and organisations, and a large number of Russian Antimonopoly Committee staff members from all parts of Russia.

II. Seminars

Belarus

22-26 November 1993 - *Introduction to the Law and Economics of Competition Policy* - attended by staff of the Antimonopoly Committee.

Bulgaria

12-16 October 1992 - *Introduction to Micro Economics and Antitrust Law and Policy* - attended primarily by staff of the Commission for the Protection of Competition.

Czech Republic

3-7 May 1993 - *Introduction to the Law and Economics of Competition Policy* - attended primarily by staff of the Ministry of Economic Competition.

Hungary

1-3 April 1996 - *Economic Issues Involved in Adjudicating Hungarian Competition Cases* - attended by judges of the Supreme Court and Metropolitan Court, and staff of the Office of Economic Competition.

Kazakstan

26-30 October 1992 - *Introduction to Micro Economics and Antitrust Law and Policy* - attended primarily by staff of the Antimonopoly Committee.

15-19 July 1996 - *Effective Competition Policy Enforcement* (using case studies) - attended by competition enforcement officials primarily from Kazakstan but with substantial representation as well from Kyrgyzstan.

Poland

23-26 November 1992 - *Introduction to Micro Economics and Antitrust Law and Policy* - attended primarily by staff of the Antimonopoly Office.

11-13 December 1995 - *Economic Issues Involved in Adjudicating Polish Competition Cases* - attended by judges of the Antimonopoly Court and Supreme Administrative Court, and staff of the Ministry of Justice, Ombudsman Office, Antimonopoly Office; observed by two officials of the Russian Supreme Arbitrazh Court.

Romania

2-6 September 1991 - *Introduction to Micro Economics and Antitrust Law and Policy* - attended by staff of the Ministry of Economy and Finance, Counsel for Reform and other government officials interested in competition policy.

Russia

17-21 February 1992 - *Introduction to Micro Economics and Antitrust Law and Policy* - attended by staff of the Antimonopoly Committee.

13-17 December 1993 - *Topics in Competition Policy* - attended primarily by staff of the Antimonopoly Committee but with some representation from other CIS countries.

December 1994 - *Topics in Competition Policy* - attended primarily by staff of the Antimonopoly Committee but with some representation from other CIS countries.

Summer 1995 - (in collaboration with the World Bank) missions to Irkutsk and Novosibirsk to discuss competition policy implementation with regional Antimonopoly Committee staff.

2-6 December 1995 - *Topics in Competition Policy* - attended primarily by staff of the Antimonopoly Committee but with some representation from other CIS countries.

6-9 May 1996 - *Economic Issues Involved in Adjudicating Russian Competition Cases* - attended by judges from the Arbitrazh Court and officials of the Antimonopoly Committee.

18-20 November 1996 - *Implementation of Competition Law in the Russian Federation* - attended by judges of the Arbitrazh Court and officials of the Antimonopoly Committee.

2-6 December 1996 - *Topics in Competition Policy* - attended primarily by staff of the Antimonopoly Committee but with representation as well from: Azerbaijan, Belarus, Georgia, Kazakstan, Kyrgyzstan, Moldova, Tadjikistan, Ukraine and Uzbekistan.

10-12 November 1997 - *Implementation of Competition Law in the Russian*

Federation

1-5 December 1997 - *Topics in Competition Policy*

Slovak Republic

19-23 April 1993 - *Introduction to the Law and Economics of Competition Policy* - attended by staff of the Antimonopoly Office.

28-30 October 1996 - *Economic Issues Involved in Adjudicating Slovak Republic Competition Cases* - attended by judges of the Supreme Court and staff of the Antimonopoly Office, including its Commission.

Ukraine

10-14 January 1994 - *Introduction to the Law and Economics of Competition Policy* - attended by staff of the Antimonopoly Committee.

2-6 October 1995 - *Effective Competition Policy Enforcement* - attended by staff of the Antimonopoly Committee.

24-28 June 1996 - *Effective Competition Policy Enforcement* - attended by staff of the Antimonopoly Committee.

23-27 June 1997 - *Effective Competition Policy Enforcement* - attended by staff of the Antimonopoly Committee.

Czech Republic, Hungary, Poland and Slovak Republic

7 May 1992 - advised the Czech and Slovak Republic competition offices on principles and guidelines for the control of natural monopolies.

20-22 November 1995 - *Seminar on Vertical Restraints* - attended by competition officials from the four countries.

Seminars at the Joint Vienna Institute

- *Topics in Competition Policy* - these two week seminars have typically involved delegates from the competition offices of Bulgaria, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Poland, Romania, Russia, Slovak Republic, Ukraine, and, less frequently Armenia, Azerbaidjan, Belarus, Kazakstan, Kyrgyzstan, Turkmenistan and Uzbekistan;
- the seminars are focused on real competition cases submitted by the participating countries;
- except for the first year (when three shorter seminars were presented) the seminars have been held annually in Vienna since 1992.

Seminars at the OECD's Centre for Private Sector Development (Istanbul)

11-15 July 1994 - Why is a Competition Law Necessary and How to Facilitate Adoption of Such a Law and the Creation of an Enforcement Agency - attended by high level government officials from: Azerbaidjan, Georgia, Kazakstan, Kyrgyzstan, Moldova, Mongolia and Uzbekistan.

26-30 June 1995 - Effective Competition Law Enforcement - attended by competition officials from: Armenia, Azerbaidjan, Georgia, Kazakstan, Kyrgyzstan, Moldova, Mongolia, Turkmenistan and Uzbekistan.

28-31 May 1996 - Merger Enforcement Issues - attended by competition officials from: Kazakstan, Kyrgyzstan, Mongolia, Russia and Ukraine.

8-11 October 1996 - Effective Competition Law Enforcement - attended by competition officials from: Azerbaidjan, Georgia, Kazakstan, Kyrgyzstan, Mongolia, Russia, Turkmenistan, Ukraine and Uzbekistan.

1-4 April 1997 - Detecting, Investigating and Prosecuting Cartels - attended by competition officials from: Azerbaidjan, Georgia, Kazakstan, Kyrgyzstan, Moldova, Mongolia, Russia, Ukraine and Uzbekistan.

14-17 October 1997 - Deconcentration and Demonopolization.

4-7 November 1997 - Institutional Aspects of Competition Law Enforcement.

Baltic Rim Economic Forum

10-13 June 1997 - Competition Policy in the Context of Regional Integration - attended by competition officials of Estonia, Latvia, Lithuania and St. Petersburg.

Latin American Seminars

28-30 October 1996 - (organized in conjunction with the Government of Argentina and the World Bank) Emerging Market Economy Forum *Workshop on Competition Policy and Enforcement* - attended by competition officials from: Argentina, Brazil, Chile, Columbia, Peru, South Africa, Uruguay and Venezuela; with panellists drawn from the OAS and competition officials from Australia, Canada, the European Commission, France, Germany, Italy, Japan, Mexico, Poland, Slovak Republic, Turkey, and the United States.

10-13 July 1997 - (organized in cooperation with the World Bank, CADE - the Brazilian competition agency - and IBRAC - a private economics institute) *Competition Policy and Economic Reform* (competition officials expected to attend from: Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Nicaragua, Paraguay, Rica, Peru, Uruguay and Venezuela); panellists will be drawn from competition agencies in Canada, the European Commission, France, Italy, Japan, Mexico and the United States.

APEC region seminars

The OECD has contributed speakers and panelists to variety of seminars on competition policy in the APEC region, including:

Chinese Taipei 1995 (PECC)

New Zealand 1995 (APEC)

Philippines 1996 (APEC)

Korea 1996, 1997 (KFTC, KDI)

Thailand 1996 (APEC)

III. Advising on Laws, Commentaries and Methodologies

Belarus

1994 - commented on competition law amendments.

Bulgaria

1992 - commented on draft competition law.

Chile

1995 - commented on competition law amendments.

Estonia

1993 - commented on draft competition law.

Kazakhstan

1992, 1995 and 1996 - commented on amendments to competition law.

Lithuania

1992 - commented on draft competition law.

1995 - commented on draft amendments to competition law.

Malaysia

1995 - advised on draft competition law.

Mexico

1992 - advised on draft competition law.

Poland

1992 - commented on draft competition law.

Romania

28-31 July 1992 - (in collaboration with the World Bank) worked with government officials drafting a Romanian competition law (focused especially on price control and need for competition office independence).

Russia

1990-1991-1992 - participated in drafting the Russian competition law and the commentary to the basic articles of the adopted law.

1993 - commented on draft demonopolization plan, natural monopolies law and methodologies dealing with horizontal agreements, market definition, and abuse of dominance.

1994 - commented on: various methodologies and draft merger guidelines; draft unfair competition law; draft natural monopolies law; amendments to the competition statute; draft model competition law for CIS countries.

1995 - commented on: market power methodology; telecommunications restructuring plans; draft statute and Presidential Edict pertaining to the Russian Antimonopoly Committee; draft statute pertaining to the territorial administration of the Russian Antimonopoly Committee; draft statute pertaining to the register of economic subjects having market shares exceeding 35%.

1996 - commented on draft methodologies concerning market definition and evaluating market power and merger review and on commentaries relating to cartels; also comments on some CIS Interstate Council draft agreements on cooperation in competition policy (including information sharing).

1997 - commented on draft law on wholesale trading, draft commentary to law on competition, and draft methodologies (abuse of dominance, actions and agreements of state executive bodies, evaluation of the effects of restrictive trade measures on internal competition, horizontal and vertical agreements, and merger review).

Slovak Republic

1993 - commented on draft competition law.

Ukraine

20-24 September 1993 - advised high level officials working on the adoption of a competition law.

1997 - advised on amendments to the competition law.

IV. Other

Working jointly with the World Bank on: a revised and up-dated *Glossary* of the legal and economic terms fundamental to competition law and policy (to be published in 1997) - an earlier version has been translated into several languages including Russian and Spanish.

Working jointly with the World Bank on: a *competition manual* for transition and developing countries (to be published in 1997).

^{1.} Joint reports on trade and competition were submitted by the Trade and the CLP Committees in 1992, 1993 and 1994.

^{2.} C(95)130/FINAL.

^{3.} Interim Report on Convergence of Competition Policies, OECD/GD(94)64.

^{4.} Coverage of Competition Laws and Policies, OECD, 1996 (forthcoming).

^{5.} Australia, Canada, France, Germany, Japan, Mexico, Portugal, Sweden, the United Kingdom, the United States, the European Union and Hungary participated in this study.

^{6.} Exceptions to coverage, which varied by country, were found in a wide range of sectors, including labour/employment-related activities, agriculture, fishing, forestry, horticultural products, energy, utilities, postal services, transport communications, defence, financial services, insurance, securities, media, publishing, cosmetics, medicaments, pharmaceuticals, natural resources, spirits and sports.

^{7.} A merger case proved that a national competition office could effectively enforce its law against an international merger which would have had anticompetitive consequences for purchasers of the product in many countries, even though the near monopoly which would have been created would have meant rents for the domestic firm at the expense of foreign purchasers.

A case involving dominant firm practices showed that a national competition office could discipline the distribution practices of a locally dominant domestic supplier, eliminating a rebate system which acted as a barrier to entry into the domestic market. Here, the immediate beneficiaries of the action were foreign suppliers and domestic consumers, at the expense of the profits of the domestic dominant firm.

^{8.} For example, whether rebate practices cause anticompetitive effects, for example, depends heavily on the market power of the firms employing them.

^{9.} In one case, privately prepared product standards were shown to operate as a barrier to market access. In this case, the competition agency began to supervise the activity of a standards body composed of domestic firms in order to ensure that products by foreign firms were not unfairly denied standards approval. This both increased competition and lowered a barrier to market access.

^{10.} In this case, equipment buying practices by national monopoly service suppliers were shown not to violate competition law, the solution to the trade friction laying instead in the elimination of the downstream monopoly through regulatory reform.

^{11.} *OECD/GD(93)101, Paragraph 1. Both Committees also agreed that "the question of the desirability and feasibility of integrating competition rules into a multilateral framework will be explored". Idem, Paragraph 23.*

¹². *Paragraph 10 of the Communiqué C(93)87 adopted by the OECD Council at its 806th Session on 3 June 1993.*

¹³. OECD/GD(93)101, Paragraph 23.

¹⁴. *Idem.*