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Joint Group on Trade and Competition

OUTLINE OF

(A) CORE PRINCIPLES, COMMON APPROACHES AND COMMON STANDARDS and (B) BILATERAL AND MULTILATERAL APPROACHES

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(A) CORE PRINCIPLES, COMMON APPROACHES AND COMMON STANDARDS
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(B) BILATERAL AND MULTILATERAL APPROACHES

I. Introduction

1. As a follow up to its discussion on "International options" at the meeting of 18 February 1998 the Joint Group asked the Secretariat "to deepen the work and focus on two types of main issues":

(i) "the distinction between core principles or procedures and minimum standards, including identification of such core elements in particular relevant areas for the market access-competition interface"; and

(ii) "the articulation of bilateral and multilateral approaches".

2. In respect of the first issue, most of this Note is an attempt to apply the recently developed terminology to certain aspects of competition law and policy. Section V of the Note addresses the question of articulation of bilateral and multilateral approaches. The Note has been revised to take account of comments made by Delegations in that meeting and written comments subsequently received by the Secretariat. As agreed, this Note was made available to the OECD Conference on Trade and Competition held on 29 and 30 June as work in progress under the Secretariat's name. The Note does not intend to suggest the general desirability of reaching agreement on any particular option, nor does it consider the particular desirability or appropriateness of new or existing options from the point of view of economic development. Both of these issues will require further discussion, and perhaps negotiation in other fora. Certain developmental aspects of the options discussed below have been mentioned in this Note, however.

II. Terminology

3. Insofar as the Joint Group has been considering the possibility of a multilateral agreement on competition policy, the idea of a uniform competition law has never been considered realistic or relevant. Discussions in the Joint Group have recently focused on the possibility of agreements with respect to "core principles," "common standards," or "common approaches" and on whether and to what extent such agreements might be subject to dispute settlement.

4. Before discussing in detail how these three terms have been described, it should be noted that there is a reasonable degree of consensus on the relevance to the market access/competition interface of the necessity or desirability for countries participating in the trading system to have and enforce a national competition law applying such principles as transparency, national treatment, etc. This could be seen as an agreement on "core principles," including implementing procedures such as rights to remedy under competition law; whether and to what extent the principles could be subject to dispute resolution is an issue for further discussion.

5. There are, however, considerable doubts regarding the feasibility (at least in the near future) of a wide-ranging multilateral agreement on "common standards" applicable to particular practices, *i.e.*, an agreement specifying, on an internationally agreed basis, how national competition law should deal with particular practices recognised as having potential impacts on trade, investment and competition. Some fear that common standards could be agreed only on a lowest common denominator basis, which would not

be acceptable to countries having advanced approaches to competition law and might actually retard the wider adoption of laws going beyond the common denominator. The term "common approaches" has been introduced to describe a category in which countries maintain considerable flexibility in implementing commitments in this area.

6. Discussions in the Joint Group have suggested the possibility of reaching agreement on some core principles and/or a common approach for effective enforcement action against hard core cartels (except perhaps for export cartels); whether such an agreement could be subject to dispute settlement is another matter, however. Questions also remain about the feasibility of reaching any agreement in other areas though for certain practices such as some vertical restraints or abuses of dominance, the view has been expressed that at least some kind of common approach setting forth common criteria for assessment might be possible.

7. Before attempting to discuss what core principles, common standards, and common approaches might refer to in an agreement relating to anti-competitive practices with a significant impact on international trade and investment, it is useful to note that each of these categories may relate to agreements with respect to substantive or procedural matters. It is also useful to describe how these terms were defined based on experience with WTO agreements, that are subject to dispute settlement, and non-binding OECD Recommendations. It should also be noted that agreements in any of these categories may or may not be subject to dispute settlement as it is commonly understood -- as, for example, in the application of the WTO Dispute Settlement Understanding.[1] There is now consensus that dispute settlement should not be available to review individual cases. Some other form of dispute settlement might, however, be negotiated for core principles, common standards and common approaches discussed below.

8. **Core principles** may be seen as fundamental principles of general application. In the WTO context, it can be the case that many of the core principles are expressed in general enough terms that nations have significant freedom in choosing the content of their own laws or nature of their policies and procedures. It can also be the case that core principles are expressed in more specific terms, which reduces countries' options but produces greater convergence and may also provide countries greater certainty that laws or actions will be found to conform to their obligations. More specific obligations may thus facilitate dispute settlement, though the dispute settlement process can be and is applied to a variety of quite general obligations. If there are negotiations concerning a possible WTO agreement relating to competition policy, the level of detail in core principles and the applicability of dispute settlement would both be subject to negotiation. The core competition policy principles that are contained in OECD Council Recommendations are by definition not binding or subject to dispute settlement.

9. **Common standards** may be seen as more detailed and specific commitments by countries. A common standard would generally set forth, in varying levels of detail, standards that must be applied and the manner in which they must be applied. Common standards do not necessarily imply "minimum" standards; indeed they can be "maximum" standards. As with core principles, it would be a matter for possible future negotiations to determine whether and how common standards might be subject to dispute resolution. To the extent that any aspects of the OECD Council Recommendations on competition policy are seen as constituting common standards, they are of course neither binding nor subject to dispute settlement.

10. **Common approaches** can be seen as more detailed and less flexible in application than core principles, and less detailed and more flexible in application than common standards. A common approach

1. Dispute settlement would not necessarily be available to determine whether a substantive provision of a country's law conformed to the WTO agreement.

would set forth or list certain criteria or objectives to be considered, without necessarily delineating how those criteria would be applied, or what precise weight should be assigned to particular elements of the criteria. Common approaches might be binding or non-binding. Once again, it would be a matter of possible future negotiation to determine whether and how dispute settlement might apply.

11. Of course, different nomenclature could be used to refer to the three categories discussed above. The basic point of the exercise is simply to provide common terminology for categories based on the nature of the agreement. If there are multilateral negotiations on competition policy, nations may find it easier to agree on some matters than on others, and these differences can be expected to relate to both the nature of the commitment and the applicability of dispute settlement.

12. It is important to note that different aspects of a topic can be subject to different types of commitments, meaning for example that one commitment might be a core principle, another a common standard, and another a common approach. For instance, consider the case of intellectual property. Countries might agree that, in order to deter trade distortions, foreign and domestic innovators should be treated in a non-discriminatory manner. This commitment could be characterised as a core principle. Countries might further agree to a common approach with an objective or method of protecting innovative activity through an intellectual property right without specifying the terms of countries' substantive or procedural law. Finally, countries might agree that in order to avoid certain problems it is necessary to go even further and to delineate a common standard such as the precise length of the intellectual property right. Each of these commitments might, or might not be subject to dispute settlement.

13. A similar analysis could be applied to competition law. Countries might agree, for example, to a core principle that a country's law should prohibit anti-competitive horizontal agreements to fix prices, rig bids, restrict output, or divide markets. Countries might also agree to a common approach for determining whether particular kinds of agreements are not "anti-competitive" (or are eligible for an individual exemption), *i.e.*, what kinds of justifications may be accepted in what circumstances. Countries might go further and develop common standards. For example, they could agree to define price fixing with enough specificity to be able to prevent Country X from claiming compliance on the basis of a law that either includes price co-ordination by divisions of the same firm or excludes agreements that do not fix a precise price or that are not followed by every competitors in the market. Notably, common standards are rare in WTO Agreements because of the difficulty of agreeing to such precise rules.

14. A similar analysis could be applied to international co-operation in the competition law enforcement context. Countries might decide as a core principle to agree to provide full and sympathetic consideration to any request for co-operation by any other party to the agreement. However, countries might not accept the notion of a WTO panel enquiring into whether they in fact "considered" requests or whether their consideration was full and sympathetic; in that event, they might agree that the only question for dispute settlement would be whether a requested country agreed to discussions with a requesting country. Countries could also agree to a common approach setting out in more detail both criteria for deciding when they might co-operate, and indications of what kind of co-operation might be provided in particular circumstances. The question for dispute settlement would be whether the requested country's actions conformed to the agreed framework, but for dispute settlement purposes some proxies might be identified to avoid detailed review into sensitive and to some extent subjective matters. Countries could further agree to common standards setting out, *e.g.*, precise timelines and documentary exchange. In this area, dispute settlement on whether the standards had been met could be relatively straightforward.

15. It has already been emphasised that whether a core principle, common standard or common approach is binding or not would be entirely up to possible signatories to decide. Likewise, it would be a matter of negotiation to determine whether and exactly how the WTO's dispute settlement mechanism would apply to whatever is agreed, and the answer could differ across or even within the three categories.

It is worth noting, however, that in the course of discussions on a possible multilateral competition policy agreement, no competition agency has supported having individual competition case decisions being reviewed under the WTO's dispute settlement mechanism. Be that as it may, it may be that signatories to a multilateral competition policy agreement would agree to some kind of consultative process and perhaps some institutional application of peer pressure. The WTO's Trade Policy Review Mechanism may well have value as a model in the competition policy domain.

16. The next section of the paper presents a possible classification of certain concepts in accordance with the terminology described above. Ultimately, whether these categories and the concepts included in them are considered worthwhile will depend on the scope of the commitments that countries may be prepared to make. In this context, it may be helpful in future Joint Group work to consider the implications of dealing with particular practices, were they to be classified as core principles, common standards, or common approaches.

III. Core Principles

17. This section provides a non-exhaustive list of things that might be considered as core principles. The order of presentation is not intended to be a statement concerning the relative importance of the elements concerned. The discussion begins with the fundamental WTO principles of national treatment, non-discrimination and transparency in the competition policy context, and it then turns to certain other principles, more specific to competition policy, that might be thought of as "core".

1. National treatment, non-discrimination

18. These two principles would apply to the substance of the law as well as to administrative processes or procedures, including enforcement.

- This would mean that competition laws and their enforcement, *de jure* or *de facto*, would involve no discrimination between foreign and domestic firms' products, services or investments, or among foreign firms' products, services or investments.
- Competition laws would be required to be administered in accordance with national treatment, i.e., applied without distinction based on origin or nationality.
- The relationship between bilateral antitrust co-operation agreements and the principle of non-discrimination requires further work. Where co-operation involves sharing information, competition agencies are naturally concerned to ensure that proper safeguards protect against unauthorised disclosure.

2. Transparency

19. This concept is essential to ensure that businesses and consumers know under what legal conditions they operate and to facilitate intergovernmental co-operation. It applies both "ex ante" (formulating clear rules for potential economic operators) and "ex post" (*i.e.* making those concerned aware of enforcement decisions). The grouping of the elements below is purely indicative, as other elements might be preferred if this framework evolves.

- Law(s) and regulations should be made publicly available as regards all anti-competitive practices such as cartels and other horizontal agreements; vertical relationships; abuse of dominance; mergers.
- Any current gaps in coverage should be specified.[2] If any special rules existed for certain sectors, they could also be specified. All exceptions to laws and regulations could be publicly stated. Where the law(s) provide(s) for exemptions, exemption criteria, whether predetermined or through rule of reason analysis, could be set out in the published legislation or guidelines, or judicial opinions.
- Provisions should be made also that modifications to laws and regulations would be regularly published (and if appropriate, a contact point be made available for foreign authorities or private agents in bilateral contacts).
- Transparency of enforcement policy could include publication of priorities and guidelines.[3] Further consideration needs to be given to the inclusion of agency case selection criteria or exemption criteria in the list of policies to be disclosed.
- Where competition authorities make dispositive case decisions, publication/explanation of such decisions by the competition authorities where doing so would be administratively feasible and would not be unduly burdensome.[4]
- Competition authorities should be required to protect commercial secrets and other confidential information.

3. Due process (Rights to Remedy under Competition Laws)

20. As an important element of effective and non discriminatory domestic enforcement it is important that firms be given, on a non discriminatory basis, effective access to domestic judicial or administrative remedies. Consideration could be given to the following types of provisions.

- Rights of complainants to petition competition authorities and seek explanations for inaction on matters with an international dimension; right to bring complaints before the competition authorities.
- Rights of private parties to access the judicial system to seek remedies for injury suffered by anti-competitive practices.
- Due process for all parties in administrative or judicial procedures including protection of confidential information.
- Where competition authorities make dispositive case decisions, publication/explanation of such decisions by the competition authorities.
- Judicial review for administrative decisions; judicial decisions subject to appeal.

2. Countries could also consider agreeing to a “standstill” or “rollback” of such gaps.
3. This also relates to “Adequate enforcement” and to “Due process”.
4. This also relates to “Adequate enforcement” and to “Due process”.

4. Scope and coverage of competition laws

21. This refers to the adoption and implementation of a competition law. The discussion here is without prejudice to how the scope and coverage of competition laws should take into account development objectives.

- There could be an undertaking to apply a coherent, comprehensive competition law (or a consistent set of laws) with enforcement authority attributed to clearly designated neutral and independent administrative or judicial structures. The objectives of the law could be specified, as well as the applicability of the law to key categories of anti-competitive practices.

- A commitment could be considered to avoid new sectoral exclusions, and to progressively cut back on existing exclusions. Any regulated conduct or state action doctrines having the effect of insulating regulated sectors from the application of general competition law could be clarified.

- Competition authorities should be free of political interference, have adequate resources, and be accessible to complainants.[5] The advocacy role of competition authorities, both in general and before government ministries and regulatory authorities, could be specified in law.

- Adequate and sufficient deterrents or sanctions could be authorised.[6]

- Governments or administrative authorities could undertake to refrain from encouraging or permitting any conduct in contradiction to the competition law.

- Any sector specific regulatory policies that essentially cover competition matters should be specified. Provisions regarding coherence with general competition law could be included.

- Application of competition disciplines to business practices of state-owned enterprises/state sanctioned monopolies would be specified.

- There could be commitment to legal provisions granting competition authorities power to obtain information necessary for the effective control of anti-competitive practices, while ensuring full and adequate protection of non-public information.[7]

- The rules could apply to business practices in a neutral way, irrespective of the public or private ownership of the firms involved (subject to specified exceptions).

5. International co-operation

22. At the multilateral level, co-operation could have at least two dimensions: co-operation on individual cases; and co-operation in support of capacity building.

- International co-operation could, at least in the first instance, involve exchange of information and co-operation among antitrust authorities modelled on the non-binding, voluntary process presently pursued bilaterally. Elements might be inspired by the OECD

5. This also relates to “Adequate enforcement” and to “Due process”.

6. This also relates to “Adequate enforcement” and to “Due process”.

7. This also relates to “Adequate enforcement” and to “Due process”.

Recommendations on co-operation and on hard core cartels, which include the negative and positive comity principles referred to below.

- Governments should adopt the negative comity principle that a country could (a) notify other countries when its enforcement proceedings may have an effect on their important interests, and (b) give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.

- Governments could adopt the positive comity principle that a country should (a) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting another country's interests, and (b) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests.
- Governments could consider the promotion of co-operation through authorising competition agencies to share confidential information with foreign agencies in accordance with specific protections against improper disclosure or use and upon a finding by the competition agency that the sharing would be consistent with national interests.
- The complementarity between bilateral agreements and a possible multilateral co-operation framework should explicitly be recognised and the latter should in no way alter the voluntary nature of the former.
- Co-operation could be developed with respect to the general exchange of experiences on the application of competition law, which could be of particular value for newly established competition authorities in developing and transition economies.
- Consideration could also be given to the means to enhance and promote a more co-ordinated approach to technical assistance in the competition field.
- With respect to developing and transition economies, consideration could be given to the adoption of a "phased-in" or incremental approach to co-operation beginning with technical assistance.

IV. Common Standards and Common Approaches

23. The purpose of this section is to illustrate the kinds of agreements that might be considered as possible common standards or common approaches. The question of how far it may be possible to go in this respect at the multilateral level requires *inter alia* future discussion in the Joint Group. The following is, therefore, more of an initial exercise to illustrate the nature of the distinction for analytical purposes. Where common standards or approaches are not feasible or desirable, it might be possible to agree to a programme of further analysis. Some WTO agreements contain provisions whereby studies will continue and the feasibility of further rules would be reviewed after some years (see the GATS, TRIMs and TRIPs).

1. Hard core cartels

24. Based on the OECD Recommendation, it might be possible to have a common approach to the prohibition of hard core cartels. The agreed list of prohibited categories could reflect the most egregious practices. Individual countries would remain free to apply more refined national definitions, and dispute resolution might or might not be available.

25. For instance, the Hard Core Cartel Recommendation urges OECD Members to ensure that their competition laws effectively halt and deter hard core cartels and to co-operate in their competition enforcement. The Recommendation "defines" hard core cartels in terms of four forms of conduct -- price fixing, output restriction, bid rigging, and market division -- but it does not define those categories. Moreover, since the definition incorporates various provisions in Members' laws, it does not provide a multilateral definition of a hard core cartel. This approach depends upon the pre-existing general consensus among OECD Members in this area, and would not provide a basis for determining whether a particular country's law conforms to a commitment in a multilateral agreement.

2. Vertical restraints

26. For vertical restraints, a common methodology for rule of reason assessment could be explored, which could facilitate intergovernmental co-operation and consultations. However, given the work of the Joint Group in this area, it seems unlikely that this is an area in which agreement on a common standard is desirable or possible, given the complex and fact intensive nature of the analysis of the effects of vertical arrangements. That being said, it might be worth exploring whether agreement on the nature of a common approach containing a methodology is desirable or possible given the importance of these issues for trade and competition.

3. Abuse of dominance: mergers

27. The Joint Group is only just beginning its work on mergers. Similarly, it is anticipated that the Joint Group will turn its attention to abuse of dominance in subsequent meetings.

V. The Relationship between Multilateral and Bilateral Options

28. There are differing perceptions of the desirability/feasibility of various multilateral/bilateral approaches that would enable competition enforcement to meet the challenges of globalisation, while enhancing the coherence between competition and trade policies. Many different proposals have been made which cannot be canvassed fully here. Broadly speaking, a complementarity is acknowledged between bilateral and multilateral approaches, but some have questioned whether anything more than a bilateral approach is really necessary to tackle problems that can be addressed by a competition policy focused on maintaining competition rather than market access.

29. Some have proposed a mixed multilateral/bilateral architecture along the following lines:

(i) The institution of a multilateral framework, to establish the ground rules for national competition policies to be applied by all countries participating in the trading system, based on a number of general principles and rules. This would be aimed, *inter alia*, at alleviating tensions in the trading system; and

(ii) Bilateral antitrust co-operation in the enforcement sphere given the need among countries with extensive trade and investment relations for custom-made bilateral co-operation agreements providing for clear rights and obligations for both parties.

30. This approach distinguishes between: (i) dispute settlement in the multilateral context, as an intergovernmental process confined to assessing whether a country has respected its obligations in terms of implementing and enforcing an adequate competition law as defined by a multilateral framework; and (ii) voluntary antitrust enforcement co-operation enabling antitrust authorities to deal with particular cases

arising between particular jurisdictions (it being understood that this does not preclude supplementary bilateral co-operation procedures).

31. Depending on what signatories decide, consultation and application of the WTO's dispute settlement mechanism could be involved when questions arise in relation to the extent to which a country's law or policy conforms to the agreed core principles, common standards or common approaches. However, it is not anticipated that the dispute settlement mechanism would apply to individual cases. The desirability and feasibility of dispute settlement in the competition policy context is and will continue to the subject of further work. For the purposes of this paper, however, it is worth noting that dispute settlement leading to binding determinations and possible penalties is not the only possible mechanism for encouraging compliance with agreements. Some form of non-binding peer review might also be possible, perhaps taking the form of a competition policy review mechanism within the WTO or OECD that would not apply to cases.

32. Bilateral and multilateral approaches can be complementary rather than substitutes for each other. Increased trust, confidence, and analytical convergence based on voluntary bilateral co-operation could facilitate multilateral or plurilateral agreement. Alternatively, a multilateral or plurilateral framework could facilitate the spreading and deepening of bilateral co-operation agreements for similar reasons. The policy debate is not whether these alternatives are complementary, but rather relates largely to the question whether broader and deeper experience of beneficial voluntary co-operation is desirable before seeking to pursue a multilateral agreement or at least before seeking to negotiate substantive competition requirements that are subject to dispute settlement.

VI Models of Bilateral Co-operation Agreements

33. Various models of bilateral co-operation agreements corresponding to successive deepening of co-operation can be identified, for example:

- Non binding, voluntary exchange of non confidential information and of technical expertise.
- Agreements based on traditional comity (aiming at avoiding jurisdictional conflicts by self-moderation, e.g. declining to enforce).
- Agreements based on positive comity along the lines of that provided for in, for example, OECD Recommendations and the 1991 EC-US Agreement.[8] The provisions relating to positive comity contained in the 1998 EC-US agreement could also be explored by more countries.
- Bilateral agreements or treaties permitting the exchange of confidential information on a case-by-case basis; these require special legislation, and so far only Australia and the US have signed an implementing agreement.
- Mutual Legal Assistance Treaties have permitted very successful co-operation in competition cases that are criminal offences.

8. This concept was originally developed in a 1973 OECD Recommendation and is currently contained in C(95)130(final) and C(98)35(Final)

VII A Model of a Multilateral Framework

34. While resolving market access issues caused by trade and other governmental measures is essentially a matter for trade policy and relevant WTO Agreements, a multilateral competition policy framework could reinforce national control of anti-competitive practices, particularly where market foreclosure effects are involved. Issues which may fall in a grey area (e.g. not clearly attributable either to governments or to business) might also be more easily addressed if there were a multilateral competition policy framework.

35. In this context, elements of a multilateral framework could:

- set out core principles to be adhered to by participants in enacting/enforcing a competition law. All participating countries would agree to abide by these core principles, although a staged approach could be provided for countries where competition policy is less advanced, and an additional form of staging, applicable to all countries, could be provided by limiting the provisions that are subject to dispute settlement;
- foster negotiation on scope and coverage of national competition laws in order to reduce exceptions and, *inter alia*, address business practices of SOEs and regulated monopolies;
- set out such agreement as is possible in respect of common standards and common approaches and provide a framework within which further work could proceed on these;
- provide an additional forum where advice could be furnished to countries on institutions and enforcement systems, including the role to be played by competition authorities domestically;
- develop principles on adequate enforcement and ensure that all countries provide adequate rights to remedy for those injured by competition law violations;
- provide a forum to encourage bilateral antitrust co-operation and exchange of information among countries and to develop instruments of deeper co-operation for the future;
- determine the extent and modalities of application of dispute settlement -- there should be no expectation, however, that this would extend to considering individual case decisions.
- provide a context in which to consider sectoral approaches

36. The reasons why it would be difficult or inappropriate to deal with particular cases or appeals involving private practices in a multilateral context have been highlighted on many occasions:

- problems of sovereignty of domestic competition authorities and courts
- complex and fact intensive nature of competition analysis (although some trade cases could be described as complex and fact-intensive);
- two authorities applying a rule of reason might quite legitimately reach different conclusions even if they apply similar methodologies or norms -- in other words, crucial elements of judgement are required in deciding key aspects of competition cases (e.g. market definition; significance and durability of barriers to entry; probability of co-ordinated interaction and unilateral effects in merger cases; impact of alleged facilitating practices in horizontal cases, etc.);
- sensitivity of information (the exchange of confidential information appears generally feasible only in a bilateral context and often on an ad hoc voluntary basis);

- because WTO agreements are not given direct effect in national law, a multilateral dispute settlement panel would lack enforcement power against firms and would also be unable to interfere with a domestic judicial process.

- given these considerations, it seems likely that any intergovernmental disputes on individual cases would be matters to be covered solely under bilateral co-operation agreements.