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EXECUTIVE SUMMARY OF THE HEARING ON ENHANCED ENFORCEMENT CO-OPERATION

17 June 2014

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during Item III of the 119th meeting of Working Party No. 3 held on 17 June 2014. It is circulated to delegates FOR INFORMATION.

More documents related to this discussion can be found at http://www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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EXECUTIVE SUMMARY

By the Secretariat[*]

(1) The importance of promoting international co-operation is unanimously acknowledged as a key objective of competition authorities across the globe. The lack of sufficient enforcement co-operation can reduce the effectiveness of the enforcement action and consequently create substantial harm to society. In an increasingly globalised economy, the need for more effective international co-operation between antitrust enforcers is perceived as more important than ever before.

1. It is well-recognised that to review effectively anti-competitive mergers and anti-competitive conduct affecting markets and consumers globally, competition authorities must work closely together and assist each other in their investigations. The past two decades have witnessed an increasing globalisation of economic activities which has brought important economic benefits for society around the world, but has also raised challenges for competition enforcement. Competition authorities' actions are increasingly more focussed on cases with an international dimension, and in this context effective and efficient international co-operation becomes not only desirable, but necessary for the successful enforcement of competition laws at national level.

2. Failure to co-operate in parallel investigations and proceedings can be detrimental for authorities, businesses, and consumers alike. It duplicates investigative efforts of the authorities involved in the review of cross-border cases and generates unnecessary regulatory costs for businesses. The business community has frequently pointed out that investigations by several authorities of the same or related matter often end up with the production by the involved firms of identical sets of information or the collection of statements from the same witnesses on the same questions. If authorities could work closer together, for example by streamlining their investigations in such cases and allocating investigative tasks to the best placed authority, this could save significant enforcement costs and avoid inefficient use of taxpayers' money, while reducing at the same time the regulatory costs for the firms.

3. Uncoordinated parallel investigations can result in divergent or even inconsistent outcomes. Divergent outcomes might be due to differences in substantive rules or to different conditions of competition. Even though we have seen considerable substantial and procedural convergence across jurisdictions, there are still differences in national rules, practices and procedures. Even if substantive rules are aligned, market conditions might differ across jurisdictions, which is often the reason why competition authorities may reach different conclusions on specific cases. But often firms' conduct is subject to multiple reviews by competition authorities applying equivalent legal standards to business conduct with similar effects on each domestic market. In these cases, co-operation is key to eliminate or reduce the risk of inconsistent assessments of the case by different competition authorities.

[*] This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the hearing and the conclusions of the expert papers.

(2) International co-operation in competition law enforcement has made significant progress in the last two decades, mainly through the development of bilateral relationships between competition authorities. The Hearing discussion highlighted the need to review the scope and degree of the existing co-operation and to explore new and enhanced methods of co-operation between enforcers. Those new methods may also include the development of multilateral frameworks for co-operation.

4. International co-operation in competition law enforcement has improved significantly since the mid-1990s. Improvements have been achieved mainly through the development of bilateral relations between competition authorities. Although it is still important for competition authorities to explore the way to deepen their existing bilateral relationships, it is equally important to consider the limitations of bilateral co-operation in pursuing effective and efficient international co-operation in competition law enforcement. The scope and degree of bilateral co-operation differs depending on the legal settings or practices of the jurisdictions concerned, making co-operation through bilateral mechanisms increasingly more complex and costly as the number of competition authorities involved in the review of cross-border cases increases. According to the Competition Committee's contribution to the OECD NAEC project (New Approaches to Economic Challenges), the number of jurisdictions with competition authorities has increased by a factor of six between 1990 and 2013. With the progress of internationalisation of business activities and the increasing number of competition authorities actively enforcing their competition laws, competition authorities are considering new methods of international co-operation, including multilateral frameworks.

5. In order to address the need for better and more effective co-operation, several methods have been proposed to further international co-operation. Some aim at strengthening existing co-operation mechanisms; others are more advanced and innovative. These methods include:

- Recognition of decisions made by agencies or courts in other jurisdictions;
- One-stop shop models, e.g. for leniency or markers;
- Appointment of a lead jurisdiction in cross-border cases;
- Joint investigative teams and cross-appointments;
- Co-operation at court level.

(3) In order to increase overall deterrence of international cartels, academics have proposed mechanisms which would allow competition authorities or courts in a jurisdiction to rely on the factual findings made in another jurisdiction (so-called recognition of foreign decisions). If in place, such mechanisms could lower the enforcement costs for competition authorities and enable more competition authorities to review international cartels, especially in jurisdictions with few investigative resources, thus increasing the overall level of cartel deterrence.

6. To solve the problem of duplication of enforcement costs and to increase deterrence against international cartels, some academics have suggested that competition authorities should be allowed to use findings in foreign decisions. The idea behind this mechanism is to allow competition authorities and courts to voluntarily recognise the decision made by a foreign competition authority or court and to rely on its factual findings when deciding on the same or related case. According to the proposed mechanism, once a competition authority in one jurisdiction successfully proves an illegal international cartel, competition authorities in other jurisdictions may use the finding as the basis for their decisions. However, they would still need to prove some

"local" elements of the cartel, i.e. the cartel features specific to their jurisdiction, such as identifying local customers, calculating the local turnover in the jurisdiction for fining purposes, etc.

7. This mechanism has the potential to significantly reduce the overall enforcement cost of international cartel investigations. In parallel investigations of cartels affecting multiple jurisdictions, the core facts which the investigating authorities need to prove are often common. They include the existence of an illegal agreement between competitors, the identity of the participants to the agreement, its duration and the products affected. As a result, under the current enforcement system often more than two authorities conduct independent investigations in order to prove a common set of facts. They often require the investigated firms to produce the same or similar information regarding the case, they try to access the same pieces of evidence, and they call on the same witnesses to testify on the same matters. This overlap of investigative efforts is not only costly for the authority and the companies involved, but may also lead to unnecessary competing investigations by multiple competition authorities. The recognition mechanism could reduce duplications, avoid investigative inconsistencies and save enforcement resources which could be redeployed on other cases.

8. The principal rationale for such a recognition mechanism is that it increases the level of deterrence against international cartels. With the expansion of international trade, more cartels have an international nature and affect more countries than before. In order to have sufficient deterrence against these cross-border practices, all jurisdictions affected by the cartel conduct should effectively enforce their laws against the cartel based on the harm to their jurisdiction. However, enforcement against international cartels often tends to take place in a limited number of jurisdictions. Usually smaller or younger authorities do not have the resources necessary to open an investigation even if their jurisdiction is affected by the illegal conduct. This produces a negative externality as it increases the prospect of profits from international cartels and with that the incentives to engage in international cartel activity. The proposed system addresses this externality problem by reducing the investigative burden for authorities lacking sufficient resources to enforce their competition laws against international cartels. That will increase overall deterrence against international cartels globally.

9. The concept of relying on another enforcer's finding has already been used in some jurisdictions even if only on a *de facto* basis. For example, Brazil's Council for Economic Defence (CADE) relied on the findings made by the U.S. Department of Justice and the European Commission in their Vitamin cartel cases to support the decision to impose a fine on the cartelists in Brazil. In the area of merger control, for example, agencies often rely on remedies negotiated by other agencies if they conclude that such remedies will also address the concerns identified in their own jurisdiction. Finally, it is interesting to note that as part of the close relationship between Australia and New Zealand, the 2010 Trans-Tasman Proceedings Act includes provisions allowing for mutual recognition and enforcement of each jurisdiction's judgments.

(4) The business community encourages governments to consider the introduction of one-stop shop models as a way to improve co-operation between enforcers in cross border-cases and to reduce regulatory costs for businesses. Enforcement areas which would potentially lend themselves to one-stop shop models are those which require filings or applications by companies to multiple agencies, such as leniency and markers applications or merger filings.

10. In general, there seem to be some advantages with one-stop shop mechanisms. First, one-stop shop systems can reduce enforcement costs of authorities and companies alike. From a public enforcement perspective, having a single authority receive applications and information could increase administrative efficacy by avoiding duplication and fragmentation of administrative costs. It can also ensure that relevant information is provided to relevant authorities in a timely manner, addressing the concerns that some authorities may have difficulties obtaining information which other authorities have already received. Co-operation between involved authorities will also improve, as the information received through a single

contact point will be shared by relevant authorities in a timely manner, promoting further discussions between the authorities on the case and *de facto* aligning the timing of the different proceedings. From a business perspective, one-stop shop systems decrease significantly the burden related to multiple filings. Companies will need to spend less time and resources to identify the jurisdictions where they need to make filings or applications, to understand the legal requirements in each of these jurisdictions, and to respond to follow up requests from multiple authorities.

11. A one-stop shop mechanism can also help streamlining multiple procedures, reduce the complexity and incoherence potentially associated with them, thus increasing certainty and transparency for businesses. Two enforcement areas lend themselves to the introduction of one-stop shop models: applications for amnesty/leniency and related applications for markers, and merger control filings.

12. Leniency programmes have proven successful in many jurisdictions and have helped uncover a number of large-scale cartels which would have gone otherwise unpunished. The success of these programmes has led more jurisdictions to adopt them over the last few decades. This proliferation, however, may risk undermining the benefits of such programmes because of the consequent increased uncertainty and complexity of the regulatory environment for businesses when deciding if and where to apply for leniency. Possible divergent (or sometimes conflicting) requirements regarding features of leniency programs (e.g. marker systems) or the types of information that they need to submit to the authorities may significantly affect the incentive of firms to enter the programme. A one-stop shop for leniency applications or for markers could contribute to address the problem of the uncertainty and complexity, which would result in more leniency applications to the authorities.

13. Complying with multiple merger regimes can involve significant costs and time if the transaction has competitive effects in several jurisdictions. In large-scale cross-border cases, the merging parties have to check the requirements of each merger regime, co-ordinate filings and respond to the follow-up information requests from multiple authorities. The regulatory cost associated with multiple filings might have the effect to discourage efficiency-enhancing transactions. In order to reduce the regulatory burden, some jurisdictions with regional competition powers already rely on one-stop shop principles in their merger control. This is, for example, the case of the EU and COMESA whose merger regimes provides for single clearance points over mergers with regional impact.

(5) In order to reduce the substantial transaction costs associated with uncoordinated parallel antitrust proceedings, some academics have proposed new and more advanced ways in which authorities could co-operate more effectively. Some of these proposals include lead jurisdiction models where one authority is designated to investigate and make a decision on a cross-border case on behalf of all other affected jurisdictions.

14. The basic idea of "lead jurisdiction" models is to identify the jurisdiction which is better placed to investigate a particular cross-border case and to designate it to handle the case and decide on behalf of all affected jurisdictions. The investigation and decision making will be made under the laws and procedures of the lead jurisdiction. The lead jurisdiction should have a substantial interest in the case and the necessary skills, competence and resources to lead the investigation with the assistance of the other jurisdictions, to co-ordinate the views of all relevant jurisdictions, and to decide on the case taking into account the interests of all the jurisdictions affected by the case.

15. These models avoid multiple proceedings, and consequently reduce inefficiencies and risks of duplication for the authorities and for the business alike. In the absence of co-ordination mechanisms, each jurisdiction has the incentive to pursue only its own interest, without considering the interest of the other jurisdictions investigating the case in parallel. In such circumstance, the lack of comity considerations raises the risk that one jurisdiction might take a unilateral enforcement action which could jeopardize

interventions by others, especially by those who might be better placed to pursue the case or might have a more legitimate interest in pursuing it. The lead jurisdiction model incentivizes relevant jurisdictions to consider not only their own country interests, but the interests of all affected interests. Having one authority with primary responsibility to co-ordinate views of relevant jurisdictions would reduce significantly the risk of conflicting outcomes.

16. Lead jurisdiction models can be voluntary or mandatory. Under a "voluntary" model, the lead jurisdiction investigates the case on behalf of all relevant jurisdictions and prepares a recommendation regarding the outcome of the case. Such recommendation, however, is not binding on the other jurisdictions, which can still reach separate and independent decisions based on their own assessment of the case. Under a "mandatory" model, the lead agency will be given full jurisdiction to issue a binding decision for all jurisdictions adhering to the system. The mandatory model *de facto* eliminates parallel proceedings completely.

17. Lead jurisdiction models can also be structured on multiple levels, i.e. with a national and an international dimension. A "multilevel" lead jurisdiction model adds a "referee" function to the basic framework. As in the basic model, a designated authority at national level will investigate and make a decision on behalf of all affected jurisdictions according to its laws and procedures. The multilevel model adds a new "entity" at the international level, namely a referee entity, which does not investigate or decide cases itself, but has the task to identify and appoint the lead agency according to pre-determined criteria, to monitor and supervise the lead jurisdiction and to solve jurisdictional conflicts between the countries involved.

18. Lead jurisdiction models are not exempted from concerns and challenges. The first question concerns how the system can ensure that the decision made by a lead jurisdiction reflects the joint interest of all jurisdictions involved and not only those of the lead agency. It might be difficult in some cases to expect the jurisdiction to make such a decision when there are conflicting interests. A second concern relates to the fact that the outcome of a case may differ substantially depending on which country serves as lead jurisdiction. Since the decision will be made according to the law and procedure of the lead jurisdiction under the model, the possibility of different outcomes is a possible consequence of the model.

19. Lead agency mechanisms are already in place in areas of law other than competition. For example, the International Patent System by the Patent Convention Treaty (PCT) allows applicants to file an international patent application with the World Intellectual Property Organisation (WIPO); one patent authority will be designated as an International Searching Authority (ISA) to conduct international searches with respect to the patent application. The designated authority will carry out the search for all related jurisdictions in accordance with a uniform standard and will produce an international research report and a written opinion on the potential patentability of the invention. Although the PCT international search report and the written opinion produced by the ISA are not legally binding and the decision on granting a patent in each jurisdiction remains the responsibility of each national or regional patent office, those documents are taken into account by each patent office when deciding whether to grant patent protection.

(6) In addition to creating new institutional frameworks for enhanced co-operation among authorities, it can also be effective to strengthen personal ties and build stronger relationships between enforcers. For this purpose, some competition authorities have engaged in joint investigative activities and have organised exchanges of staff with their counterparts.

20. Mutual understanding and trust between competition authorities provide the strongest possible basis for better international co-operation. For example, it is often pointed out that building a "pick-up-the-phone" relationship between investigators is one of the factors for the success of international co-operation. In order to build firm and long-lasting relationships, competition authorities have increased interactions

and expanded personal exchanges with their counterparts. Some authorities have also adopted special programmes for personal exchanges, such as the Visiting International Enforcer Program of the United States. The discussion in international organisations such as the OECD and the International Competition Network also serves this purpose.

21. In some cases, agencies have also engaged in joint enforcement activities which could be considered to go beyond what is generally considered normal co-operation. These activities included (i) face-to-face negotiations of merger remedies with the parties attended by officials of all the competition authorities involved in the review of the merger; (ii) different case teams attending one another's interviews with key witnesses; (iii) joint discussions of remedy proposals by the merging parties; (iv) joint discussion to validate and improve the econometric models used by both agencies in the same case; and (iv) joint assessment of expert reports put forward by the parties.

22. A unique form of enhanced co-operation is represented by the cross-appointments in the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC). The two authorities have a long history of co-operation based on geographic and economic proximity. Since 2010, the two jurisdictions have in place a system of cross-appointments at Commissioner's level. Based on such arrangements, Commissioners of each authority are appointed as Associate Commissioners for the other authority. Cross-appointments only concern the review of mergers which affect both jurisdictions and in practice imply that the cross-appointed commissioners participate in all meetings of the other agency on such mergers and have full access to all information (including confidential information) in possession of the other agency. These arrangements have established an extensive, high-level co-operation between the two jurisdictions and have helped the two authorities to deepen their co-operation, to align their analysis of mergers and merger remedies, and to share their respective knowledge and experience of specific industry sectors.

(7) Co-operation for purpose of competition law enforcement should not be limited to competition authorities. Courts are competition decision makers in many jurisdictions, and review decisions of competition authorities in jurisdictions where competition authorities are the principal decision maker. It is equally important that courts in different jurisdictions be able to work together in their review of cross-border cases.

23. In competition law enforcement, national or regional courts play a role as important as that of competition authorities. Courts ultimately make decisions on competition cases either as primary decision makers, or as reviewers of appeals against decisions made by competition authorities. With the development of private enforcement in many jurisdictions, judicial co-operation will become increasingly relevant. Despite the central role played by courts in competition law enforcement, international co-operation between courts is far less developed than co-operation between competition authorities. In fact, there are very limited mechanisms available for courts to co-operate internationally due to the lack of international rules.

24. There are some formal and legal mechanisms for courts in different jurisdictions to co-operate on a case. Letters rogatory are the most traditional tool that a court in one jurisdiction can use to ask for judicial assistance to a court based in another jurisdiction. Letters rogatory are generally used to service documents or seek assistance in taking of evidence. Assistance will be provided according to the laws and regulations of the requested jurisdiction. Although letters rogatory certainly provide for a formal way for courts from different jurisdictions to assist each other, it is often a time-consuming process and not necessarily the most convenient when courts are seeking timely co-operation. Letter rogatory requests generally are made through diplomatic channels, i.e. through ministries for foreign affairs, and can take up to one year before they are executed. In order to overcome the difficulty with these formal co-operation tools, multilateral treaties, such as the Hague Convention on Taking Evidence, and the Hague Convention

on Service of Process in Civil and Commercial Matters, have simplified the requirements for letter rogatory and provide courts of the signatory States with ways to seek assistance in more timely manner. It is not clear, however, if those treaties can be applied to competition cases.

25. Courts in various jurisdictions have also developed domestic legal doctrines to avoid conflicts with other jurisdictions. These doctrines, however, are unilateral or informal and usually do not involve interactions between multiple courts. For example, the notions of territorial jurisdiction and personal jurisdiction, which are present in most jurisdictions, require that the matters in front of a court have sufficient nexus with the jurisdiction. This doctrine allows a national court to reject claims which are not necessarily linked to its own jurisdiction, therefore avoiding stepping over the jurisdiction of courts in countries which have a stronger nexus to the claim. The principle of "*forum non conveniens*", also recognised in some jurisdictions, provides courts with the discretionary power to decline a case where there is another court which is more suitable to hear it. Similarly, the "*lis pendens*" doctrine enables courts to stay proceedings when the matter is already pending before another court. All those doctrines may function to avoid possible conflicting decisions made by courts from different jurisdictions.