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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

### **Working Party No. 3 on Co-operation and Enforcement**

#### **SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS**

**27 October 2015**

*This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Item III of the 122nd meeting of Working Party No. 3 on 27 October 2015.*

*More documentation related to this discussion can be found at: [www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm](http://www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm)*

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## SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS

*By the Secretariat*

The **Chair** of Working Party No. 3 Mr. William Baer, opened the roundtable on cartels involving intermediate goods. The aim of the roundtable was to discuss jurisdictional requirements for enforcement action by competition agencies, factors that each jurisdiction may consider in deciding whether to bring an enforcement action, appropriate sanctions, and whether or not jurisdictions consider penalties imposed by other jurisdictions, in determining the appropriate penalties. The discussion benefited from a background paper prepared by the Secretariat, and was structured around a hypothetical scenario shared with the delegates (annexed to this summary of discussion).

### 1. Introduction

The Chair gave the floor to Mr. Antonio Capobianco of the Secretariat for a brief overview of the background paper. Mr. Capobianco outlined the relevance of intermediate goods in globalised economies, and the OECD's research on global value chains according to which, 30%-60% of exports from G20 countries consist of intermediate goods, increasingly traded within global value chains. International trade in intermediate goods means that the effects of potential anticompetitive practices can cross national borders and trigger parallel enforcement actions in various jurisdictions, thus requiring co-ordination between the respective competition agencies.

Secretariat research shows that a significant number of cartel enforcement decisions across OECD jurisdictions involve intermediate goods; they constitute half of all cartel decisions in Canada, the European Union (EU), Korea and the United States (US). Intermediate goods cartels have certain features that distinguish them from cartels involving final (consumer) goods. With regard to cartel formation, collusion in final goods seems more frequent, possibly due to factors such as market transparency and in particular, price transparency. Around 60% of cartel cases recorded in the Private International Cartels (Connor) database are in final goods. Cartels involving intermediate goods tend to, on average, have a longer duration. In the EU for example, according to cartel cases from 1969 to 2014, cartels involving intermediate goods were 22% longer in terms of duration than cartels in final goods. Cartels in intermediate goods have wider geographic scope than finished goods cartels, possibly because the increase in trade between countries has expanded their reach. Last, more cartels involving final goods have been detected *ex officio* (i.e. detected through investigations) than cartels involving intermediate goods. As reported in the responses to the hypothetical scenario shared with the delegates, all agencies look at the effects of alleged anticompetitive practice in their territory to establish jurisdiction, although the tests are different. For example, the US has a direct, substantial and reasonably foreseeable effects test, the EU applies a theory of implementation, and other jurisdictions may require a link with the country, such as local presence. Agencies do not usually take action against pure export cartels. Also, countries have not reported any case where an agency claimed jurisdiction exclusively on indirect sales, although this may be in theory possible. To calculate fines, most agencies looked at direct sales in their jurisdictions, and may take into account fines imposed by other agencies, to avoid the risk of double counting.

The Chair then explained the hypothetical scenario, consisting of Countries A, B and C, and two companies, Alpha and Beta, who make intermediate goods and determine their prices in Country A. Alpha and Beta export their products to companies in Country B who integrate the product, which is then shipped to Country C, where retailers buy the finished goods. The Chair finished explaining the hypothetical and opened the discussion on jurisdictional issues.

## 2. Jurisdictional issues

First, the **Australian** Competition and Consumer Commission (ACCC) explained that the ACCC has not brought a case for cartel conduct occurring outside Australia by firms incorporated or carrying on business in Australia, or by individuals who are Australian residents or citizens, although the Competition and Consumer Act allows to capture such overseas cartel conduct on the basis of extended jurisdiction. The ACCC has started enforcement action for overseas conduct, using the provisions on extended jurisdiction, only where the conduct also involves making or giving effect to a cartel in Australia, i.e. not just in cases of pure overseas conduct but where some level of domestic effect or harm is established. Australia is considering a new provision on extended jurisdiction to capture overseas conduct only in so far as it relates to trade or commerce within Australia or between Australia and other countries.

The **Mexican** Federal Institute of Telecommunications (IFT) described the Mexican law concept of “affectation upon economic activity”, which must be present for the law to apply to conduct occurring outside Mexico. This concept allows capturing overseas cartel conduct that would have an effect on Mexican consumers through consumption of the products in Mexico. Mexican law also applies to export cartels, as the cartel overcharge may reduce exports. Despite the fact that relevant guidelines exist, there have not been any related cases.

The **Japan** Fair Trade Commission (JFTC) explained that the JFTC takes into account international comity principles before initiating an investigation in cross border cases; namely, the JFTC considers whether another competition authority has initiated investigations on the same international cartel to decide whether it will also take action. If, however, the JFTC does take action and finds a violation of the Japanese Antimonopoly Act, it will impose sanctions based on the calculation formula provided in the Act. This formula takes into account the amount of sales of the cartelised products or services during the cartel period, the type of conduct, the size of operation, etc. It does not, however, take into account sanctions imposed by other competition agencies. Once a violation is found, the JFTC does not have discretion with regard to whether or not to impose a sanction, or how sanctions should be calculated. International comity is therefore considered before an investigation is initiated, and not when sanctions are being applied.

The **UK** Competition and Markets Authority (CMA) explained that there are specific statutory obligations on the CMA to interpret UK law consistently with EU law. The UK Competition Act 1998 specifically gives effect to the implementation doctrine as established by the European Court of Justice in the Wood Pulp judgment, according to which, in order to establish jurisdiction, what matters is the geographical location of the implementation of the cartel agreement, i.e. where the cartelised product is sold. Whilst the “implementation” doctrine might be used to assert jurisdiction in Country B scenario, the “qualified effects” doctrine is arguably a mere expansive basis for establishing jurisdiction and may therefore be an alternative avenue to seek to establish jurisdiction in Country C scenario.

The **Canadian** Competition Bureau explained that fundamentally, the test for subject matter jurisdiction is whether there is a real and substantial link between the cartel and Canada. Canada will take into account various elements such as where the events took place, the location of the victims, where the benefits derived by the offence were received. If there is a combination of direct sales and indirect sales, Canada might pursue the case based on the direct sales and use the indirect sales as an aggravating factor in the calculation of sentences, as has been done several times in auto-parts cases. Canada clarified that it has never brought a case which pertained solely to indirect sales in Canada.

The **US** Department of Justice explained that the Sherman Act applies to conduct involving non-import foreign commerce that has a direct substantial and reasonably foreseeable effect on US commerce. An effect is direct if it is proximately caused by the conduct. Under US law, proximate cause is used to distinguish between a cause that should give rise to legal liability from a situation in which the cause is too remote to give rise to legal liability. This standard allows an authority to assess all of the facts to determine the application of US antitrust law. The proximate cause standard is used by the enforcement agencies and by most of the appeals courts that have considered the issue. In the hypothetical, the question would be whether the price fixing of the component X in Country A would in the natural and ordinary course of events have an effect – likely an increase in the price to the finished product imported in Country C. If there is such an effect, then the direct effect statutory test would be met.

The delegates from **Turkey** explained that the test to bring a case in Turkey is the so-called "effect theory" which has been incorporated into the Turkish legislation. It is however hard to distinguish whether the legislation refers to direct or indirect effects, it is therefore necessary to see the development of the case law in this area.

The **German** delegates explained that in this situation it would also look at the direct effect on markets in Germany, in particular on sales in Germany. It would also take into consideration the fines in other countries if it were to examine an inability to pay the fine.

The delegates from the **Australia** stated that there is an exemption for export cartels in Australia (as Country A in the hypothetical). The cartel has to relate exclusively to exports to qualify for the exemption, and it has to be notified to the ACCC within a narrow time frame. There are some export cartels that have been notified to the ACCC.

The delegates from **Chinese Taipei** explained their position in the hypothetical. If the assembly companies in Country B integrated and merely collected a fee without paying for the component, it would not bring an action because they are less likely to be involved in the price mechanism of the intermediate goods. However, if the assembly firms in Country B is involved in the determination of the price of the cartelised good, in this case Country B could take enforcement action against the cartellists in Country A.

The **UK** delegates reported that the CMA has never investigated a case identified in the scenario of Country C, where retailers buy the finished goods. The CMA considers whether the investigation falls within its administrative priorities set out in its prioritisation principles. This prioritisation assessment is a balancing exercise in which the CMA is required to weigh up the impact and the strategic significance of taking forward a case against the risk and the resources it takes to open an investigation. The CMA would in practice be likely to exercise more caution in deciding whether to assert jurisdiction in circumstances where the possible impact of CMA intervention is likely to be more limited/remote, an infringement is more difficult to prove and there is more uncertainty about whether the CMA has jurisdiction.

The **Japanese** delegates explained the JFTC's decision on a Television Cathode-ray Tubes (CRT) cartel case and the concept of "virtual inseparability" used in the case. The Japanese manufacturing and sales companies of CRT televisions and their overseas manufacturing subsidiaries, affiliated companies, or contracted manufacturing companies were found to be "virtually inseparable" because of the following two facts: (1) the Japanese manufacturing and sales companies of CRT televisions controlled production, sales, and inventory, etc. of the CRT televisions manufactured by their overseas manufacturing subsidiaries, affiliated companies, or contracted manufacturing companies, as well as procurement of Television CRTs, and (2) the Japanese manufacturing and sales companies of CRT television negotiated with the manufacturers of Television CRTs, and determined the suppliers of the CRTs and important trade conditions of the CRTs, such as purchase price, purchase quantity, etc. In theory, it is possible that the JFTC could enforce the Antimonopoly Act even if none of the finished products enters Japan if it is

recognised that a Japanese company and its overseas company assembling intermediate goods to manufacture final products are “virtually inseparable” as a customer and this customer purchased the cartelized products.

### 3. Calculation of fines and relevant issues such as pass-through and double counting

The Chair moved the discussion to the calculation of fines and issues related to it, such as pass-through (when the buyers of the cartelised good pass on all or part of the cartel overcharge to their customers, so that their net loss is less than the overcharge), double counting (companies getting punished twice for the same cartel conduct), and over-punishment. The Chair stated that the discussion should also cover jurisdictional issues and the role of prosecutorial discretion (in choosing to start a case and in the imposition of sanctions).

The Chair asked the **Australian** delegates to comment on the role of pass-through in its enforcement decisions. The ACCC explained that it looks at the harm to Australia in terms of exercising enforcement discretion. The harm to Australia could be in different types, not just in the form of pass-through higher prices but also in the form of substituting inferior inputs, which would have follow-on effects. The harm to Australia could be measured in terms of the volume of trade or affected size of market in Australia.

The **US** delegates explained the *US v. Hsiung* case, where the Department of Justice (DOJ) alleged that price fixing of LCD panels had the requisite direct substantial reasonably foreseeable effect on US commerce. In this case the LCD panels were sold abroad and incorporated into finished products and ultimately imported into the US. The DOJ used several types of evidence at trial to demonstrate the direct effect on US commerce, such as, an estimate by an expert economist of the DOJ showing that an increase in the price of the LCD panels sold abroad would affect the finished good price being imported into the US; testimony from employees of US computer companies to prove that cost increase of the LCD panels was reflected in the price of the finished product; and minutes from the conspiracy meetings showing that the conspirators were aware of the fact that raising the LCD panel prices abroad would affect the price of the finished product and they calibrated their price fixing so that they were not adversely impacting demand for the finished goods.

The delegates from **Lithuania** explained that, if some overcharge has been passed through, Lithuania, being Country B in the hypothetical, would consider this enough to establish jurisdiction. Even if the entire overcharge was passed through but that resulted in lower output, there would still be a restriction of competition to satisfy jurisdictional requirements. In terms of enforcement priorities, Lithuania has a zero tolerance policy toward cartels and it is likely that it would start an investigation against this type of case, unless it considered another authority to be better placed, or it was completely out of resources.

**BIAC** emphasised the significance of this topic to businesses: they are victims not only when they are buyers of intermediate goods sold at increased prices, but also when the prices of the finished products incorporate the surcharge, thus making the final product more expensive and resulting in a decrease in demand. Jurisdictional issues are important as they concern the due process right of companies: anyone being prosecuted should be subject to not just personal jurisdiction but also to subject matter jurisdiction. BIAC considers the risk of double counting to be important and pointed out that proportionality in sanctions is required to avoid excessive punishment. In cases where the cartel has both direct and indirect effects in many jurisdictions, it would be very difficult to avoid double counting purely through interagency co-ordination; therefore, economic considerations and econometric tests should be used to examine whether pass-through has occurred, and to measure the actual effects. It is not sufficient to presume effects based on the sales of the finished product that incorporates the cartelised goods in the jurisdiction. The level of pass-through of the cartel overcharge depends on the case and various circumstances, such as a portion of the cartelised intermediate good in the finished good, the nature of cost

(fixed variable or a mixed cost), the percentage of the finished products affected by the intermediate goods (i.e. how ubiquitous the cartel is), how competitive and dynamic the downstream market for finished goods is, and the extent of differentiation of the finished product, because that may imply different ability to pass through the cartel overcharge. Thus, using econometric tests would be required. BIAC explained some of these econometric tests. It is necessary to define a counterfactual situation first, a model that describes the behaviour of the variable absent the anti-competitive practice, based on theory and data. The next step is to perform various kinds of tests, for instance comparing the behaviour of a relevant variable before, during and after the practice. In a cartel only concerning final goods, tests should focus on prices, quantities and other relevant variables on the final market. In contrast, when the cartel concerns intermediate goods, there is an additional issue of pass-through, and tests should add models of a counterfactual situation to determine the degree of pass-through on the final market.

The **European Commission** explained its position as regards cases concerning indirect sales only. The Commission confirmed that they would have jurisdiction in such a case, because the agreement has been implemented in terms of sales, even if indirect. The value of the component to the final product, the total sales amount of the product, and the sales amount of the product in the EU would all be relevant factors here. In practice however, they have opted not to use resources to investigate such as case, so far.

The **Canadian** delegates raised the question of measuring the pass-through. Canada had substantial difficulty in establishing the necessary link to trigger criminal prosecution against cartel members and one of the difficulties was obtaining the data outside of their jurisdiction to quantify the pass-through; the Canadian Competition Bureau reaches out to other agencies to obtain the data. Enhanced co-operation between agencies is required to share confidential data and get investigative assistance to obtain information.

#### **4. Relevance of enforcement action by another competition authority**

The Chair moved on to the issue of the relevance of enforcement by another jurisdiction.

The **Chilean** delegates explained their recent refrigerator compressors case, issues of *res judicata* and the relevance of enforcement by another jurisdiction. The case involved refrigerator compressors manufactured in Brazil, which were used to manufacture refrigerators, which were then exported to Chile. One compressor manufacturer admitted to a cartel agreement and applied for leniency in the Chilean national prosecutor's office. The company argued that there was *res judicata* because the case was based on the same facts as the case against it in Brazil, where the company had already reached an agreement with the Brazilian competition authority to pay a fine, so the conduct had been punished. The Chilean tribunal did not accept the argument, as its ruling was limited to the products sold in Chile only, so the geographical market concerned by the ruling was different from the one covered in the Brazilian settlement. Furthermore, the settlement with the Brazilian authority only covered the effects in the Brazilian market, and did not take into consideration the Chilean market. Based on these reasons the tribunal refused the claim of *res judicata* and the Supreme Court, sitting on appeal, confirmed this. The Chilean delegates clarified that long as the Chilean market is affected by a conduct, enforcement actions that take place in other jurisdictions do not preclude enforcement actions in Chile.

The delegates from **Canada** explained that in this type of situation they would follow an approach described in their leniency programme, which takes into account how other jurisdictions were intending to, or had prosecuted the case. Namely, they would identify whether the penalties in foreign jurisdictions were adequate in addressing any harm felt in Canada. The Canadian would require significant and convincing evidence to substantiate the claims concerning pass-through by parties. Canada underlined its willingness to work with its international counterparts on the calculation of fines, in an effort to minimise concerns about the fairness of fines levied in multi-jurisdictional matters.

The delegates from the **Korean** Fair Trade Commission (KFTC) explained how they consider enforcement activities in other countries. According to Korean law, if the cartel has an impact on the Korean market, the KFTC may bring a case and impose sanctions. Whether other jurisdictions have imposed sanctions for the conduct does not affect KFTC's decision to bring an enforcement action. However, in calculating the surcharge, the KFTC has the discretion to take into consideration decisions by other competition authorities. The KFTC had overlap issues in relation to a 2010 air cargo cartel case and the issue was resolved by each authority taking into account 50% of the surcharge.

The **Australian** delegates explained that whether or not the ACCC would bring enforcement action depends primarily on the extent of the harm from the cartel felt in Australia. If the harm of the cartel was felt most immediately in other jurisdictions where enforcement action had been already taken, it may be considered more appropriate to leave enforcement activities to such other jurisdictions. In the DRAM cartel and the fuel surcharges cartel on transatlantic passenger services cases, the ACCC did not take action because the companies in question were subject to enforcement actions in other jurisdictions and there was only a minimal impact in Australia.

The **US** DOJ explained that the relevance of enforcement by another jurisdiction is a matter of prosecutorial discretion. Under the US law, prosecution by a separate sovereign does not preclude US prosecution for the same conspiracy. In most of the cases in the US that have involved successive prosecutions, the defendants have been sentenced in the US first. In such cases, the DOJ, guided by the US sentencing guidelines, seeks a sentence that reflects the seriousness of the conduct and that will provide adequate punishment and deterrence to prevent future instances of this type of conduct. The DOJ's focus in cartel sentencing is the effect on US commerce. When a sanction is first imposed outside the US, the DOJ would examine whether the sanction accounts for the harm to businesses and consumers in the US and therefore satisfy deterrent interests of the US. The DOJ would not defer prosecution simply because another jurisdiction had investigated the conduct and determined not to proceed with a prosecution. In the case of individuals, the DOJ is of the opinion that jail sentences are the most effective and essential form of deterrence. If the sanction imposed outside the US is of administrative or financial nature, it is unlikely to affect the US decision on whether or not to prosecute the individual. On the other hand, if the individual serves a jail sentence outside of the US, there could be a reduction in a potential jail sentence in the US because it is possible that the issue of deterrence in the US is partially satisfied by the jail sentence outside the US.

The Chair asked the **European Commission** to explain why in the LCD panel case the Commission chose not to include indirect sales in determining a fine, despite have looked at indirect sales. The delegates explained that the Commission takes the value of sales (which can include indirect sales) as a starting point for the calculation of fines. In concluding the above case, the Commission did not consider indirect sales, because the final fine, calculated using only the value of direct sales, was seen as sufficiently deterrent. Two distinct types of direct sales were discussed in the judgment of this case. The first type was direct sales by the cartelist of a component in the EU. The second type was direct sales through transformed products, involving an internal transaction within the corporate group of the cartelist: the resale to another subsidiary of the cartelist and the incorporation of the component into a final good. The final product was sold to a client unrelated to the cartelists in the EU. The direct sales through transformed products were included in the calculation of the fine in the LCD decision, which as upheld by the court.

The **Australian** delegates mentioned again the air cargo case as an example of taking into account penalties imposed in other jurisdictions. This case concerned price fixing on fuel surcharges on the cost of air cargo transport services. The Australian court observed that fuel surcharges imposed on flights to and from Australia would have the most direct connection with the loss of businesses or consumers in Australia. The fines imposed on Qantas in the US covered flights to and from the US and overlapped with flights with a direct Australian connection from and to the US. The Australian court explicitly took into

account a penalty of USD 61 million (US dollars) imposed in the US for the cartel's global conduct, as well as the threatened penalty arising from the investigations in the EU. The other example in which an overseas penalty has been taken into consideration was in the animal vitamins cartel, in which the Australian court referred to a fine imposed in Canada as an indication that the level of penalty proposed was appropriate.

The **UK** delegates explained that the CMA has a six step approach to imposing civil fines. In the fifth step, the CMA needs to make sure that the statutory penalty maximum of 10% of global turnover is not exceeded and to avoid double jeopardy. The CMA penalty guidance provides that in circumstances where an undertaking has committed an infringement of both the UK and the EU rules, the undertaking will not be fined twice for the same anticompetitive effects. This means that if a fine has been imposed by either the European Commission or one of the other competition authorities of the EU member states, the CMA would take that into account. The CMA may consider, on a case by case basis, whether it is appropriate to take fines into account that have been imposed in jurisdictions outside of the EU. For example, the OFT, the predecessor authority to the CMA, took into account the fact that the US DOJ had already imposed a fine for the same conduct that had an effect both in the UK and in the US, when setting out fines against British Airways for the airline passenger fuel surcharge cartel.

The **Japanese** delegates clarified a decision, including a minority opinion, in the Television Cathode-ray Tubes (CRT) cartel case. The delegates explained that under the Antimonopoly Act, the authority does not have discretion on how to calculate surcharges. A supplementary opinion stated that the amount of the fine, albeit correct under the Act, did not appear to be reasonable from an economic view point, because the majority of the final products were not purchased by Japanese consumers. The opinion suggested that it is necessary to design a system where the JFTC can take such facts into consideration in the calculation of surcharges, to avoid duplication.

**BIAC** emphasised the concern about over-punishing a cartel, although it is not aware of any study or instances which deemed sanctions on a cartel to be excessive, disproportionate or insufficient. BIAC has observed that, no matter what the penalty, there is always someone who will not be deterred by it. It believes that the principle of proportionality has however a role: once any jurisdiction sets a fine at an appropriate and proportionate level, another jurisdiction imposing penalties on top of that needs to strike a proper balance.

**ANNEX***Hypothetical scenario for the roundtable on cartels involving intermediate goods*

Alpha Corporation and Beta Corporation are organised under the laws of Country A and have factories in Country A where they manufacture Component X, a piece of high-tech hardware used in electronic products. Alpha and Beta agree to charge higher prices for Component X sold to integrators. These integrators are organised under the laws of Country B and have factories in Country B where they incorporate Component X into finished electronic products sold in Country C.

Some or all of the anti-competitive overcharge on Component X is passed on by the integrators to purchasers of the finished product in Country C. Alpha and Beta Corporations are aware that Component X is incorporated into finished products sold in Country C and discuss market conditions and track sales of the finished products in Country C.

**1. Assume You Are Country A:**

1. What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?
2. If you would bring an enforcement action under these facts, how would a penalty against Alpha or Beta be determined? What factors would you consider in determining an appropriate penalty?
3. Would you consider whether other jurisdictions have imposed penalties for this conduct either in bringing an enforcement action or in determining an appropriate penalty?

**2. Assume You Are Country B:**

1. What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?
2. Is your analysis any different if Alpha and Beta have attended price-fixing meetings in Country B?
3. If you would bring an enforcement action under these facts, how would a penalty against Alpha or Beta be determined? What factors would you consider in determining an appropriate penalty?
4. Would you consider whether other jurisdictions have imposed penalties for this conduct either in bringing an enforcement action or in determining an appropriate penalty?

**3. Assume You Are Country C:**

1. What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action against Alpha and Beta?
2. Is your analysis any different if Alpha and Beta have attended price-fixing meetings in Country C?

3. Is your analysis any different if Alpha and Beta have had contacts with finished product purchasers in Country C, including negotiations regarding Component X pricing?
4. Is your analysis any different if, contrary to the facts outlined above, the finished products are sold around the world and Alpha and Beta are unaware or indifferent to whether the finished products are sold in Country C?
5. Is your analysis any different if the integrators are wholly-owned subsidiaries of the finished product purchasers in Country C?
6. If you would bring an enforcement action under these facts, how would a penalty against Alpha or Beta be determined? What factors would you consider in determining an appropriate penalty?
7. Would you consider whether other jurisdictions have imposed penalties for this conduct either in bringing an enforcement action or in determining an appropriate penalty?