



Recommendation of the Council
concerning Effective Action
against Hard Core Cartels

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Date(s)

Adopted on 25/03/1998

Background Information

The Recommendation concerning Effective Action against Hard Core Cartels was adopted by the OECD Council on 25 March 1998 on the proposal of the Committee on Competition Law and Policy (now called Competition Committee). This Recommendation recognises that hard core cartels are the most egregious violations of competition law. They injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others. Effective action against hard core cartels is particularly important from an international perspective – because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive -- and particularly dependent upon co-operation -- because they generally operate in secret, and relevant evidence may be located in many different countries. This Recommendation advises Adherents to ensure that their competition laws effectively halt and deter hard core cartels by providing for effective sanctions and adequate enforcement procedures and institutions to detect and remedy hard core cartels.

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to previous Council Recommendations' recognition that "effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports" [C(86)65(Final)]; and that "anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries" [C(95)130/FINAL];

HAVING REGARD to the Council Recommendation that exemptions from competition laws should be no broader than necessary [C(79)155(Final)] and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways" [C/MIN(97)10];

HAVING REGARD to the Council's long-standing position that closer co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade, and its recommendation that when permitted by their laws and interests, Member countries should co-ordinate investigations of mutual concern and should comply with each other's requests to share information from their files and to obtain and share information obtained from third parties [C(95)130/FINAL];

RECOGNISING that benefits have resulted from the ability of competition authorities of some Member countries to share confidential investigatory information with a foreign competition authority in cases of mutual interest, pursuant to multilateral and bilateral treaties and agreements, and considering that most competition authorities are currently not authorised to share investigatory information with foreign competition authorities;

RECOGNISING also that co-operation through the sharing of confidential information presupposes satisfactory protection against improper disclosure or use of shared information and may require resolution of other issues, including potential difficulties relating to differences in the territorial scope of competition law and in the nature of sanctions for competition law violations;

CONSIDERING that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others; and

CONSIDERING that effective action against hard core cartels is particularly important from an international perspective -- because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive -- and particularly dependent upon co-operation -- because they generally operate in secret, and relevant evidence may be located in many different countries;

I. RECOMMENDS as follows to Governments of Member countries:

A. Convergence and Effectiveness of Laws Prohibiting Hard Core Cartels

1. Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:

- a) Effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and
- b) Enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

- a) A “hard core cartel” is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;
- b) The hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

B. International Co-operation and Comity in Enforcing Laws Prohibiting Hard Core Cartels

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries’ important interests.

2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:

- a) The common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country’s laws, regulations, and important interests;
- b) To the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries’ mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;
- c) A Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority’s resource constraints or the absence of a mutual interest in the investigation or proceeding in question;
- d) Member countries should agree to engage in consultations over issues relating to co-operation.

In order to establish a framework for their co-operation in dealing with hard core cartels, Member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.

3. Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

4. The co-operation contemplated by this Recommendation is without prejudice to any other co-operation that may occur in accordance with prior Recommendations of the Council, pursuant to any applicable bilateral or multilateral agreements to which Member countries may be parties, or otherwise.

II. INSTRUCTS the Competition Law and Policy Committee:

1. To maintain a record of such exclusions and authorisations as are notified to the Organisation pursuant to Paragraph I. A 2b);

2. To serve, at the request of the Member countries involved, as a forum for consultations on the application of the Recommendation; and

3. To review Member countries' experience in implementing this Recommendation and report to the Council within two years on any further action needed to improve co-operation in the enforcement of competition law prohibitions of hard core cartels.

III. INVITES non-member countries to associate themselves with this Recommendation and to implement it.

Annex 1

**STATEMENT ON THE ASSOCIATION BY NON-MEMBERS WITH THE OECD COUNCIL
RECOMMENDATION ON EFFECTIVE ACTION AGAINST HARD CORE CARTELS**

1. In Section III of its 1998 Recommendation on Effective Action against Hard Core Cartels [C(98)35/FINAL], the OECD Council "[i]nvites non-member countries to associate themselves with [the] Recommendation and to implement it." As the Committee on Competition Law and Policy (CLP) enters a new and intensified phase of its anti-cartel programme, the Committee wishes to underscore this encouragement to interested non-Members and to facilitate the association process. Therefore, this statement clarifies what association involves and what procedures will be used to consider association requests by non-Members. Additional information may be obtained by contacting the Secretariat in the Competition Law and Policy Division, Directorate for Financial, Fiscal, and Enterprise Affairs, OECD.

2. The Recommendation was issued by the OECD's Council, and it is the Council, in conjunction with the Secretary-General and the Committee for Co-operation with non-Members (CCN), that makes decisions on association requests. The government of a non-Member that wants to make a formal request for association should send its request to the Secretary-General.

3. A letter requesting association with the Cartel Recommendation should be accompanied by a report, written in English or French, that describes the non-Member's substantive legal provisions relating to cartels (as interpreted by its competition authority and courts); the available investigative tools and sanctions, plus its record of using them; and its laws and procedures governing the treatment of confidential information in competition cases. Non-Members are also invited to include a description of any other laws or policies that significantly affect its ability to act against cartels or to co-operate in a cartel investigation. This report will be referred to the Secretariat in the OECD Competition Law and Policy Division, who will determine whether it addresses the required topics. The Secretariat will forward papers that do so to the CLP, and it will inform the government of the non-Member if the report is deficient in this respect. The Secretariat will not undertake to review the report's completeness or accuracy; this is the responsibility of the non-Member government.

4. When the CLP has completed its review of a report forwarded by the Secretariat, it will make its recommendation to the Council, through the CCN. The CLP believes that widespread association with and implementation of the Recommendation would contribute both to halting cartels' multi-billion dollar drain on the global economy and to creating more co-operative relationships among competition authorities around the world. Therefore, the CLP's recommendations will not be based on whether a non-Member currently appears to follow OECD best practices but whether its laws and policies appear to reflect a commitment to move in the direction of effective, efficient, and co-operative enforcement. While the CLP encourages widespread association with the Recommendation and is seeking

opportunities for a more active and interactive relationship with non-Members, it should be understood that association with the Recommendation does not entitle a non-Member to participate in CLP meetings or create any other rights or obligations.

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- **Decisions:** OECD legal instruments which are legally binding on all Members except those which abstain at the time of adoption. While they are not international treaties, they entail the same kind of legal obligations. Adherents are obliged to implement Decisions and must take the measures necessary for such implementation.
- **Recommendations:** OECD legal instruments which are not legally binding but practice accords them great moral force as representing the political will of Adherents. There is an expectation that Adherents will do their utmost to fully implement a Recommendation. Thus, Members which do not intend to do so usually abstain when a Recommendation is adopted, although this is not required in legal terms.
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