



FORUMS

Global Forum on Competition 2002

Introduction

This publication includes the documentation presented at the second Global Forum on Competition held in Paris in February 2002.

Overview

The programme of the Forum included four main sessions on competition law and policy and its relation to economic growth and development, capacity building and technical assistance, international co-operation in mergers and cartels cases, and a presentation and discussion of a cartel meeting that had been taped.

Related Topics

Prosecuting Cartels without Direct Evidence (2006)
OECD Council Recommendation on Merger Review (2005)
Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity (2004)
Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998)
Revised recommendation of the Council Concerning Co-operation between Member countries on Anticompetitive Practices affecting International Trade (1995)

GLOBAL FORUM ON COMPETITION

-- 14 and 15 February 2002 --

OECD GLOBAL FORUM ON COMPETITION

-- 14 and 15 February 2002 --

The OECD Global Forum on Competition is one of eight "Global Forums" created within the framework of the Organisation's Centre for Co-operation with Non-Members in order to deepen and extend relations with a larger number of non-OECD economies in fields where the OECD has particular expertise and global dialogue is important. The Competition Committee has for decades been the leading forum for regular, focused policy dialogue among the world's leading competition officials. The Committee groups together Members' competition authorities and those of the six non-Member observers (Argentina, Brazil, Israel, Lithuania, Russia and Chinese Taipei).

This dialogue has built mutual understanding and had substantial benefits, such as means of conflict avoidance and co-operation that have been used successfully by Members and non-Members. The Competition Committee has also identified voluntary "best practices" and created substantial analytical convergence.

For more than a decade, the OECD's Members and its Secretariat have been co-operating on competition law and policy matters with a wide variety of non-Members. Until now, this co-operation has consisted largely of regular capacity building activities and occasional conferences. With the advent of the Global Forum on Competition, OECD co-operation with non-Members has expanded to include in-depth "OECD-style" dialogue with an increased number of economies with whom OECD Members have a strong interest in a common agenda. This Forum does not replicate the universality of other institutions; rather, it creates a network of high-level officials from 55 or more economies who meet regularly to share experiences on "front burner" competition issues.

Like other OECD activities, the Forum is inter-governmental. Some regional organisations and other international organisations, such as the World Bank, UNCTAD, and the WTO, also participate and through the Business and Advisory Committee to the OECD (BIAC), the International Bar Association (IBA), the Trade Union Advisory Committee (TUAC) and Consumers International, representatives of the business community and consumers also contribute. The Forum is organised by the OECD's Competition Division and Centre for Co-operation with Non-Members (CCNM).

Eric Burgeat
Director

Centre for Co-operation with Non-Members

In developing and transition economies, competition policy can be particularly important in generating economic growth and increasing living standards of the poorest consumers. An apparent challenge for governments is how to promote the long-term benefits of competition when faced with more pressing and immediate objectives such as health, education or poverty reduction.

The discussion at this second Global Forum on Competition held in Paris on 14 and 15 February 2002 underscored that these objectives are mutually supportive: increased competition and the removal or reduction of government barriers can have an immediate positive impact, for example by reducing the price of basic necessities of life, increasing the prices received by poor farmers for their crops or other agricultural products or by improving the quality and variety of services in the health sector and elsewhere. It is therefore crucial for developing countries to adopt a comprehensive competition policy, including an effective competition law at an early stage of development. One size does not fit all, however. The key parameters of a broad competition policy and a domestic competition law must be adjusted to reflect local economic realities, culture and traditions. Given that efficient markets are critical in many vital sectors, the exercise of building a competition culture must include civil servants, judges, academics, labour and business representatives, the media and other key stakeholders.

The Forum included participants from the 30 OECD countries (plus the European Commission), the six non-Member observers to the Competition Committee (Argentina, Brazil, Israel, Lithuania, Russia and Chinese Taipei) and 23 other invited non-Members: Bulgaria, Cameroon, Chile, Egypt, Estonia, Gabon, Ivory Coast, Indonesia, Kenya, Latvia, Malaysia, Morocco, Peru, Romania, Senegal, Slovenia, South Africa, Thailand, Tunisia, Ukraine, Venezuela, Zambia and Vietnam. Representatives of regional organisations such as Common Market for Eastern and Southern Africa (COMESA) and the West African Economic and Monetary Union (WAEMU) also participated. In addition, several non-governmental organisations as well as the OECD's Business and Industry Advisory Committee and Trade Union Advisory Committee attended most of the sessions.

This publication comprises the documentation presented at the Forum. It opened with a keynote speech by Mr. Kondo, OECD Deputy Secretary-General. Current studies on the relationship between competition and economic growth and development were then reviewed. The Forum then discussed the technical assistance/capacity building needs of developing countries in the field of competition policy, and how such needs can best be met. Finally, various issues of co-operation among the competition authorities of different countries were addressed. The documentation of the Global Forum on Competition, together with other documentation on competition law and policy, is also available electronically at: <http://www.oecd.org/competition>.

OECD GLOBAL FORUM ON COMPETITION

-- 14-15 February 2002 --

FOREWORD

PROGRAMME

KEYNOTE SPEECH

Mr. Seiichi Kondo, *Deputy Secretary-General*, OECD

SESSION I. COMPETITION POLICY AND ECONOMIC GROWTH AND DEVELOPMENT

Special issues in developing and transition markets

Competition Policy Implementation in Transition Economies: An Empirical Assessment
(*Note by Mark A. Dutz and Maria Vagliasindi*)

Competition Policy Issues in Developing and Transition Markets
(*Note by Mark A. Dutz*)

Contribution from Egypt

Contribution from Indonesia

Contribution from Brazil

Evidence from OECD economies

Competition Policy and Economic Growth and Development
(*Note by the OECD Secretariat*)

Competition Policy and Economic Development 
(*Note by F. Sanchez Ugarte, Mexico*)

Contribution from Mexico

International cartels' impact on developing countries

Private International Cartels and Developing Economies (Note by Simon J. Evenett)

International Cartel Enforcement: Lessons from the 1990s
(*Note by S. J. Evenett, M.C. Levenstein, V.Y. Suslow*)

SESSION II. CAPACITY BUILDING AND TECHNICAL ASSISTANCE

Technical Assistance in Competition Policy 
(*Note by the OECD Secretariat*)

Experiences of OECD Outreach & Members' Technical Assistance Activities in 1999-2000 

(*Note by the OECD Secretariat*)

The United States Experience in Competition Law Technical Assistance: A Ten Year Perspective

Contribution from Australia

Contribution from Korea

Contribution by Mr. Tsyganov, Deputy-Minister, Russian Ministry for Antimonopoly Policy and Support of Entrepreneurship
Contribution from WAEMU/UEMOA



SESSION III. OTHER INTERNATIONAL INITIATIVES

SESSION IV. INTERNATIONAL CO-OPERATION IN MERGER AND CARTEL CASES

International Co-operation in Mergers: Summary of Responses
(*Note by the OECD Secretariat*)



Information Sharing in Cartel Investigations
(*Note by the OECD Secretariat*)

Information Sharing in Cartel Investigations: Suggested Issues for Discussion and
Background Material
(*Note by the OECD Secretariat*)



SESSION V. COMPETITION AUTHORITIES' DISCUSSION AND EVALUATION OF INFORMATION SHARING AND OTHER ASPECTS OF INTERNATIONAL CO-OPERATION

SESSION VI. SUMMARY, FUTURE WORK

SESSION VII. PRESENTATION AND DISCUSSION OF CARTEL MEETING TAPE(S)

An Inside Look at a Cartel at Work (US Department of Justice)

OTHER CONTRIBUTIONS

Brazil
Bulgaria
Chile
Consumers
International
Estonia
Israel
Ivory Coast 
Kenya
Latvia
Lithuania
Malaysia

Peru
Romania
Russian Federation
South Africa
Chinese Taipei
Thailand
Tunisia 
Ukraine
Vietnam
Venezuela
Zambia

Unclassified

CCNM/GF/COMP/A(2002)1/REV1



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

08-Feb-2002

English - Or. English

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

OECD Global Forum on Competition

PROVISIONAL REVISED FORUM AGENDA

To be held at the OECD, Château de la Muette, 2 rue André-Pascal,
75116 Paris, on 14 and 15 February 2002, starting at 9:00 am

JT00120567

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/A(2002)1/REV1
Unclassified

English - Or. English

**GLOBAL FORUM ON COMPETITION
14 and 15 February 2002**

Preliminary Agenda

Thursday 14 February

9:00-1:00

Opening Remarks

by Seiichi KONDO, Deputy Secretary General

I. Competition policy and economic growth and development (open to all)

Chair: Frédéric JENNY, Chairman, OECD Competition Committee

The planned discussion of the relationship between competition policy and economic growth and development has been expanded. It is anticipated that Topic "A" will occupy about one-half of the morning.

A. Special issues in developing and transition markets

- There will be a presentation reviewing empirical evidence and identifying the characteristics of developing markets most likely to affect the kind of competition problems they face (and thus the kind of competition regime they might want).

Speaker: Mark DUTZ, GTZ Advisor to Turkish Treasury and Ministry for Economic Affairs (on leave from World Bank)

- Three developing country competition officials will discuss the challenges they face, the arguments they hear against competition law and against various aspects of competition policy, and arguments for different kinds of competition regimes.

Speakers: Mahmoud MOHIELDIN, Senior Adviser to Minister of Foreign Trade, Egypt
David LEWIS, Chairman, South African Competition Tribunal
Didik RACHBINI, Commissioner, Indonesian Commission for the Supervision of Business Competition

B. Evidence from OECD economies

- There will be a presentation of an OECD Economics Department study on the impact of competitive product markets on the overall health of OECD Members' economies, and participants will be invited to discuss its implications for their economies and usefulness in their competition advocacy. Mexico will also make a presentation.

Speakers: Jorgen ELMESKOV, Deputy Director, Policy Studies Branch, Economics Department (OECD)
Sanchez UGARTE, President, Federal Competition Commission, Mexico

C. International cartels' impact on developing countries

- The results and implications of work done for the World Bank Development Report.

Speaker: Simon EVENETT, Director of Economic Research, World Trade Institute, Bern (formerly with the World Bank)

1:00-2:30

OECD buffet lunch

2:30-4:30

II. Capacity building and technical assistance (open to all)

Co-Chairs: Jean-Claude FAURE, Chairman of the Development Assistance Committee
Frédéric JENNY, Chairman of the Competition Committee

The Competition Committee has considered the assistance in competition policy, while the Development Assistance Committee has analysed assistance programmes in general. The Doha communiqué provides for negotiations on competition policy and commits to increased assistance, thus raising the profile of assistance in competition policy.

- As background, the WTO Secretariat will report on an inter-Secretariat meeting on implementing the Doha communiqué's statement that WTO assistance should be provided in co-operation with other relevant intergovernmental organizations.
- Competition officials from assistance-providing and assistance-receiving economies will make presentations. Topics for discussion include the importance of competition policy, the needs of beneficiaries, and the relative effectiveness of different kinds of assistance and providers thereof.

Speakers: Allan FELS, Chairman, Australian Competition & Consumer Commission
Joseph Seon HUR, Director General, Korea Fair Trade Commission
William KOVACIC, General Counsel, U.S. Federal Trade Commission

Andrey TSYGANOV, Deputy Minister, Russian Antimonopoly Office
Aini PROOS, Deputy Director General, Estonian Competition Board
Jean-Luc SENOU, Union Economique et Monetaire de l'Ouest Afrique

4:30-5.00

III. Other International Initiatives

Chair: Frédéric JENNY, Chairman, OECD Competition Committee

This is an opportunity for brief presentations on other relevant initiatives.

5:00-6:00 IV. International co-operation in merger and cartel cases (open to all)

A. Mergers

Co-Chairs: Margaret BLOOM, Director of Competition Policy, Office of Fair Trading, United Kingdom
Andrej PLAHUTNIK, Director, Competition Protection Office, Slovenia

Discussion will focus on the special problems of information sharing and other barriers to international co-operation in merger cases.

Friday 15 February

9:00-11:00 Continuation of session IV on international co-operation (open to all)

B. Cartels

Co-Chairs: Margaret BLOOM, Director of Competition Policy, Office of Fair Trading, United Kingdom
Andrej PLAHUTNIK, Director, Competition Protection Office, Slovenia

This session will discuss what restrictions are reasonably necessary to protect the confidentiality of business information that may be shared with a foreign competition authority. It will also consider what other legitimate interests of firms are at issue and what protections those interests may warrant.

Speaker: Calvin GOLDMAN, BIAC

11:00-12:30 V. Competition authorities' discussion and evaluation of information sharing and other aspects of international co-operation (open only to representatives of governments and international organisations)

Co-Chairs: Mr. Alexander SCHAUB, General Director for Competition, EU Commission
Mr. Len-Yu LIU, Commissioner, Chinese Taipei Fair Trade Commission

This session will provide officials an opportunity to discuss among themselves their views on what rules should govern information sharing. Based upon the results of Secretariat questionnaires to Members and non-Members, there will also be discussion of successful and unsuccessful efforts to engage in international co-operation.

12:30-1:15 VI. Summary; future work (open only to representatives of governments and international organisations)

Chair: Frédéric JENNY

Participants will be asked to present their views on the meeting and on future topics, procedures, and formats for the Forum. Some final comments will be offered.

1:15-2:30 **OECD buffet lunch**

2:30-5:00 **VII. Optional -- Cartel meeting tapes and other topics (open to all)**

In OECD theatre (New Building, close to Room No. 1)

- *Presentation of the undercover tapes of lysine cartel meetings*, by James Griffin, U.S. Department of Justice
- *Presentation of the Mortgage Credit Case ("Crédit immobilier")*, by the French Competition Council

GLOBAL FORUM ON COMPETITION

Paris, 14 February 2002

Opening remarks of Mr. Seiichi Kondo Deputy Secretary General Organisation for Economic Co-operation and Development

1. Good morning, ladies and gentlemen, and welcome. This is the second meeting of the Global Forum on Competition. One year ago, the OECD established eight Global Forums, each focussed on subject areas which defy solutions in individual countries or regions and for which the relevance of OECD work is dependent on interaction and policy dialogue with non-Members world-wide. The objective is to develop networks of policy makers in both Member and non-Member economies that can contribute to mutually beneficial learning, and to enhance the capacity of non-Members to benefit from OECD work as well as to bear on it. When the Global Forum on Competition was launched last year, we had keynote speeches and other formalities that will not be repeated today. This second meeting will have fewer formalities -- and, hopefully, more work. Before you go into the details, I would like to thank you for being here and say a few words about why I consider your work so important.

2. Like the other OECD Global Forums, this one provides a venue for in-depth dialogue on subjects on which the OECD has particular expertise and where the issues are global in the sense of being "borderless." Competition policy certainly meets those criteria. The Competition Committee and the agenda of this meeting deals both with global conduct, such as international cartels and transborder mergers, and also with broader issues concerning the role of competition in economic policy and development throughout the world. We consider this and the other Global Forums to be an important part of a key OECD mission -- to serve as a resource and a bridge between the developed and developing world. Indeed, our founding Convention calls upon the OECD to contribute to sound economic expansion in Member as well as non-Member economies.

3. The merger and cartel discussions you will be having are important, but I want to focus my remarks on the broader issues -- competition policy's relationship to economic growth and development, and the needs and methods of capacity building. I am very pleased that the Forum is addressing these issues, and is doing so at a time when economies of scale resulting from co-ordination with the Competition Council of France permit us to welcome additional invitee economies. At the October Forum meeting, Ministers from India and Russia -- two of the world's largest countries, each with a history of different but very substantial government intervention in the economy -- addressed the role of competition policy in economic reform. Each Minister emphasised different points, but the underlying consensus on the importance of competition policy was a striking example of analytical and political support for reducing poverty through market-oriented institutional and policy reform.

4. I am pleased that you are building on that discussion, and doing so with the participation of the OECD's Development Assistance Committee and Development Co-operation Directorate. Most of you spend most of your time on domestic competition law enforcement or competition advocacy. Few of you, I suspect, consider yourselves experts on international development and poverty reduction. Therefore, some of you may not be fully aware of just how interested your governments and the international community in general have become in using the institutional and policy know-how that underlie your work to promote economic growth, development and poverty reduction throughout the world.

5. In fact, world-wide interest in market reform to support economic development and poverty reduction has intensified greatly over the last decade. While I think it is safe to say that competition officials are not the first people to whom the world turns for advice on development issues, there is strong emphasis on promoting international trade and investment, notably through competition policy, to ensure that developing countries are able to fully realise the benefits. To this end, it is essential to build institutions and adopt laws and policies which make effective use of competition law and policy. In differing ways, the G8 poverty reduction initiative for Africa, the broader development goals of the Monterrey Consensus, and the "trade and competition" goals of the Doha communiqué all mention the importance of competitive market reform.

6. Of course, competition law and policy -- like anti-corruption initiatives -- provides a necessary framework for efficient markets that produce growth and development. The existence of a mainstream competition law reassures potential investors, and competition policy creates opportunities for trade and investment by serving, for example, as a guide to privatisation and natural monopoly reform. In developing economies, competition law and policy also help overcome inefficiency and wasted resources, and can also help ensure that the benefits of market reform go to those with talent and vision, rather than those who already have economic and/or political power. Building on the expertise of its Competition Committee, the OECD has been at the forefront of competition policy capacity-building since 1990.

7. On the other hand, some continue to have questions and concerns, and there are certainly important issues on what the role of competition policy is in particular circumstances. In my view, the virtue of OECD Global Forums is that these issues can be addressed informally through policy dialogue among peers.

8. I will leave you soon to your discussions, but first I want to emphasise that although economies at various stages of development face some specific issues and must tailor their policies to those problems, there are also issues common to all economies. Thus, I am glad to see that the OECD Economics Department will be presenting its new empirical work concerning the positive impact of competition on economic performance and employment in OECD countries.

9. In conclusion, I note the strong interest of our Member countries to have the OECD play an expanded role in promoting economic development through market-oriented institutional and policy reform, including through competition law and policy. All of you -- OECD competition officials, representatives of developing and transition economies, and representatives of NGOs and IGOs -- are essential participants in these efforts. Let me express my confidence that your discussions here today will contribute to creating a more prosperous world that is capable of generating employment in a context of sustainable development.

Competition Policy and Economic Growth and Development

A. Special Issues in Developing and Transition markets

Unclassified

CCNM/GF/COMP/WD(2002)13



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

25-Jan-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP/WD(2002)13
Unclassified

OECD Global Forum on Competition

COMPETITION POLICY IMPLEMENTATION IN TRANSITION ECONOMIES: AN EMPIRICAL ASSESSMENT

This note drafted for the EBRD by Mark A. Dutz and Maria Vagliasindi is circulated as a background contribution for Session I of the Global Forum on Competition to be held on 14 and 15 February 2002.

JT00119959

Document complet disponible sur OLIS dans son format d'origine
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English text only

**European Bank
for Reconstruction and Development**

**Competition policy implementation
in transition economies:
an empirical assessment**

by **Mark A. Dutz and Maria Vagliasindi**

Abstract

Between 1990 and 1996, competition laws have been adopted in 22 of the 26 transition economies of central and eastern Europe and the former Soviet Union. Yet there is very little systematic evidence about implementation experience, and none regarding its impact on intensity of economy-wide competition. The novelty of this paper is twofold. First, it defines a range of competition policy implementation criteria relevant for transition and developing economies along the three main dimensions of enforcement, competition advocacy and institutional effectiveness. These classification criteria go significantly beyond the traditional emphasis on abuse of dominance, agreement and merger cases. Second, it provides an assessment of the effectiveness of competition policy implementation across 18 countries along these criteria, based on data from each country's competition authorities and supplemented with assessments by legal practitioners. The relationship between competition policy and intensity of competition is explored, with the latter captured by a measure of economy-wide enterprise mobility that reflects selection effects. We find a robust positive relationship between effective competition policy implementation and expansion of more efficient private firms.

JEL Classification Number L4, K21, P2.

Keywords: competition, competition policy, transition economies.

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We are very thankful to all competition agencies that actively provided data and information, through the survey and additional communications. Assistance by Marcella Vigneri is gratefully acknowledged. This research reflects the work of the authors and does not necessarily reflect the views and policies of the EBRD or of the World Bank.

The authors are affiliated at the EBRD and World Bank (Dutz) and the EBRD (Vagliasindi).

The working paper series has been produced to stimulate debate on the economic transformation of central and eastern Europe and the CIS. Views presented are those of the authors and not necessarily of the EBRD.
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INTRODUCTION

By 1996, only a *few* years after the fall of the Berlin Wall, 22 of the 26 transition economies of central and eastern Europe and the former Soviet Union had adopted competition laws. Yet there is virtually no evidence about implementation experience across all transition economies¹. Moreover, there has been no empirical attempt to test whether effectiveness of implementation has any significant economy-wide impact in terms of intensity of competition.

The objective of this paper is to assess the effectiveness of competition policy across transition economies. The novelty of the paper is twofold. First, we define criteria to measure effectiveness of competition policy implementation. The analysis is based on implementation experience with three main dimensions which we believe represent essential features of an effective competition law regardless of the specific needs of any given country: (i) enforcement, (ii) competition advocacy, and (iii) institutional effectiveness. As part of these three general dimensions, we add specific criteria that we believe are particularly relevant for transition economies. Second, we explore whether there is any robust relationship between these dimensions of implementation experience and country-level indicators of intensity of competition based on new data.

In the first section, we provide a brief overview of the timing of adoption and amendments of competition laws. In Section 2, we develop a set of criteria to classify implementation experience. We report results based on data provided by the competition authorities, supplemented where appropriate by the assessment of legal practitioners and experts. In Section 3, we present our findings on the relationship between effectiveness of competition policy implementation and indicators of intensity of competition based on a detailed cross-country enterprise-level survey. A final section concludes.

1. THE TIMING OF COMPETITION LAW ADOPTION

The adoption of competition laws is a relatively recent occurrence in transition economics. **Table 1** lists all 26 countries from central and eastern Europe and the Former Soviet Union according to the adoption year of the initial law, together with dates of main amendments. Poland was the first country in February 1990, followed by Hungary in November of the same year. By mid-1999, only Bosnia and Herzegovina and Turkmenistan had not drafted their own competition laws.

¹ An earlier study restricted to Hungary, Poland, and the Czech and Slovak Republics reported that the statutes have been interpreted in a very similar way, and that what varies are the emphasis and intensity of implementation. See Fingleton et al. (1996).

Table 1: Adoption of competition laws and amendments

Countries	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Hungary	*							↑		
Poland	*	=				↑	=	=	=	
Czech Republic		*	=				↑			↑
Slovak Republic		*				↑				
Bulgaria		*	=						↑	
Kazakhstan		*		=		=				
Latvia		*						↑		
Moldova		*		=						
Russia		*	=					↑		
Ukraine		*		=		=		=	↑	
Belarus			*							↑
Lithuania			*	=						
Slovenia			*							
Tajikistan			*							
Uzbekistan			*		=		=			
Azerbaijan				*				=		
Estonia				*		=			↑	
Kyrgyzstan					*					
Albania						*		=		
Croatia						*				
Georgia							*			
Romania							*			
Armenia										Draft
FYR Macedonia										Draft
Bosnia and Herzegovina										
Turkmenistan										

Note: Countries are listed alphabetically for each year. * indicates year of adoption of initial law.

↑ indicates year of amendment with significant changes. = indicates year of amendment with minor changes.

In practice, the main positive amendments have been adopted by countries around the time of their conclusion of E.U. Agreements on competition policy.² One common feature to the amendments is compliance to the most relevant provisions of EU competition law (particularly, concerning the original Articles 85 and 86 of the Treaty of Rome). Moreover, administrative procedures for the conduct of investigations and legal safeguards for independence and institutional effectiveness are generally described in more detail. In some cases, new provisions for competition advocacy have been introduced, as in the case for Estonia. Its new 1998 law provides the competition authorities with special powers relating to natural monopolies and entities with government-created exclusive rights. These special powers include both the requirement of a public

² Hungary, Poland, and the Czech and Slovak Republics reached EU agreements on competition in 1995 (all four were first to positively upgrade laws), Bulgaria in 1997 (amendments in 1998), and Estonia, Latvia, Lithuania and Romania in 1999 (amendments for the Baltic countries in 1997-99; Romania adopted a state-of-art law in 1996).

competition for exclusive rights granted to enterprises and the requirement that natural or government-created monopolies must provide access to their network or exclusive facility on a non-discriminatory basis.³

2. IMPLEMENTATION EXPERIENCE

Chart I reports implementation effectiveness in 1997 for 18 countries, nine from central and eastern Europe and the Baltics, and nine from the former Soviet Union.⁴ The results are based on general classification criteria subsequently tailored for transition economies. We assign equal weight to nine dimensions grouped into three categories, namely (1) law enforcement, (2) competition advocacy and (3) institutional-related activities. Each dimension is assessed on a 0-1 scale, with some reflecting further sub-dimensions enterprise-related law enforcement, for instance, is a composite of data for abuse of dominance, hard-core cartels, other agreements, and mergers. Our view is that for transition economies all three categories represent essential features and key priorities for effective competition policy implementation. This broader perspective goes significantly beyond the traditional emphasis on the number of abuse of dominance, agreements and merger cases processed. Our classification criteria are independent of country size, so small countries that bring proportionately fewer cases are not penalised relative to larger countries. The dimensions also have been chosen carefully so as to be amenable to uni-directional rating over time, to exclude the possibility that countries at one level of development where a particular criteria may be less relevant are penalised relative to countries at a different stage.

The first category is composed of separate assessments of the effectiveness of enforcement activities against enterprises and against state executive bodies (with a higher effectiveness if violations constitute at least 10 percent of decisions). There is a third dimension to reflect whether fines actually have been levied (with a higher effectiveness if one of the three largest fines levied per year is in the “hard core cartel” category). In terms of bans against anti-competitive acts by enterprises, the coverage of most countries laws is generally similar to that in established market economies, with the main variation stemming from the level of detail in explicitly spelling out economic criteria to be used. An important innovation is that we include among enforcement activities anti-competitive acts by other government bodies — which are prohibited explicitly in almost all transition economies, a sharp departure from practice elsewhere in the world.⁵ These provisions are intended to help prevent attempts by entities with state executive power, especially at regional and local levels, to introduce barriers to competition through their conduct.

The competition advocacy category reflects an assessment of the effectiveness of written comments and objections concerning a broad range of economic policies affecting competition, specifically the regulation of infrastructure sectors and privatisation policies. There is a third dimension to reflect education and constituency-building efforts specifically directed at consumers and small businesses. The benefits from the incorporation of competition principles in the legislative and regulatory activities of government can be substantial, especially in countries that have recently privatised some of the network infrastructure industries and where adequate regulatory expertise is scarce.

Finally, institutional effectiveness is based on assessments of the degree of political independence of the competition authorities. The transparency of the agency, and the effectiveness of the appeals process based

³ See Articles 15-18 of the new Estonia competition law (enacted March 1998).

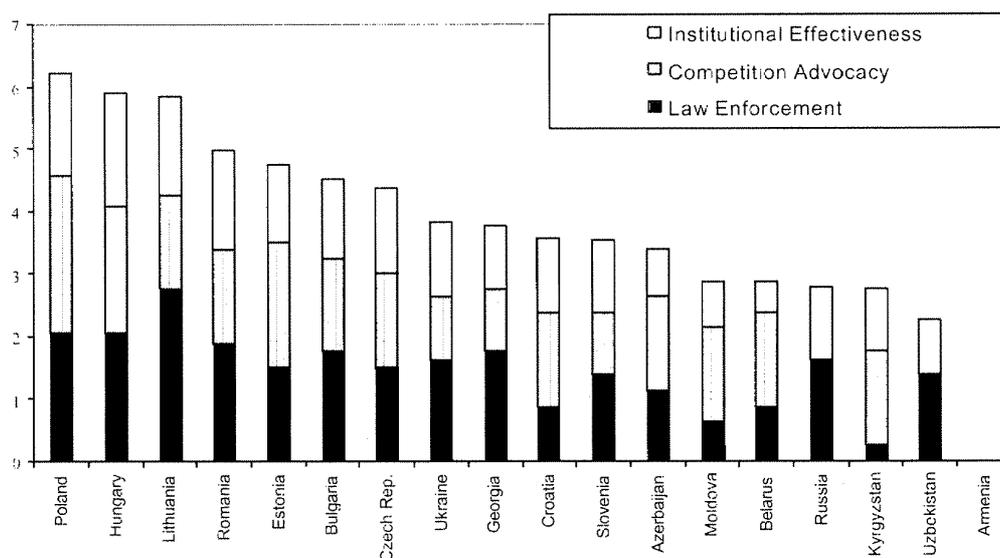
⁴ These are the countries for which both detailed information has been submitted by the competition authorities and relevant firm-level data are available.

⁵ Prohibited acts by a single body or in agreement typically include restrictions to the free movement of goods and capital between regions/localities, plus restriction of competition in the production of infrastructure and non—infrastructure goods and services. In most countries civil and administrative liability is incurred for violations, though Georgia and Russia also include liability under criminal law.

on relevance of adjudication⁶ Law enforcement and competition advocacy activities are classified according to data from the competition authorities in each country.⁷ Given the nature of the assessment required for the institutional-related dimensions, this third category is based on a separate survey instrument from law practitioners and others familiar with legal practice in the area of competition policy in each country.⁸

As **Chart 1** shows, Poland and Hungary, the first adopters of competition law, the Baltic states and Romania have the most effective overall implementation of competition policy.

Chart 1: Competition policy implementation - Effectiveness indices



On the other hand, Armenia, without a law or a dedicated set of individuals focusing exclusively on competition issues, had no explicit implementation of competition policies. The portion of the overall indicator accounted by the three main categories is highlighted. Chart I shows a significant variation across countries, both in the overall as well as constituent dimensions.

⁶ An assessment of independence is based on the frequency of decisions that the authorities have failed to take or decisions taken that have been overturned for political reasons. Transparency is based on the extent to which decisions and annual reports are publicly available as reflected in the awareness by the general public of competition law provisions. Appeals are evaluated on the extent to which they are judged based on economic content rather than exclusively on due process.

⁷ Reported information reflects data over both 1996 and 1997. The competition policy survey was designed and administered by the authors during the first half of 1999.

⁸ The legal survey covering competition and other laws was administered by the EBRD during the first half of 1999 and reflects the views of 130 experts in the 18 countries. Given the slower pace of changes in the institutional area in these countries, it is an appropriate proxy for 1997 values.

3. IMPACT ON INTENSITY OF COMPETITION

The empirical results are based on the competition policy survey, the legal survey, plus a major new survey on the business environment and enterprise performance undertaken by the EBRD in collaboration with the World Bank. This survey sampled over 3,000 firms in 20 transition economies in the first half of 1999⁹. Importantly for our purposes, the survey asked the manager of each enterprise about the external factors that influence the activities of each firm, including competition faced in product markets. The survey also reports on the overall performance of the firm as measured by changes in employment and labour productivity.

To reflect intensity of competition at the economy-wide level, we use a country-level productivity-augmented mobility variable. This indicator captures the frequency with which private enterprises have expanded employment over the past 3 years (expanding firms over the 1997-99 period as a proportion of all firms), weighted by the corresponding proportion of expanding firms that increase labour productivity¹⁰. In this way, the indicator captures not only the ease with which new enterprises can expand in the economy, but also reflects market selection effects, namely whether there is appropriate pressure leading productivity-increasing firms to expand. The indicator uses the frequency of expanding firms in the economy in order to control for macroeconomic cycles across countries (which would bias the indicator, the frequency of expansion being greater for robustly growing economies).

Given that our measures of both enterprise mobility (1997-99) and beginning-of-period competition policy (1997) are available only for 18 countries, we need to develop as parsimonious a specification of the basic model as possible. Prime candidates that may influence country-wide intensity of domestic competition include the extent of structural concentration in the economy coupled with the extent of competition pressure from foreign sources. We use the share of total market sales in each firm's main product line, averaged across all firms by country as our measure of economy-wide market concentration (MktSh). To capture the variation across countries in the impact of foreign competition, we use the importance of pressure from foreign competitors on each firm, again averaged across all firms by country (ForComp)¹¹.

As reported in **Table 2**, the most parsimonious model (equation 1), consisting of only these two variables, structural concentration and foreign competition, performs relatively well in terms of explanatory power. While increased average concentration acts as a brake on expansion by more efficient enterprises, competition pressure from foreign sources is positively related to mobility¹². In equation 2, we explore the relationship between competition policy, as captured by our overall effectiveness of implementation indicator, and mobility. 'The relation is both positive and highly' significant, as well as increasing the explanatory power of the model.

⁹ By design of the sample, the firms are fairly representative of those in their domestic economies in terms of size and sectoral representation. By design, there are also representatives of all three ownership categories in each country (state-owned, privatised and new private entrants).

¹⁰ For a more detailed description of this and other mobility-related indicators, see Dutz and Vagliasindi (1999a). For an overview of mobility measures, see Caves (1998). For an assessment of various types of economy-wide measures to capture intensity of competition, including structural and mobility variables, see Dutz and Hayri (1999).

¹¹ This question asked enterprise managers to rate the influence of pressure from foreign competitors on technical efficiency ("on key decisions about the business with respect to reducing the production costs of existing products"). We use the proportion of firms responding various levels of "important" (versus "not at all important"). Country averages range from 16% of enterprises responding that foreign competition is an important pressure (Belarus) to 83% (Slovenia).

¹² The concentration—mobility link is in line with related results by Blundell et al. (1995) on concentration and innovation.

Table 2: The impact of competition policy on enterprise mobility
(standard errors in parentheses)

Enterprise mobility	(1)	(2)	(3)	(4)	(5)	(6)
MktSh	-1.137** (0.257)	-1.057** (0.206)	-1.036** (0.167)	-1.020** (0.167)	-1.065** (0.190)	-0.992** (0.143)
ForComp	0.665** (0.130)	0.518** (0.114)	0.503** (0.093)	0.529** (0.089)	0.559** (0.104)	0.459** (0.081)
CompPol	-	0.263** (0.085)	0.153* (0.078)	-	-	-
CorpGov	-	-	0.079** (0.027)	0.090** (0.025)	0.103** (0.032)	0.078** (0.022)
ENF	-	-	-	0.095* (0.047)	-	-
CA	-	-	-	-	60.011 (.066)	-
Instit	-	-	-	-	-	0.230** (0.072)
Constant	0.229** (0.045)	0.173** (0.040)	0.205** (0.035)	0.209** (0.033)	0.239** (0.034)	0.198** (0.028)
R ²	0.6405	0.7868	0.8701	0.8716	0.8323	0.9063
Adj. R ²	0.5927	0.7411	0.8301	0.8321	0.7807	0.8775
F-test	13.360	17.226	21.764	22.063	16.135	31.421
Prob> F	0.0005	0.0001	0.0000	0.0000	0.0001	0.0000

Notes:** indicates significance at 95% level, * at 90%. All regressions are based on country-level variables for Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kyrgyzstan, Lithuania, Moldova, Poland, Romania, Russia, Slovenia, Ukraine and Uzbekistan (18 observations). “Enterprise mobility” (the proportion of productivity-increasing expanding private enterprises), Market share” (the average share of market sales of each firm’s main product line) and Foreign competition” (the average extent to which pressure from foreign competitors is rated as important by enterprises) are based on a 1999 EBRO/World Bank enterprise-level survey on the business environment and enterprise performance comprising over 3,000 firms in 20 countries. CompPol, ENF, CA and Instit refer to the overall competition policy implementation indicator and its main constituent categories. ‘Corporate governance’ is an indicator reflecting strategic outsider versus insider corporate governance control structures. See Dutz and Vagliasindi (1999a).

We next explore, within this framework, the inter-relation between competition policy and policy aimed at improving corporate governance, given the potential role of both competition and corporate governance as discipline devices spurring improved enterprise performance. As a measure of policy aimed at improving corporate governance, we use a country-level indicator that reflects whether the dominant privatisation method adopted by each country has favoured direct sales to strategic outsiders versus insider or more diffuse control structures (CorpGov)¹³. As expected, effective policy aimed at promoting desirable corporate governance structures is to some degree a substitute for effective competition policy. As reported in equation 3. competition policy maintains a positive relation with expansion by more efficient private enterprises in the presence of the corporate governance variable, though both the magnitude of its effect and its level of

¹³ For a detailed description of the rationale and empirical bases for such an approach. see Dutz and Vagliasindi (1999a).

significance drop suggesting that corporate governance substitutes to some extent for product market competition¹⁴.

Finally, we report results on the relative importance of the three main dimensions of competition policy implementation, as captured by law enforcement (ENE), competition advocacy (CA) and institutional effectiveness (instit) indices. Of the three constituent components of overall implementation, competition advocacy has no significant relationship with mobility, probably reflecting the fact that there is less variance within this dimension across individual countries. Enforcement (anti-competitive acts by enterprises and state executive bodies, plus the deterrence value of fines) and institutional effectiveness (independence, appeals and transparency) are both positively related to intensity of competition. However, the level of significance of the Instit effect is higher, and its magnitude is more than twice that of ENE (with the difference being statistically significant)¹⁵. This implies that factors related to institutional effectiveness are indeed critical in ensuring that competition policy has its intended economy-wide impact. The stronger link between implementation effectiveness and ease of expansion of productive enterprises suggests that building a reputation for independent, transparent and appropriate decision-making can be an important prerequisite for more effective enforcement and competition advocacy activities by national competition authorities.

4. CONCLUSIONS

Through implementing effective competition law, governments can affect the business environment in which firms operate, encouraging mobility and more efficient allocation of resources. In addition to their traditional role of tiling and investigating alleged anti-competitive practices by enterprises, competition authorities in transition economies have important functions with regard to filing cases against local and regional government bodies whenever their conduct restricts competition, as well as using their considerable formal powers as competition advocates to incorporate competition principles in legislative and regulatory activities of government and to educate all key economic actors of the benefits of competition. In principle, all these activities should be especially geared to foster opportunities for newcomers and those other enterprises that are more likely to pursue innovative activities and operate in new segments.

Our comprehensive classification of implementation experience reflects not only enforcement experience *vis-à-vis* enterprises but also the other important dimensions of enforcement, competition advocacy and institutional effectiveness. We find a robust positive relationship between more effective competition policy implementation and intensity of competition as captured by economy-wide enterprise mobility. Merely having a competition law on the books, or having an up-and-running competition agency, is not a sufficient condition for effective implementation. The stronger and statistically more significant impact of institutional dimensions of implementation independence, transparency and effectiveness of appeals suggest that in order to help foster the entity and growth of enterprises, competition authorities should be more accountable to civil society, and build additional safeguards to protect against undue influence from pressure groups in government and elsewhere. The absence of any robust impact of competition advocacy, on the other hand, probably reflects that this is a most difficult area to implement effectively across all transition economies. It requires the competition authorities to gain expertise not only in traditional anti-trust enforcement but also in the other industry oversight (especially network infrastructure industries). It also requires sufficient resources to be spent on effective education.

¹⁴ Based on a sample of UK manufacturing enterprises over the period 1982-94, Nickell et al. (1997) report evidence to suggest that corporate governance can substitute for product market competition.

¹⁵ Similar results hold regressing the constituents of the overall competition policy implementation index in the specification without corporate governance non-reported variants of equation 2). This time both Inst and ENE are statistically significant at the 95% level as separate regressors. Similarly, the magnitude of the Inst coefficient is more than twice the level of the ENE coefficient.

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Unclassified

CCNM/GF/COMP/WD(2002)35



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Mar-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

COMPETITION POLICY ISSUES IN DEVELOPING AND TRANSITION MARKETS

-- Contribution by Mark Dutz --

This note was submitted by Mark Dutz, under Session I of the second meeting of the Global Forum on Competition, held on 14-15 February 2002.

JT00122291

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)35
Unclassified

English text only

Competition policy issues in developing and transition markets

Mark Dutz
Paris, February 14, 2002

Outline

I. BENEFITS OF COMPETITION

1. Unique challenges of less mature markets
2. The importance of competition
3. Empirical impact of competition and competition law

II. IMPLICATIONS FOR LESS MATURE MARKETS

1. Special elements of effective competition policy
2. Implications for competition law authorities
 - **open ‘strategic bottlenecks’ to competition**
 - **emphasise ‘enhanced’ competition advocacy**
3. Directions for further work

I.1. Challenges of less mature markets

- **Inadequacy of business infrastructure**
 - **physical:** low level and restricted access
 - **institutional:** dysfunctional legal & regulatory frameworks and implementation capacity; legacy of excess intervention and weak governance; uneven playing field
- **Special problems with thin markets:** more substantial information asymmetries in credit and product markets; missing or insufficiently dense markets
- **Insufficiently educated & organised civil society:** industrial and end-use consumers lack understanding of benefits of competition; key beneficiaries of competition lack voice

I.2. Competition matters most in such markets

- greater impact of ‘discipline incentives’ **to spur competitiveness of firms** in countries with weaker markets for corporate control
 - reduces managerial slack
 - improves selection (closure of poorly-managed firms)
 - spurs innovation
- competition law **more important as a complement to trade liberalisation**
 - greater proportion of ‘localised’ (non-tradable) markets
 - more limited distribution channels
 - greater propensity for institutional public and private barriers that cannot be disciplined by imports (e.g. Turkey cases against entry barriers from legal monopoly and from private companies)

I.2. Competition matters most (cont.)

- internationally-accepted, independently-enforced competition law **enhances investment climate and FDI**
 - creates a level playing field with rewards based on performance
 - reduces need for government intervention and scope for corruption
 - provides a familiar environment with familiar remedies
- innovations in technology and new goods spurred by increased competition **stimulate job and income growth**, directly contributing to increased standards of living

I.3a. Competition spurs innovation & growth

- Chile: **Competition in long-distance telephony with equal access** mandated in mid-1994
 - by mid-1996, ave. rates fell by more than 50%
 - domestic long-distance traffic rose by more than 50%
 - reforms unlocked approx. USD 120 mn in consumer W in 1995 (Crandall and Waverman, 1997)
- Mexico: **Free entry into trucking, container and cargo handling**, 1989-93 (Dutz, Hayri and Ibarra, 2000)
 - increases in quantities and distances of freight hauled
 - increases in reliability (timeliness, transit losses)
 - overall benefits estimated at 10% of operating margin of a representative user company

I.3b. Effective competition law spurs growth

- Empirical test: whether countries with *effective* competition law implementation have higher growth
 - responses from over 3000 top business executives of large international and domestic firms in 53 countries to:
 - **‘Does antitrust or anti-monopoly policy in your country effectively promote competition?’**
- Dutz and Hayri (2001) find that *effective competition law implementation is positively associated with long-run growth*, controlling for other determinants of growth
 - association goes beyond trade liberalisation, institutional quality and a favourable policy environment

II.1. Special elements of effective policy

- **Starting small is better than not starting at all**
 - given that markets not functioning sufficiently well, desirable to have a **responsible entity** within the State (e.g. Albania)
 - **gradual build-up** of human capital and expertise
 - **focal point** for efficiency and consumer welfare, to deepen ‘culture of competition’
- A key focus of the competition institution should be to **promote entrepreneurship** (entry & exit)
 - **preserve rewards from productive entrepreneurship** by focusing on fundamental investment climate issues
 - **foster ‘grass-roots’ enterprises** that spur either revolutionary or evolutionary innovations

II.1a. Preserve rewards from entrepreneurship

Claim: Productivity and growth depend on **allocation of entrepreneurship** between different activities
(supply of entrepreneurs varies less between countries)

- allocation influenced by **relative payoffs**
(vs. rent-seeking or non-entrepreneurial activities)

Implication: legal & regulatory frameworks critical

- protect and ensure **property rights** serve public interest
- remove legal & other **obstacles misdirecting resources**
- ensure fair & speedy **dispute resolution** mechanisms



emphasise ‘enhanced’ competition advocacy

II.1b. Foster grass-roots entrepreneurship

Claim: Infrastructure services and other essential local inputs may be **more subject to monopolisation and foreclosure**

- more frequent (legacy of more SOEs)
- more persistent (imperfect, less dense markets)

Implication: emphasis on access policy through supply side

- eliminate **barriers to grass-roots entry**
- facilitate **access to essential business services**



**emphasise opening ‘strategic bottlenecks’ to competition
& enhanced competition advocacy**

II.2a. Enforcement actions to open bottlenecks

- Focus enforcement resources on **detecting collusive agreements or exclusionary practices aimed at foreclosing access** to essential business services
 - focus on **ensuring provision of essential inputs** that are local in character such as localised real estate and banking, transport, distribution warehouses, communications & professional business services (information and market-making)
 - e.g. *examine exclusive supply or distribution contracts* (including shipping, importing and local supply)
 - e.g. at the rural level, *stop tyre slashing* that impedes new local transport services

II.2b. Enhanced competition advocacy

- Address **missing or poorly-functioning institutions** that help provide access to essential business services
 - **power to introduce or amend new laws** to promote competition (e.g. movable assets registry)
 - **oversight responsibility** to ensure that relevant institutions perform their role (e.g. unbiased property rights enforcement, speedy dispute resolution mechanisms, streamlining of administrative barriers to entry & exit)
- Eliminate **government policies that suppress rivalry**
 - **prohibitions in law** against anti-competitive acts by other governmental bodies (e.g. transition economies)
 - **power to modify existing laws** to promote competition (e.g. exclusionary trade & investment rules)

II.2b. Enhanced advocacy (cont.)

- Play strong pro-active role as **watchdog for network utilities: keep competition issues with competition authority** to ensure flexible availability of infrastructure services that facilitate entry and restructuring of efficient firms
 - **responsible for** initial setting of industry structure & restraints on companies' operations
 - **veto** power over determination of regulatory boundaries
 - power to **review** whether decisions in public interest
- Build **competition culture** and mobilise **pro-competition support constituencies** through broad-based education
 - activities to support natural allies (e.g. Mexican '*competition in regulatory reform*' benchmarks)

II.3. Possible further work

- **more systematic evidence that competition is good** for transition and developing economies
 - easy-to-understand case studies across countries of '**natural experiments**' of the removal of competition obstacles and their impact on enterprises and markets
 - links between improved competition policy implementation and **FDI** (investment more generally)
- **more systematic documentation and analysis of innovative implementation measures** taken by competition authorities
 - extension of the analytical framework of **foreclosure analysis** to various elements of business infrastructure
 - systems of **monitoring and oversight** that limit institutional capture and give voice to beneficiaries of competition

Unclassified

CCNM/GF/COMP/WD(2002)27



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM EGYPT

-- Session I --

This contribution is submitted by Mr. Mahmoud MOHIELDIN (Egypt) during Session I of the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120651

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)27
Unclassified

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ON THE FORMULATION AND ENFORCEMENT OF COMPETITION LAW IN EMERGING ECONOMIES: THE CASE OF EGYPT¹

Mahmoud Mohieldin²

Introduction

Unlike most emerging economies which adopted competition legislation in the wave the early 1990s, Egypt's is still in the making. Egypt has never had a comprehensive competition legislation, although various provisions in different legislation address basic anti-competitive behaviour. Recently, the Egyptian economy has been experiencing major challenges at both the national and international levels that necessitate the introduction of a competition law. The private sector has been growing rapidly to dominate the market without adequate regulation, there are allegations of anticompetitive practices conducted by many market participants in various sectors. There are many cases of mergers and acquisitions that have been undertaken without proper investigation regarding their implications on the market conditions and fair competition.

At the international level, there are debates and negotiations regarding the inclusion of competition policy in bilateral and multilateral trade agreements, in which Egypt is involved. Dealing with multinationals also requires the capacity to deal with possible anticompetitive practices committed by them and to cope with the implications of international and cross-border mergers and acquisitions. Finally, there is that recent threat of international private cartels which impose a real challenge to fair competition.

The paper starts by discussing the difficulties facing an emerging economy in formulating competition policy. The paper then turns to discuss the Egyptian experience, explaining the case for the introduction of competition policy in Egypt and the reasons for the reluctance in implementing it. Then the paper explores the main features of the Egyptian competition policy, which includes a competition law, still a draft law, and the proposed establishment of a Competition Commission. The paper ends with concluding remarks on the prospects of competition policy.

Difficulties facing an emerging economy in formulating competition law

Policy makers in emerging economies face several difficulties which might be seen as common between them in respect of formulating a competition policy and introducing a competition law. These difficulties are summarised below.

The influence of trading partners

The logical starting point in formulating a new economic law is to review the country's economic needs and legal traditions and shape the law accordingly. Competition law, some suggest, is different in this respect: a state should formulate its competition legislation along the lines already adopted by its existing or potential trading partners.

According to this view, the adoption of an advanced competition model can have beneficial effects on future trade, and consequently on the economy as a whole. An EC-based competition law, for

instance, would encourage Western European investors attracted by the familiar legal environment. Similarly, competition legislation based on the United States' model, in addition to being a safe bet,³ would also encourage American investment attracted by the familiarity of the legal framework.⁴ It has been argued that decisions about which competition law model to adopt is to a large degree predetermined by the country's international economic policy.⁵

The general approach of the law: per se v. rule of reason⁶

A country's formulation of its competition legislation will further be affected by the regulatory considerations. Emerging economies with either little or no experience of administering a complex regulatory framework may at first opt for a competition law that can be easily enforced. This may be a good reason to reject a rule of reason type legislation (which would require complex case-by-case analyses), and opt for the more straightforward per se approach, at least until its competition agencies develop the expertise necessary to administer the former approach. The unconditional prohibition at the heart of the per se approach has the advantage of being relatively cheaper to enforce. It also provides clear guidance to the business community. It is more efficient, since no time is wasted until the legality of a given conduct is established. True, the per se approach may condemn acts which the rule of reason approach might not sanction. However, the certainty that the per se approach offers offsets the loss of the benefits derived from the rule of reason approach.⁷

Drafting per se competition legislation, however, is no easy task: the legislation must define, clearly and in detail, those practices which are prohibited;⁸ it must clearly define competition as well those acts which are sanctioned. Competition legislation may be fashioned in one of several styles. It may adopt rules against cartels and market-blocking acts by dominant firms as in the United States; or it may take a more interventionist attitude that allows for the introduction of case-specific answers more responsive to a country's special needs and norms; or it may adopt a sui generis combination of the foregoing approaches.⁹

Objectives of the law

Setting clear objectives for any proposed legislation is obviously important. Axiomatic though this may be, it has been noted that, the UK law (and to a lesser extent EEC law) has developed without any overall conception of the function either of competition or competition law, and that this has produced many of the difficulties that exist.¹⁰

Competition legislation in emerging economies must aim to achieve two objectives: to maintain and, where absent, to create competition. Only the first of these objectives forms part of the function of competition legislation in developed economies. The second task, the creation of competition, results from the economic status of emerging economies. And in this regard, advanced competition laws can offer no assistance to emerging economies, as they are based on the assumption of the existence of freedom of voluntary exchange in a generally competitive environment.

Scope of the law

It has been argued that considering the difficulties which an emerging economy faces in fashioning a sophisticated competition law, it should focus initially on regulating horizontal agreements¹¹ and mergers and acquisitions, as opposed to trying to include vertical agreements¹² and abuse of market power as well. Horizontal agreements are given precedence because the market structure of an emerging economy, characterised as it is by the involvement of a small number of firms, lends itself easily to these types of agreements.¹³ By way of refinement, one commentator has argued that the initial roster of

forbidden practices might be limited to horizontal price-fixing, collusive tendering and market allocation schemes. The attractiveness of this approach resides in its imposition of the lightest short-term analytical and administrative burdens and, at the same time, its tackling of the most prejudicial practices.¹⁴

The fact that there are at present, and will be for some time to come, several state-owned firms which will be subject to competition laws in emerging economies is not only novel, but actually runs counter to prevailing tradition. The law must therefore discourage monopolistic practices. It must also entrust the competition agency with an active role in the government's de-monopolisation schemes, in the implementation of trade policies and schemes aimed at increasing consumer awareness, as well as in the creation of conditions facilitating access to markets.

The difficulty is that if a competition law does not adequately protect the competitive process, the country's overall economic development suffers as a result of those distortions which the law fails to remedy; if the competition legislation is overzealous, it ends up restricting the freedom of businesses to adopt beneficial practices and organisational forms, and thus cripples the economy.¹⁵

Enforcing competition law

Establishing a competition agency is an integral part of introducing competition law.¹⁶ It is this agency which conducts investigations into suspected competition violations (proprio motu or at the behest of the injured party), issues rulings, assesses penalties, monitors the market and studies prevailing conditions in the search for price irregularities. It also advises the government on the sale of state-owned enterprises, and on the overall soundness of the competition environment.¹⁷ Given its pivotal role, the establishment of an efficient agency is imperative if competition law is to be introduced, as it is the enforcement policy that will determine the practical impact of the legislation.

To do all of this, a competition agency must enjoy (i) a transparent, independent and impartial administrative structure; (ii) qualified staff; here the difficulty does not concern those who will preside over the agency, rather it is the economists, lawyers and others who will be engaged in the daily activities of the agency, given that a properly functioning agency would require a substantial number of these professionals; and (iii) adequate resources to attract qualified staff and to ward off corruption.¹⁸ The above represents some of the prerequisites for the establishment of a competition agency.

If one turns to analyse the prevailing conditions in emerging economies, one recognises the difficulty of the task at hand, even if one assumes that adequate finance can be made available. Establishing an independent, impartial and transparent body entrusted with the administration of competition law will be difficult for several reasons, including the novelty of the institution. Moreover, the staff of an agency can exceed hundred members would neither be well trained nor acquainted with complicated regulations and with the legal and economical issues pertaining to competition law.¹⁹

Enforcement issues represent the main difficulty in introducing competition law. Available enforcement capabilities must dictate the substantive approach of the law. It is counterproductive to introduce a sophisticated piece of legislation that is difficult or impossible to implement by the existing competition agency.²⁰ Establishing an efficient enforcement agency capable of implementing sophisticated competition legislation can only be seen as a long-term objective. Those who overlook how long it has taken Western regulatory agencies to reach their present level of sophistication tend to have unrealistically high expectations of nascent agencies in emerging economies.²¹

It has been cogently argued that emerging economies, which have no real experience of competition regulation, and all sorts of difficulties in obtaining accurate data and records, should start off

with per se rules rather than complex rule of reason analysis. Only when the competition agency has acquired the necessary expertise should they consider converting to a rule of reason regulatory approach.²² Modest regulatory capabilities favour the simple approach to competition if serious market-wide problems are to be deterred and remedied by the competent agencies.²³

Lack of expertise

Economic analysis forms an integral part of any competition legislation. Competition laws are about the way in which markets work. Drafting and implementing such legislation mainly requires the involvement of economists and lawyers. Only lawyers who have had training in the field of competition will do: “Any lawyer involved in competition law should acquire basic understanding of how markets work and of pricing theory; the competition lawyer of the future will need to possess a hybridized skill combining elements of both law and economics.”²⁴

This type of lawyer is rare in most emerging economies, whose educational programmes and professional practices tend to dissociate law and economics. The absence of this special breed of lawyers makes it all the more necessary to formulate competition legislation which can initially be managed relying on local talent. This need not result in less effective legislation.

There is also, of course, the problem of the judges in emerging economies who often lack the necessary training to enforce sophisticated laws that require economic analysis. This makes it all the more important for the competition legislation not to have courts decide fine points of economic analysis such as the adopting of a rule of reason approach would entail. It should be kept as simple and as straightforward as possible.²⁵ Hence, the preference for a per se approach, whose rules might suit the current state of the development of the judiciary, as the courts are trained to apply rules sanctioning specific actions.

The above issues facing policy makers in emerging economies illustrate the difficulties involved in introducing competition laws. Some of these issues are self-contradictory and difficult to implement for the following reasons:

1. Modelling competition legislation along the lines of that adopted by a state’s future trading partners (who may have a highly sophisticated approach) conflicts with the need for simplicity (i.e. a per se regulatory approach) which seems essential, in the light of the lack of expertise of competition agencies.

Advanced competition laws might not suit the needs of emerging economies: “it would be unwise to presume that the law and policy appropriate to an already established and fully functioning market economy are also suited to an economy still in transition.”²⁶ This view is based on the substantial difference in economic conditions prevailing in both emerging economies and advanced market economies.

Adopting a competition law on the lines of future trading partners assumes, wrongly, that trading partners must have similar competition laws. This is difficult to reconcile with the fact that firms belonging to countries with diverse competition philosophies are constantly trading in the international market. The diversity between competition laws of major trading nations has not affected the flow of trade between them. Germany and the US, for instance, have a long-standing trade relationship despite widely differing competition regulations. The point that should be made here is that between major trading nations, there exist a lowest common

denominator of protection against anti-competitive practices. It is this minimum which emerging economies should endeavour to establish.

2. Formulating a simple per se law contradicts the need for establishing rules that sanction monopolistic practices. As explained above, market structures in emerging economies suggest that monopolies (and oligopolies) are the most urgent concerns for any competition legislation. Monopolistic practices cannot by their very nature be subjected to per se rules; they require a complex analysis of market structure, review of individual practices, and cost-benefit analysis.
3. Formulating legislation along the same lines adopted by future trading partners contradicts the need for a law which maintains as well as creates competition. Advanced competition laws do not aim to create competition; they merely promote it
4. Formulating a law along the same lines adopted by a trading partner assumes that one has a single major trading partner; this assumption runs counter to the trend of trade globalisation.²⁷

Legislation must generally take into account a country's economic, historical, political and social conditions. Competition legislation is no exception.²⁸ The "trading partners" argument overlooks this legislative axiom.²⁹

The case of Egypt

Recent national and international developments are supporting the case of introducing a competition law in Egypt as a necessary step for a competition policy. At the national level, when the state had the right to use direct price control and allocate resources through administrative intervention, it managed to restrain monopoly power when necessary and hence competition policy was not required.

Unlike most emerging economies which adopted competition legislation in the wave the early 1990s,³⁰ Egypt's is still in the making. Egypt has never had a comprehensive competition legislation, although various provisions in different legislation address basic anti-competitive behavior.³¹ One does not argue that the reason behind the delay in implementing competition policy in Egypt was due to the adherence of policy makers to the theoretical claims against it which we discussed above. Rather, it was the heavy state intervention in the economy, through the state owned enterprises (SOEs) and its control of economic activities. With the presence of financial repression,³² price controls and subsidies, import bans and quotas, exchange rate control, the Egyptian government was a source of monopoly power. In this environment one cannot expect that a government, any government, would adopt a competition policy to discipline its activities. Moreover, competition was seen as a social burden and a political liability, as it may lead to the ultimate exit of uncompetitive firms and hence the possibility of increasing unemployment.

However, after its adoption for decades in Egypt, the state-led-inward looking strategy failed to achieve its targets. Towards the end of the 1980s, the economy suffered from several structural weaknesses and distortions. Such distortions did not appear suddenly in the economy, they were present for a long period but masked by the remarkable increase in external resources and capital inflows. These resources enabled the government to expand its expenditure, financed investment programmes and funded rising imports. With the sudden and steep shortage of external resources in 1986, it became harder to cover these distortions. At this stage a critical need for stabilisation measures and adjustment efforts became apparent.

Thus a comprehensive Economic Reform and Structural Adjustment Programme (ERSAP) was adopted in 1991. This reform programme has been supported by a stand-by arrangement from the IMF and

a structural adjustment loan from the World Bank, in addition to the bilateral debt forgiveness/debt service relief of the Paris Club. The primary objective of ERSAP is summarised by the IMF (1991) as: "to create, over the medium term, a decentralized market based, outward-oriented economy where private sector activity will be encouraged by a free, competitive, and stable environment with autonomy from government intervention."³³

Indeed the private sector, through privatisation, and other means, has been gaining ground in Egypt. It has become responsible for 66% of total investment and 72% of the GDP. Meanwhile the regulatory framework did not improve in a way to cope with the requirements of the new market conditions where private enterprises are replacing public ones in their domination of the production and distribution of most of the goods and services. Allegations of anticompetitive practices are numerous, especially in retail distribution, cement, steel and food products. Recently, these allegations reached other sectors, such as audio-visual products and health services, with heavy involvement of the media in the subject calling for government corrective intervention to protect public interest.

Moreover, there are growing cases, both in value and number, of mergers and acquisitions which are not effectively monitored or investigated from the perspective of their implications on market structure, the state of fair competition or the possible abuse of market dominance

At the international level, attempts to promote and coordinate national competition policies that involve LDCs can be traced back to 1979,³⁴ when the UNCTAD circulated a draft law as model for consideration by these countries. The United Nations, in 1980, approved a document entitled "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" sponsored by the UNCTAD.³⁵ In addition to these multilateral efforts, few bilateral agreements have been reached between the European Commission (EC) and developed countries: EFTA countries, in the early 1970s; as well as economies in transition, such as Hungary and Poland in 1991 and more recently with developing Mediterranean countries, Tunisia and Morocco (1995). Egypt has also signed an association agreement with the EU few months ago.

The EC considers competition as "the best stimulant of economic activity" and recognises competition policy as "an essential means for satisfying the essential needs for satisfying the individual and collective needs".³⁶ These ideals have been reflected in the declared policies of the EC within Europe and outside it. The proposed Euro-Mediterranean Agreement (EMA) requires the adoption of particular competition rules of the EU as far as they affect trade between the EU and its partner countries.

These competition rules deals with collusive behaviour, abuse of dominant position and competition distorting state-aid.³⁷ This has been the case, in the already signed EMAs, of Tunisia and Morocco,³⁸ and it is very likely to be the case with Egypt as well. If we assume that Egypt's EMA will follow, the Tunisian and the Moroccan models, on "Competition and Other Economic Provisions"³⁹, Egypt will implement, within five years, the rules of the Treaty of Rome.⁴⁰

During these five years, GATT rules regarding state aid will be applied and Egypt will be treated as a disadvantaged region, according to the Treaty of Rome, article 92 (3)(a), which means that state aid can be applied within its boundaries during this period. Liberalisation of government procurement is not required, which may be an advantage to Egypt. And there is a provision for protecting intellectual, commercial and industrial property rights which may not be necessarily an advantage to it.⁴¹

At face value, there may not be a significant disparity between the competition rules, as stated in the European partnership agreements and those stated in the draft of the Egyptian competition law, apart from the issue of exemptions and exceptions, e.g. export associations and the allowance for the government to fix the prices of essential goods. However, it is not sensible to assume that Egypt could or

should duplicate the stringent and extensive system of competition enforcement currently in place in Europe. Moreover, the articles of the EMA on competition policy are too general which may cause some trouble in the process of dispute resolution.

Some economists see the solution of the likely disputes, and the answer to the need for harmonisation of national competition policies, in the establishment and gradual empowerment of an international antitrust enforcement agency within the World Trade Organisation.⁴² This suggestion is optimistic, one economist even, rightly, describes its prospects as the same as those of establishing "an effective international standing army".⁴³

Within Europe itself there remains a tension between traditional national outlook in European countries concerned with their sovereignties and the commission's frequent intervention. This tension increases when the commission attempts to extend the scope of competition policy or constrain the conduct of national governments, especially when the actions of the commission are not supported by rigorous analysis.⁴⁴ Likewise, one anticipates similar tensions, obviously from the Egyptian side, if the Association Council,⁴⁵ that oversees the association agreement between Egypt and Europe, emulates the conduct of the European Commission in this respect.

Dealing with multinational companies is another concern that pushes Egypt to pursue competition policy, for two reasons: first, it has been considered as a prerequisite of entry into the developing host countries by some multinationals, second, it is required by the developing countries to counter the national impact of international mergers and acquisitions undertaken by multinationals.

In the context of the international environment, there is a serious concern in Egypt with the operations and behaviour of international cartels. Increasing liberalisation of trade increased the incentive for firms to participate in cartels in a way that was described as "worldwide cartels are looming as a major enforcement concern...It's almost as if private arrangements are replacing governmentally imposed market barriers".⁴⁶ International cartels are engaged in price fixing, division of market at the international level, establishing price ceilings, or floors, for new entrants and provide mechanisms for the incumbent firms to prevent market entry. It is estimated that in the year 1997 alone developing countries imported more than \$81 billion of goods from suppliers that were involved in price-fixing conspiracy in the 1990s. Levenstein and Suslow (2001) have shown that in particular international private cartels cases, such as Bromine, Citric Acid and Graphite Electrodes, developing countries were over charged for their imports by a range from 20% to 45% during the last decade. In order to effectively deal with such private cartels, there is a need for international coordination which is not going to be possible for Egypt to benefit from without having its own national competition policy.

Thus, in Egypt, as in many other LDCs undertaking economic reform, the market is gradually replacing the state that remained, for a very long time, the major producer and distributor. But it has been realised that markets can be manipulated, to the extent that few economic agents can acquire economic power in a way that would distort competition and impair efficiency. In addition there are many international factors contributing to the urgent need of a competition law. However, The issuance of a competition law, has been facing some resistance but this time is not coming from the state but from the private sector that has various concerns regarding this law such as:⁴⁷

1. Fear of government intervention in a new form under the notion of protection of competition.
2. Possible abuse of the law by particular firms that may use it, unjustifiably, to charge competitors with unfair trade practices.

3. The law will not cover but the registered firms, leaving informal activities and smuggling intact.
4. Those who will be responsible for implementing the law may not have sufficient knowledge of the idiosyncrasy and peculiarity of particular segments of the market.
5. Just implementation of the law may be confronted by corruption and profiteering.

While some of these concerns may be justified, the absence of an adequate regulatory framework would make the manipulation of the market more likely, and hence would result in greater welfare losses compared with the status quo. The protection of competition necessitates the establishment of an adequate and a competent regulatory framework with an aim to promote economic efficiency, ensure fair competition and prevent any exploitation of consumers, through the deterrence and prohibition of anti-competitive practices.

Towards an Egyptian competition policy

Effective competition policy involves the restructuring of economic environment in Egypt in a way that restricts the exercise of market power by firms, promotes the allocation of resources in accordance with most efficient utilisation and enhances efficiency, in static and dynamic terms. This requires, inter alia, effective enforcement of competition law and the establishment of an independent competition authority that functions proactively against anti-competitive practices.

The Competition Law

Until now, Egypt has not enacted a competition law,⁴⁸ but there is a draft available under discussion:⁴⁹

The scope of the Law

The law applies to all persons and entities engaged in financial and economic activities including trade, industry and services. However, Article 3 of the law explicitly states that “strategic entities” will not be subject to the law. It defines these entities by stating that they are entities owned or operated by the state having its purpose as providing water, gas, electricity and petroleum and other entities established by a Presidential Decree.

While intellectual property rights and the non-commercial activities of syndicates are not subject to the law, entities established for the purpose of exportation or encouraging exports of goods and services are not subject to the law provided that the entry and exit to these entities is voluntary. The latter exemption can be deemed as unconventional and it seems that some debate is needed in terms of its appropriateness and its wording. Exemptions are of utmost importance in any competition law as they are uncompetitive practices that the law leaves unsanctioned in search for an overriding benefit. However, they must be carefully drafted otherwise they might frustrate the purpose of the law.

Anticompetitive practices

The draft law sets out in Article 4 absolute prohibitions in respect of four forms of agreements that it deems anticompetitive per se, they are: the decrease, increase or control in the price of the purchase or sale of goods and services; restrictions on the production, distribution or marketing of goods and services; market sharing; and arrangements in the tendering process. It is worth noting that Article 6 of the draft law stipulates that arrangements set out in Article 4 are prohibited if one of the entities involved therein enjoys a dominant position in the relevant market as per Article 7.

If the objective of per se rules is to avoid any investigations in respect of the market power of those undertaking anticompetitive activities and provide the regulator with a clear (as far as feasible) rules that can be implemented with relative ease then the above mentioned approach is questionable.

The draft law provides for relative prohibitions in Article 5, these arrangements must be undertaken in respect of a relevant market as per Article 7 and must have as its object the restrictions of competition or jeopardizing the interest of the consumers.

The law then dedicates 4 Articles to set out the parameters of defining dominance and the relevant market. In so doing the law provides definitions that are not dissimilar to those found in advanced market economies. The challenge here is whether the newly established regulator would be capable of implementing such rules.

Mergers

The draft law dedicates a chapter on this issue. The rules apply in respect of mergers and acquisitions that are made by entities having a capital or turnover of 50 million Egyptian pounds. Article 19 stipulates that mergers are prohibited if it will have anticompetitive effects, these were defined as: enabling the merged entity to unilaterally set the price of the goods or services; affecting the entry or exit to or from the market; and facilitating the undertaking of prohibited activities as set out in the law. The 50 million pounds figure needs to be considered with a view of ascertaining its appropriateness.

An interesting point here is that Article 21 stipulates that the completion of the merger procedures cannot take place without a written approval from the competition commission. Mergers and acquisitions procedures will be null and void without such approval.

Sanctions

The draft law stipulates that sanctions apply in respect of all prohibited activities that have an effect in Egypt even if committed abroad. Applying the "effects doctrine" in Egypt might complicate the task of the regulatory body or the courts.

The sanctions are imprisonment and fines not less than 50 thousand pounds and not exceeding 300 thousand pounds and a compensation not exceeding 10% of the wrongdoer's activities in the preceding financial year. Non-adherence to the orders of the competition commission results in sanctions, both in the form of imprisonment and fines.

A point worth noting here is that Article 41 grants the commission the power to settle with the wrongdoer. Settlement is set out in a fashion similar to that of the Tax Authority, hence payment of special

finances can be accepted by the Commission and the effect of such a settlement would be to for any court case to cease and be dropped.

Whether the draft law has benefited from the 'advantage of starting late' is a debatable matter. It can be seen as benefiting from such a late start, as it benefits from the experience of other countries with competition laws and their successive amendments. The draft law deals with both structure, market share, and conduct, specific practices designed for, or may have, the effect of reducing competition, with emphasis on the latter. Thus, the draft law follows recent recommendations in the field. However, the draft law is not clear on the issue of divestiture and privatisation process and includes too broad exemptions. On the other hand, the draft law exempts, subject to the recommendation of the competition commission and the approval of the concerned minister, cooperation agreements for R&D, agreements that contribute to the improvement of the production and distribution of products. De Minimis agreements can also be exempted from this law.

Finally, price fixing for essential products, is allowed for the government, after consulting the Competition Commission. While we do not disagree with the importance of exemptions granted for R&D activities, under careful supervision to prevent their use as a guise to undertake collusive activities, one does not grasp the pretence to exempt De Minimis agreements, which may be repeated and accumulated to form a serious case of anticompetitive practice. Further, one should tie government action to fix the prices of essential goods with the exceptional cases of wars, natural disasters.etc.

The Competition Commission

The establishment of an impartial and independent Competition Commission has been viewed as a best watchdog of fair competition.⁵⁰ The main features of an effective Competition Commission were specified as: "Independent, insulated from political interference,.. transparent,.. subject to checks and balances,.."⁵¹

The draft law⁵² has a provision for the establishment of Competition Commission and specifies its structure, staff requirements and authority. It also outlines the rights and proceedings of the Competition Commission to apply the law, including penalties and legal sanctions. But, the role of the Competition Commission appears, in the draft, as reactive rather than proactive.

It might be the case that in the early years of its practice, the commission may indulge in the implementation of a policy towards competition rather than competition policy. By that we mean that there may not be an anti-competitive practice but still the commission will have a proactive role of the commission to strengthen the opening of the market. However, the danger of this approach is that the commission may stretch its mandate beyond its capacity. The experience of other countries⁵³ suggest that a more focused orientation may be more appropriate for the sake of legal conviction and transparency.

Concluding Remarks:

Competition policy, effectively designed and enforced, is an integral part of reform policy and cannot be substituted for other policies such as trade policy that serves different objectives. However, we emphasize that much more than unfettered competition, using Stiglitz (1995) words, is required to get the market in Egypt work in an effective manner. The viability of competition requires other measures such as, the awareness of the public, disclosure of information, enforceability of contracts, implementation of bankruptcy laws, and equally, if not more important, the commitment of the government itself and its agents to competition and refraining from creating artificial barriers.

It is worth mentioning that competition policy may have adverse effects. In some cases competition policy can be used to hinder competition, lower prices of one efficient firm can be viewed by a rival firm as predatory pricing and hence press charges against it. Competition policy may also limit cooperative efforts in the field of R&D, and if the law exempts them they can be used as a façade for anticompetitive practices.⁵⁴ Competition policy may put Egyptian firms at a disadvantage when dealing with foreign firms based in countries with relatively lenient competition policy. Moreover, the enforcement of competition law is a costly exercise, This leads us to ask the following question: Is the Egyptian legal system ready and equipped for dealing with and enforcing of a sophisticated law such as the competition law?

However, this paper has shown that recent national and international developments are supporting the case of introducing a competition law in Egypt as a necessary, but not a sufficient, step for an Egyptian competition policy. At the national level, when the state had the right to use direct price control and allocate resources through administrative intervention, it managed to restrain monopoly power when necessary and hence competition policy was not required. Today, with the growing role of the private sector, there are allegations of anti-competitive practices, which are worthy of investigation, there are actual cases, and proposals of, mergers and acquisitions which require analysis of their impact on the market structure and fair competition, and hence their approval or disapproval.

At the international level, the advanced countries have been requiring the formal inclusion of competition policy in the WTO agreements claiming the benefits of 'fair play' and 'level playing fields'. However, there are many reasons for developing countries to reject this proposal, e.g. unfamiliarity with the details of such a highly technical issue as the competition policy, concern with the application of cross-sanctions⁵⁵ and the view that there is no need to add new agreements before the assessment of the impact of the 'old' ones that established the WTO.

Dealing with multinational companies is another concern that pushes developing countries to pursue competition policy, for two reasons: first, it has been considered as a prerequisite of entry into the developing host countries by some multinationals, second, it is required by the developing countries to counter the national impact of international mergers and acquisitions undertaken by the multinationals.

Moreover, there is a very serious concern with the operations and behaviour of international cartels. Increasing liberalisation of trade increased the incentive for firms to participate in private cartels which are looming as a major enforcement and regulatory concern for competition agencies. International cartels are engaged in price fixing, division of market at the international level, establishing price ceilings, or floors, for new entrants and provide mechanisms for the incumbent firms to prevent market entry. They are considered the most stark challenge of national competition agencies, as the agreement between the members of the such cartels is an international one, there is no single national agency capable of dealing with it, which necessitates international cooperation in this field.

NOTES

- 1 The paper is prepared for “The Global Forum on Competition” organised by the OECD in Paris, 14-15 February 2002. The paper is based on a longer version by the same author and Bahaa Ali El Dean, published in The September 2001 issue of International Business Law Journal.
- 2 Associate Professor in Economics, Faculty of Economics and Political Science, Cairo University and Senior Advisor to the Egyptian Minister of Foreign Trade. The views expressed in the paper are strictly those of the authors and should not be attributed to the institutions that they are affiliated with. (moic@idsc.net.eg)
- 3 The suitability of US law for the needs of Eastern European countries was advocated by several commentators, including an argument to the effect that “[c]ertainly, the enactment of legislation similar to the U.S antitrust laws, along with the creation of the appropriate enforcement agencies, will help reduce distortions in both producers’ and consumers’ prices and thereby increase the gains from the use of the markets.”, Feinberg, R. and Meurs, M. (1994), p. 798.
- 4 Mastalir, R. (1993) p. 62. He further states that “[t]he desire to develop trade and investment relations with the United States made the U.S antitrust laws a logical model for Eastern European states.”; a similar argument can be found in, Langenfeld, J. and Blitzer, M. (1991), pp. 353–4. The former Chairman of the Federal Trade Commission in the United States has said that US-style competition laws in emerging markets will “enhance the competitiveness of American industry by helping to open new markets and investment opportunities.”, Justice Department (1991), FTC Receive Funds to Support Competition Counselling Aid, International Trade Report, p. 871, as cited by Waller, S. (1994), p. 571.
- 5 Estrin, S. and Cave, M. (1993), p. 5.
- 6 Whish, R. (1993), p. 19, notes that these two terms “have tended to become part of the competition law generally.” Rule of reason is used here to mean an approach requiring a case-by-case analysis to reach the conclusion whether as to certain practices should be prohibited or not (using EC terminology as to whether a prohibition should be exempted or not).
- 7 Langenfeld, J. and Blitzer, M. (1991), pp. 368–370.
- 8 Given the existence of a long standing competition tradition, experienced competition agencies and courts, the rule of reason prevails. Hence, the law only provides general guidelines, leaving the details of implementation to the competition agencies and the courts. Indeed, an instrument like the Sherman Act has survived for over a century now, for its general wording allowed the courts to draw different conclusions from it over the years.
- 9 Fingleton, F., Fox, E., Neven, D. and Seabright, P. (1996), p. 63.
- 10 Whish, R. (1993), p. 16.
- 11 Horizontal agreements are those agreements that can negatively affect competition undertaken by firms at the same level of the market, e.g. producers.
- 12 Vertical agreements are those agreements that can affect competition undertaken by firms at different levels of the market, e.g. a producer and a distributor.
- 13 This argument was referred to in Stevens, D. (1995), p. 955.
- 14 Kovacic, W. (1992), p. 264.

- 15 American Bar Association, Section of Antitrust law; Comments on Draft Bulgarian Antitrust Law, Fox, E. (1991), p. 246.
- 16 Different countries use different terms when referring to the body entrusted with the implementation of competition law. Competition commission and antimonopoly office are frequently used.
- 17 Some authors argue that competition advocacy is one of the most important tasks of a competition agency, see: Rodriguez, A. and Coate, M. (1997), pp. 367–401.
- 18 One commentator notes that in the Ukraine Antimonopoly Committee, a professional employee receives a monthly wage of \$20–40, while the chairman gets roughly \$100 along with the use of a apartment and a car. He then estimates that the entire operation of the antimonopoly office would be around \$200,000 a year, compared this with the US enforcement authorities budget which are in excess of \$140 million. Kovacic, W. (1996), p. 442.
- 19 For details regarding the obstacles facing emerging economies in creating an enforcement agency, see: Kovacic, W. (1997), pp. 417–429. The author addresses several areas including: frail academic infrastructure, weak professional associations and consumer groups, inadequate limits on administrative discretion, strong political opposition to economic reform, unrealistic expectations of competition policy and weak access to antitrust-relevant business data. All these aspects affect the performance of a competition agency and hence the substantive law it should be entrusted to enforce.
- 20 It has been argued that “[e]stablishing unenforceable or erratically applied laws increases uncertainty and risk for private entrepreneurs operating in what already are precarious and unpredictable conditions. For the public, empty legal reforms feed cynicism about the rule of law and the value of economic and political decentralization.”, Ibid., p. 404.
- 21 Ibid., p. 408.
- 22 Langenfeld, J. and Blitzer, M. (1991), p. 366.
- 23 Fingleton, J., et al. (1996), p. 64.
- 24 Whish, R. (1993), p. 46.
- 25 Coate, M., Bustamante, R and Rodriguez, A. (1992), p. 54.
- 26 Fingleton, J., et al. (1996), p. 15.
- 27 For details see: Waverman, Comanor and Goto, (1997).
- 28 Kovacic, W. (1996), , p. 466.
- 29 Several commentators confirm the suitability of advanced law to emerging economies; it was argued “we believe that the United States model is very well suited for Eastern and Central Europe. It offers a more explicit weighing of anti-competitive effects and efficiencies that will encourage growth and benefits consumers in the long run.”, Langenfeld, J. and Blitzer, M. (1991), p. 353. This view can reflect either a different understanding of the needs of emerging economies or that some commentators are promoting trade interests and other commercial influences via their proposals for competition policy in emerging economies.
- 30 Introduction of competition laws was at its peak during this period. Countries include: Poland (1990), Hungary (1990), Russia (1991), Czech Republic (1991), Tunisia (1991), Venezuela (1991), Peru (1991), Belarus (1992), Mexico (1992), Bulgaria (1992), Lithuania (1992), Jamaica (1993), Slovenia (1993),

Estonia (1993), Mongolia (1993), Ivory Coast (1993), Zambia (1994), Slovak Republic (1994), Turkey (1994) and Brazil (1994).

31 The current Penal Code of 1937 stipulates in Article 345 that raising or lowering prices to achieve illegal benefits is prohibited. Moreover, law 241 for 1959 stipulates that it is prohibited for any distributor to have a monopoly in distributing any domestically produced good that is subject to an import ban. There are other examples in different laws. Finally, the Egyptian commercial law prohibits acts that constitute unfair competition, e.g. negative advertising. On the whole, the implementation of these scattered provisions are lax, given that there was no competitive environment in the light of the economic policy adopted by the state.

32 On the causes and impact of state intervention in the financial sector in Egypt, see Mohieldin (1995).

33 See IMF (1991), p. 8.

34 Lloyd and Sampson (1995), p. 686, mention that earlier multilateral efforts can be traced back to the 1940s as the draft Havana Charter for an International Trade Organisation devoted a chapter for discussing restrictive business practices.

35 Gray and Davis (1993), p. 428.

36 McGowan (1994), p. 188.

37 Hoekman and Djankov (1996), p. 13.

38 Same rules were inserted in the agreements between the EU and, respectively, Hungary, Poland, the Czech Republic and Slovak Republic, signed in December 1991. See Rouam (1993), p. 31.

39 Under article 36 of the Moroccan, and the Tunisian, Agreement, it is written, " 1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Morocco [Tunisia]:

- (a) all agreements between undertakings,..., which have as their object or effect the prevention, restriction, or distortion of competition;
- (b) abuse,..., of dominant position,..
- (c) any state aid which distorts or threatens to distort competition.. "

Commission of the European Communities (1995), p. 17.

40 For a discussion of the implications of these rules, see McGowan (1994), pp. 180-187 and Fishwick (1993), pp. 92-136 and Nemitz (1996), pp. 4-10.

41 Ibid., p. 19.

42 See the review of Owen (1995), of F. Scherer's book on "Competition Policies for an Integrated World".

43 *ibid.*

44 McGowan, *op. cit.*, p. 188.

45 On the role of the Association Council, see Inama (1996), pp. 10-11.

- 46 From a speech by the Former assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, cited in Levenstein and Suslow (2001), p. 7.
- 47 For further discussion see Mohieldin (1996), pp. 12-13.
- 48 This does not deny, however, that there are articles in the "Criminal Law", that deal with monopoly and anticompetitive behaviour, e.g. articles 345 and 346. There was even a case that dates back to 5/3/1910, on a monopolistic behaviour of an owner of four mills. .
- 49 This draft is prepared by the Ministry of Economy and Foreign Trade
- 50 Khemani (1994), p. 3.
- 51 Ibid., p. 4.
- 52 The draft law provided by the Alexandria Business Association (1995) puts more emphasis on the structure and role of the Competition Commission and the authority of its chairman than the draft law discussed in this paper.
- 53 See for example Neven and Ungem-Sternberg (1996), pp. 44-46.
- 54.. Stiglitz, op. cit., pp. 132-4.
- 55 This implies that the violation in one area may be penalised in an another by the complaining countries, if the complaint is held to be justified, see Singh, Sing and Weisse (2001), p. 22.

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Unclassified

CCNM/GF/COMP/WD(2002)28



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP/WD(2002)28
Unclassified

OECD Global Forum on Competition

CONTRIBUTION FROM INDONESIA

-- Session I --

This note is submitted by Mr. Didik RACHBINI (Indonesia) for the Session I of the second meeting of the Global Forum, to be held on 14-15 February 2002.

JT00120648

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**POLITICAL ECONOMY OF BUSINESS
AND COMPETITION ISSUES IN INDONESIA ***

By

Didik J. Rachbini[†]

Old Order Regime

Up to the middle of 1950's, the direction of the Indonesian economy was still not obvious. There was no significant roles of entrepreneurs in the economy. The economic activities were mostly traditional and the income was only about 150 to 200 US dollar per capita per year. The roles of industrialists (recognised as the core of economic growth) were not in those activities. In this time, Indonesia was clearly categorised as a very low income country.

The Indonesian economy was only agricultural basis which was very traditional, without support of modern technology. The agriculture was also very unproductive and dependent on small lands (known as liliptan agriculture). The role of private business was not so essential and there was significant support of modern Industries in the economy. The population in rural area was very dominant, more than two third of the total.

The early businessmen progressing during the Old Order regime were mostly small and medium lev I. They were growing from the bottom and developed their own economic resources and opportunities at the local and national levels. The small and medium businesses were very dominant in almost economic activities with special characteristics of small capital, low profit, traditional management and technology.

Meanwhile, the big businessmen (tycoons), that were closed to the government, mostly involved in import activities, serving the demand of the state on the goods and services. The relatively great tycoon at that time were more directly and closely related to the state with inward looking orientation. Some of them were only rent seekers that received import licenses from the state and gave them to the others (Chinese Indonesian businessmen). They had advantages from the government facilities.

The economic and political situation in 1950's was still coloured by President Soekarno's heroism. He became the great leader with a clamorous social-political nuance. However, more than ten years after independence the economy was not managed prudently at all and was left behind further. It was even turned to an extra burden at the time when the politic was unable to settle its own problem.

The economic activity was only inward oriented in order to fulfil the basic needs of the people at large, mainly for foods, medicines and other durable goods. Even that could not be achieved in full as actually the economy in the country was stagnant within a long period after the independence. The government was only really interested in the politics to cover the weakness of the economic policy and condition. Such political attitude was also abandoning the rational economic policies.

*. Paper to be presented in OECD Global Forum on Competition, OECD (Organisation for Economic Co-operation and Development), Paris 14-15 February 2002.

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The Old Order regime was also glancing at the few tycoon and private business through the political accommodation of which these groups were made as its subordinate. They were also enjoying the chances, opportunities and licenses from the state. This pattern is usually occurred in closed and authoritarian regime in which the state remain as the prime mover of the business, main institution for initiating business activities. The business is only apart of the state and developing because of the wish of the state too.

There was an affirmative policy of government called "Benteng Program", which was then producing at least tens of tycoon closed to the palace. They were enjoying special licenses, mainly for the import activity as required by the state. The tycoon at that time was not apart of market dynamism, they were more like part of the state relations and initiatives which has also strengthened the structure of the state itself. The state was doing business directly and creating many corner of the privilege. The private business in this case just an instrument to implement the needs of the state through the import activities.

Market and competition was not in mind of the leaders and politicians. Large business activities were initiated by the state because the existence of modern business was insignificant. It is irrelevant to discuss the role of competition policy in this period. Firstly, economic system was still very traditional with only small and informal business activities. Secondly, there was no real consciousness among the leaders, politicians and the government apparatus to have policy based on market, competition and open market system. The new state was just learning to lead the people and the economic policy was not adequate to move the country forward.

The Benteng Program has been able to create several groups of great tycoon. Among others: Markam, Pardede, Hasyim Ning, Sudarpo, Bakri, etc. But after the fall of the Old Order, those groups of tycoon have also been encountering problem with the sustainability of their own corporations. As a result, only a few of the tycoon under Benteng Program could survive during the New Order regime.

This is understood because the market has never been developed. The tycoons were much dependent on the state and mostly not competitive, entrepreneurial and professional. Businessmen under Benteng Program existed because their special relations with the state.

Only few of them survived in the end of the Old Order (for instant Bakri, Hasjim Ning, and Soedarpo). That was because they have managed the business with their maximum efforts and carried the business on their own ability and entrepreneurship. But most of them apparently failed to carry on their businesses as their past rise was due to the state facilities and licenses granted by the government.

The existing groups of tycoon was actually too small to become a locomotive of industries and economic growth. Their existence was not more than a form of a corporatism in which the tycoon in a limited number were developing due to the state facilities. The economy could not be developed further because of absence of entrepreneurial efforts. The modern business had not enough foundation to grow continuously.

The following two decades after independence (August 17, 1945), the people were suffering from a stagnant economic growth and massive poverty. It was due to a trend of illness in economic policy which was not taken into account by the government (politic as the commander). The economy collapsed and hence became the main problem of the most people in the country. Ultimately the authority of the Old Order regime stepped down with so many problems, which were then inherited to the subsequent government.

The apprehensive condition of the economic like this during the middle of 1960's has made the political condition get rotten even faster. That has consequently accelerated the event of social and political

riots. Economic policy had never been managed properly by the government because all the government attention and priority was only politics.

There was nor proper policy to solve problems in basic needs of the people, like food production, trade, housing development, and health care. The government had fallen into deep mismanagement in the economic policy. Therefore, issue of the business competition was irrelevant to be discussed further because the government had those crucial and basic problems in the economy.

In the beginning middle 1960's, the national production level has been declining drastically. Food, nutrition, and health became critical which then influence politics and popularity of the government under President Soekarno.

The physical infrastructure was not maintained and damaged from time to time. There was not enough economic pillar, which could improve the condition of the people at large, especially their economic and social life. The people had not enough resources to fulfil their economic need and activities, which then followed by extremely low income and high level of unemployment.

The extremely high inflation rate (hyperinflation) was hitting the entire country, which was then plunged the purchasing power of the people. Nearly all the people (80-90 percent) was falling down under the poverty line with people in the rural areas living under a condition near to the level of subsistence.

To sum up, the Old Order Government (1945 to 1965) was the beginning of state formation. Many difficulties in the economy made the President Soekarno's regime could not survive anymore. The government could never manage economic policy appropriately and business activity was remain stagnant. Poverty incidence was massive, social and economic life dropped.

There was no issue of business competition policy during the Old Order because most attention of the government was only survival of the state. The competition policy became a very luxury issue. Modern business activities were not growing at all.

New Order: The Economy Without Justice

Tiring of the politic during the Old Order, the new regime (the New Order Government) was directing its policy to the economic development. The economic team (educated in the United State) was starting the new economic policy, focusing on inflation control, macro economic stabilisation, and food policy. The team was directing its ideology toward capitalistic model of the west.

The government started to have closed co-operation with the Western Countries and the World Bank to support its macro-economic policy. To support it economic policy, the government developed economic confidence.

Investment law was created two years after the riots to give certainty and to attract foreign investment. The new loan under the World Bank was signed to fix the country that had just collapsed.

The new regime apparently has taken over the authority under a disorder political condition. It was including uncertainty of the people's economy as the prices were rocketing rapidly. This could not be affordable by the purchasing power of the people at large. This also was not an easy heritage and a very difficult situation to start new economic policy and to increase social and economic condition of the people. But the government had already chosen its main policy focusing on economic development.

Until several years at the time when the authority has been transferred, the economic issue remain as a complicated problem. But with such economic policies, gradually it could be settled as the economic development become the main attention of the new regime.

More appropriate economic policy was implemented to decrease inflation. Food development was also high priority under that policy. The government was also helped by the IGGI countries to import food. Other economic activities and investments were initiated through such policy

The government modified the development orientation drastically from politics to economy. Formerly politics was set as "the commander", then the economy was as "the commander" (locomotive). It was learned from the experience during the Old Order government. The New Order regime does not have any other choices, except to modify extremely the focus of economic development by an extraordinary means or policies in order to push the economic growth. This is needed to repair of the almost total damage of the economic system, and to transform traditional economy towards the modern economy and further process of industrialisation.

From the momentum point of view at that time, the focus of attention in the economic development (regardless politics) by the extreme methods was a quite drastic choice. The focus was only economic development that directly influenced collective consciousness of the people. The jargon of economic sentence was dominant, such as "the growth will drop to the bottom" and "there is no any even distribution without any growth as the distributed item is only poverty". That was ultimately became the part of the expression in the society. The government has won the momentum at that moment to develop economy, industry and business.

However, after fifteen years of New Order government the policy on economic equity was not adequate. It was ultimately creating problem after the growth has actually been achieved. The economy suffered with unequal economic distribution.

From the modification of focus of government policy from politics to this economy, the growth has really been realised by utilising the fund source from foreign loan, foreign investment, the natural resources, and oil export. Widjojo Nitisastro and team have driven the economy into a new direction. The result was a significant improvement and high economic performance with growth up to 8 percent during the period of 1967 to 1981.

This level of growth once has been slow during the middle of 1980's at the time when the decline of the oil price. However, during the 1990's, the level of growth has been increasing again up to 8 percent, before finally hit by the wave of Thailand's flu at the end of 1997. The crisis has changed all faces of political economy in Indonesia.

The United States has been a good partner of the New Order regime, despite of its previous antagonism with the Old Order regime. This country has an important role in IGGI, which has been the pillar of the sustainable fund of the New Order regime. Finally the US government, through the IMF, continued to obstruct the efforts of the New Order regime to settle its own problem independently. For instance, policy on CBS system was not able to be implemented. Finally, the authority of Soeharto was toppled down too by the reason of economy and currency problem.

Actually, the economic development with the basis of oil resources and foreign loan was managed in Bappenas, chaired by Prof. Widjojo Nitisastro. Other than the target of such level of economic growth, the level of the people's income could be improved significantly from only 150 US dollars per capita to 1,000 US dollars per capita. This outcome was recognised as the consequence of such high level of economic growth.

But the New Order regime failed to create an even distribution adequately. It has caused a social jealousy to spread everywhere when the process of the economic transformation took place. Even before the fall down of the New Order regime, the riots in various territories occurred one after another. The impact of such situation was the capital flight in the areas that could not be accommodated by the public institutions. There is a serious conflict between large-modern capital with small-traditional activities in the regions and urban areas. Such condition is recognised as the main issues in the middle and the end of New Order regime.

Collision of development took place between the people and the government as well as the House of Representatives. There was not standing policy at the side of the people that it has even further burdened the condition of the people, due to the widely opened gap of income. The non-government organisations such as LBH (legal advocacy) are loyally standing beside the people and are accompanying them as long as the unfairness is hitting them.

This is the lesson in which economic growth could not sustain without equity and justice in the economy. There was no legal support to make business fair because the government played dominant role and out of proportion in managing the economic policy. Policy toward equity was not appropriately implemented, and even left behind. Facilities, protection and many corner of privileges were given to the interest groups, closed to the president. The economy was growing fast, but the distribution was not because of unfair business practices applied by the government itself.

Authoritarian government established such corporatism in which only few tycoons got special relationship with the government, the office of the president. Parliament was only a "rubber stamp" at this time because almost political power was in hand of the president. Structure, behaviour and attitude in politics was shaping the unfair business during this New Order era.

From Growth to Bankruptcy

Following the economic growth for three decades, the private business was then dominated by the conglomerates, large tycoon. This is an indication of the absence of the policy on economic equity and usual monopoly practices created by the government and interests group. They have a direct and closed relation to the presidential palace. The presidential institution is badly influenced by those interest groups. Facilities, special policies, and rent seeking become usual practice under this special relationship which make business activity is unfair.

The economy is growing with the specific role of large conglomeration, followed by a strong etatism, corporatism and cronyism. It has caused the tycoon to be divided into two parts, i.e. the palace tycoon and the tycoon beyond the palace. However, the core of that conglomeration was nothing but the first group has been enjoying the facility of the development projects by the support of foreign loan and other special government facilities since 1980's.

After the foreign loan was no longer reliable to push the economic growth in the middle of 1980's, the way out of the business expansion was sought by increasing the role of private business independently through series of economic deregulation. An open monetary system was designed to provide the incentive of the capital flow from overseas. Policy toward deregulation was started by opening monetary system in which government role was dominant (85 percent). This is then recognised as wrong policy in the real business activities was full of unfair and monopoly practices.

Therefore, deregulation in the middle of 1980's was misleading. Such incentive like the different of interest rate level created more attractive in getting the foreign loan. This attitude was uncontrollable which make Indonesian international reserve not enough to support the burden of foreign loan. At the same time, the Indonesian economic machine was wasteful and inefficient as indicated by high level of ICOR

(Incremental Capital Output Ratio). Almost private sectors were falling under category of highly leverage firms, big loan but small in their own capital.

As a consequence, the inflation rate was apparently high and this condition was highly appropriate as a basis for designing high interest rate level in domestic banks. The banks could not survive because the burden of such high interest rate level. The CAR of banks was inadequate.

The foreign loan during the New Order regime obviously was intoxicating as the proceeds of the capital injection into various development projects. The results were identified to be significant, although it was inefficient and extremely wasteful. The New Order regime (with the slogan of foreign loan as a supplement) ultimately was trapped too by this uncontrollable transaction. Its role in the national budget has been destructing the routine expenditure (specifically for the improvement of salary of the civil servants) as well as the development expenditure. The budget collapsed and missed its function to support the economic growth.

Such attitude in government policy together with its wastefulness and corruption finally was imitated by the private business. Private foreign loan increased sharply in the beginning of 1990's, few year before crisis (1997). Hence, there was flowing the short term capital into without any thought of the risks a macro level. The impact of its repayment after the maturity of the loans was not considered carefully.

The private business individually was enjoying it due to the striking spread of the interest rate level locally and overseas. This spread was the reason for the Indonesian big private business (conglomerate) in triggering the desire and addiction for loans from the foreign financial institutions. Such addiction was still continued because the government secured guarantee by the application of a managed float exchange. The government and Bank Indonesia (Central Bank) managed value of rupiah by a depreciation control up to the limits which are satisfactory to the private business (3– to 5 percent per annum).

However, at the same time, the government (in this case the monetary authority) also failed to monitor the cumulative volume of such foreign loan transaction in order to identify its impact on the foreign currency demand. The maturity of the loans was happened in 1997 and the currency could not be controlled anymore. At the same time the international reserve of Indonesia was not adequate to compensate the progress of the private loans. In short term, this situation created high deposit interest and panic.

Indonesian economy was unable to bear the burden of those loans collectively. Hence, the foreign investors ultimately ran away earlier, mainly from the capital market. The stock exchange index has also been sinking down only to the figure of 700 to 300. Finally the Indonesian economy, which was experiencing a bubble process since early 1990's, has really been like an exploding balloon and deflating when the exchange rate was sunken even down to 17 thousand rupiahs per dollar.

Competition Lawas New Culture[‡]

A debate related with promotion of fair business competition has been started almost fifteen years ago. The Indonesian economy was growing fast during last two decades, but the business practice was very unfair. The state involved too much in decision making process as well as in the business level. It mostly created worse climate which make certain business elite around the president could take much more opportunity in a large number of businesses.

‡. Adopted from my first previous paper (presented in this forum)

Almost two decades ago, the need of competition law was already recognised and debated in the public. Kwik Kian Gie from the opposition party of Partai Demokrasi Indonesia (now Minister of Development Planning) and other analysts (including author) had discussed publicly about the need to have competition law. In fact, Kwik Kian Gie was as a member of parliament at that time that proposed a draft of Anti Monopoly Law. But the ruling party did not accepted this draft because of group's interest reason.

The political power was actually not in hand of the parliament but concentrated in the president office. Soeharto was strong, the regime was authoritarian and controlling all political parties. This initiatives was not made possible because it was contradictory with the interests of the regime and its crony.

At that time, the economy was growing fast, but the business practice was unfair. But the state and authoritarian government had practised collusion widely in almost sectors with business actors, implemented crony capitalism and nepotism. The government had clearly promoted unfair business practices because there was no clear cut between the government roles and business roles. Public domain and private domain were mixed and interchanged each other that make business practices were full of collusion.

Therefore, there was no public room to promote anti monopoly and competition law since the government itself was the significant barrier for such initiatives. It was also difficult drafting the law since the regime was too strong and seemed not to support such legal draft.

The Anti Monopoly and Competition Law was possible to be made after the regime collapse (1998). The new government led by the President Habibie was pushed by the public to reform social, political and economic system. He then started to draft this law in the beginning of 1999 which finally approved by the parliament in September 1999.

From this short history about Anti Monopoly and Competition Law, it is clear that fair competition practice is a new thing in Indonesia. There is no significant experiences in this field and the authority is learning by doing. The institution is being built to develop its capacity and instrument. Therefore, the most important target for the government is to socialise this law that bring new culture of more fairness in business competition.

Unclassified

CCNM/GF/COMP/WD(2002)23



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

07-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP/WD(2002)23
Unclassified

OECD Global Forum on Competition

CONTRIBUTION FROM BRAZIL

-- Session I --

This note is submitted by Brazil under Session I of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120514

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DISCUSSION PAPER

THE ROLE OF COMPETITION POLICY IN ECONOMIC GROWTH AND DEVELOPMENT*

Paulo de Tarso Ramos Ribeiro¹
Luís Fernando R. Vasconcellos²

Introduction

The main purpose of this work is to preliminarily assess the interactions between antitrust enforcement institutional development and the process of economic growth. In a general sense we wish to discuss the extension to which the effectiveness of competition policy affects economic performance in less developed countries, i.e, what features of competition policy could enhance or otherwise harm economic growth after the market-oriented structural reforms that took place in many of these nations.

The exact meaning of the term competition policy is subject to much controversy. Whether it should embody strictly antitrust policies or if it also should include other related policies such as industrial policy is not yet established. Since we want to discuss the role of antitrust enforcement in the development of a market economy, the use of a strict notion of competition policy concerning only antitrust measures could yield more accurate results.

However, that does not mean other factors should be completely disregarded. Some of them are very important to explain the interactions between competition policy, understood in its broad sense, and economic growth. For example the elimination of governmental restrictions and the excess of public regulations that burden the private sector could significantly enhance economic growth and to separate such effect from the others is convenient to understand the actual effect of antitrust policies solely.

Another distinction that must be clear at this point is the one between the concepts of economic growth and development. Economic growth is usually understood in its traditional theoretical sense, as the rate of growth of GDP (or *per capita* GDP), which is simply a measure of changes of nations' wealth. On the other hand, economic development stands for a broader notion of economic performance that takes account of several qualitative matters such as product diversification, political stability, distribution of income and wealth, among others.

The relationship between antitrust policies and economic growth sets out two preliminary issues that must be addressed. The first one is the question of what would be the best indicator of antitrust institutional development. In other words, how should we measure the effectiveness of competition policy? This is an important issue that certainly has worried several antitrust enforcement agencies.

* This discussion paper represents preliminary work, circulated to encourage discussion. Citation and use of such a paper should take account of its provisional character. Comments are welcome.

This paper does not represent the Brazilian government position in any of the subjects here mentioned.

Useful comments by Jorge O. Pires are gratefully acknowledged.

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Second, there are theoretical and empirical issues regarding the interactions between growth and antitrust policy, such as the causality between these two variables, the selection of relevant variables through which policies could change the path of economic growth, among others.

The second section of this paper addresses the theoretical issues mentioned above. It provides a brief non-technical survey of the recent developments in the literature of economic growth. The third section is dedicated to empirical issues and the measurement of competition policy effectiveness in developing countries. Finally, the fourth section concludes the work and suggests issues for future discussions.

Theoretical Framework

In a general sense the relationship between competition policy and economic growth involves a discussion of the efficiency of the antitrust policy itself. As mentioned above our objective is not to provide an exhaustive theoretical discussion of the competition-economic growth interaction under the perfect competition hypothesis, which is a matter well established in the economic literature, i.e., the absence of competition or the existence of market failures and imperfect competition generates price distortions that result in welfare losses.

Several authors have studied the channels through which antitrust measures impact economic growth. Rey (1997) identifies two classes of models dealing with this relationship. The first one stresses the role of competition (again in a broad sense) in R&D and in the production process of innovations. The second one focuses on the impact of competition on the firm's behavior and productivity.

The first approach is derived from Schumpeterian models according to which a profit-maximizing monopolist could enhance the innovation creation for two main reasons: i) a monopolistic firm can fund the innovation effort more easily than competitive ones due to credit market imperfections and ii) a monopolistic firm has larger incentives to produce innovation because the present value of its future net profits is usually higher than in competitive markets.

Whereas formal theoretical treatment of the former argument pointed out above is not yet established in the literature, the latter one has received several important contributions since Schumpeter, and has been embodied in the modern endogenous growth theory, notably the literature on R&D races. According to these models competition could jeopardize economic growth and development since the monopoly rents drive the innovation production by the firms. There is also another feature that should not be ignored: the potential risk of imitation that could reduce innovative efforts. This point has been stressed by several economists among which Grossman and Helpman (1991).

However, other studies have sought to demonstrate that the R&D race models result is sensitive to the kind of innovation considered. If the new product or process makes the old one completely useless ("leap-frogging" innovation), innovation could follow another optimal path, because the incumbent has no incentives to adopt the new technology and the entrants might not be strong enough to overlap the entry barriers imposed by the incumbent.

Alternatively if a gradual innovative process is considered, competition could accelerate the innovation process thus enhancing economic growth and development. This occurs because firms that finish an innovational race with technologically equivalent products or processes could easily fall into a price war that might decrease their profitability, leading them to raise the amount of investment in R&D in order to get out this situation.

The other class of models concerns the role of competition in the firm's behavior. Such models do not treat firms only as if they were just a profit-maximizing plant. Instead, this approach takes into

account the relationship between the profit-maximizing interests of the firm owner and the private concerns of their managers. In this sense, competition plays a disciplinary role that approximates the two interests inducing firms to behave in a better way.

Rey provides a brief discussion of each effect through which intensive competition improves the firm behavior. The majority of these arguments are related to some sort of managerial behavior and a detailed explanation of each one is outside the scope of this work.

Nevertheless some studies pointed out by the author stress that competition may increase managerial efforts, make comparisons between firms and managers possible, and that “entrepreneurial firms” could exert a positive pressure on “managerial firms” enhancing the behavior of their managers. Another important argument is related to the financial pressures brought by competition: the threat of bankruptcy could also induce better management.

Empirical Evidence

In order to preserve the analytical structure developed in the theoretical survey, we could divide the empirical issues into two different questions associated with the broad class of models mentioned above.

The first matter concerns the empirical work on interactions between the innovation-growth process and competition. The second one is directly related to the behavioral approach as it concerns the competition-productivity relationship. At this point it must be clear that although the latter issue does not strictly emphasize the growth-competition interaction it does provide insights on the discussion since productivity enhancements increase GDP.

On the first matter there are several studies that lead to disputing results mainly due to different statistical methodologies and the use of distinct sets of data. The main difficulty concerning the empirical evaluation of this relationship regards the isolation, from other effects, of the impact of competition on the production of innovation. Among these factors there are externalities brought by the innovation process, notably the decrease of production costs.

Other source of empirical difficulty lies on the characteristics of concentrated industries. Scale economies for example could produce an ambiguous net effect from the balance between static welfare losses resulted from concentration and the dynamic positive effects obtained by the innovation. In other words, it is necessary to correctly assess the magnitude of these effects in order to understand the relationship between competition and innovation and consequently economic growth.

Another feature of concentrated industries is the negative feedback from the interactions between innovation and competition. That is, there is a positive effect of competition on innovations and a simultaneous negative feedback since innovations (mainly the schumpeterian ones) tend to generate more market power due to patent laws among other reasons. This usually generates statistical difficulties to separate the total net effect into the two opposite ones.

Regarding empirical problems concerning the behavioral approach and the impact of competition on productivity there is some evidence³ showing that more intensive competition leads to more efficient technical choices.

3 See Caves and Barton (1990) and Green and Mayes (1991) for cross-section studies, Haskel (1990) and Nickel et al (1992) for panel data approaches.

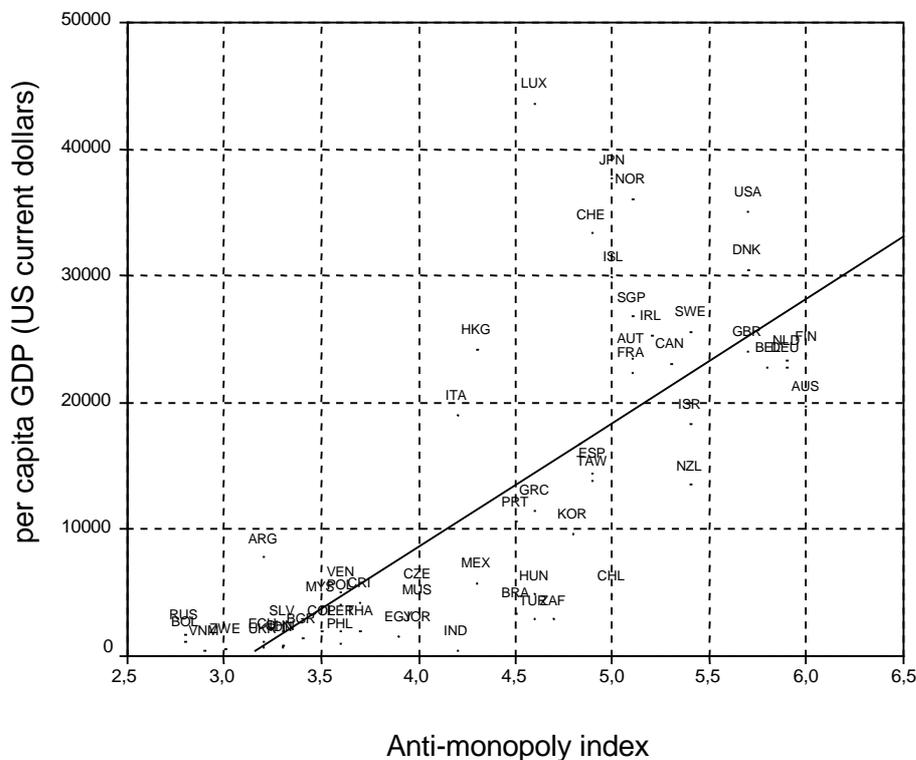
Empirical works have sought to demonstrate whether or not competition measured in different ways affects productivity and innovation. However, they only corroborate the general conclusions posted by the theoretical models. The specifics, namely, the channels through which competition influences the variables that translate into economic growth, have not yet been empirically established in a satisfactory way.

Besides that discussion we are still left with the task of identifying the relevant variables to be taken into account in order to represent adequately the degree of institutional development. The great challenge is to construct and compile a set of variables that might capture the effectiveness of competition policies.

Dutz and Hayri (1999) have taken a first step in that direction. They construct and compile some relevant variables two of which specifically seek to measure antitrust policy effectiveness. They are based on direct responses from business executives of large foreign and domestic companies to the questions: i) "Does antitrust and anti-monopoly policy in your country effectively promote competition?"; ii) "Do antitrust laws prevent unfair competition in your country?" The Institute for Management Development (IMD) conceived both variables. The answer to the first question takes the form of a grade from 1 to 7. High grades indicate strong agreement and low grades disagreement. Similar methodology is adopted in the second question with the exception that grades range from 1 to 10.

The first scatter plot below (Figure 1) shows the combination of *per capita* GDP and the index calculated as the average of the provided answers to the first question. Figure 2 shows an analog combination using the answers to the second question.

Figure 1 – Per capita GDP and Anti-monopoly index (2000)
Does antitrust and anti-monopoly policy in your country effectively promote competition?

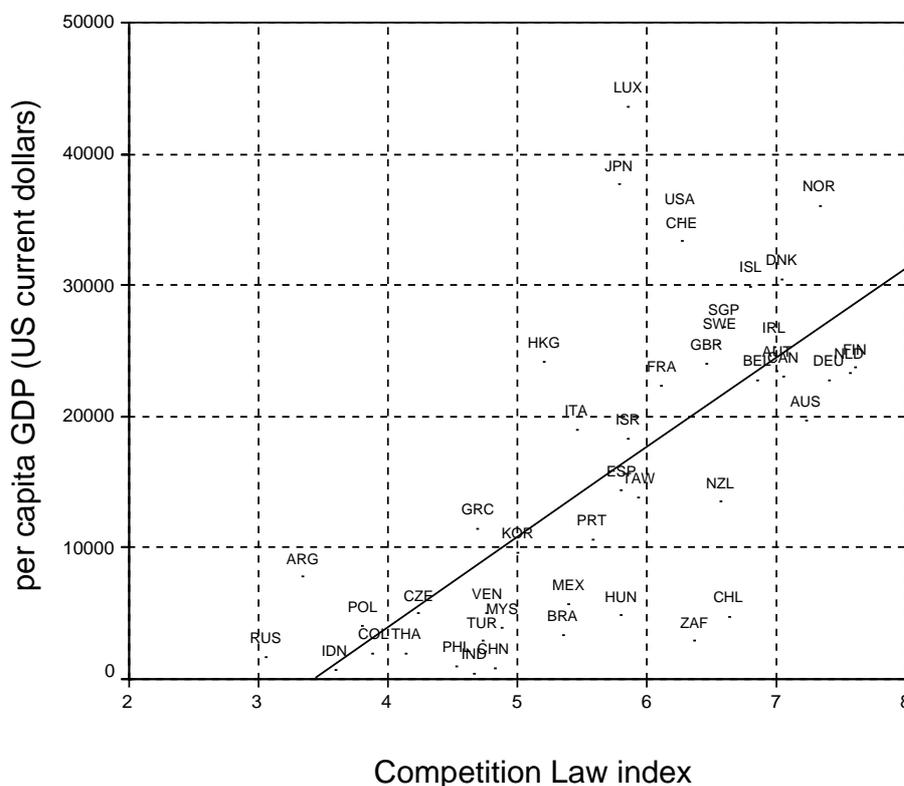


Source: Global Competition Report - 2001 "World Economic Forum. 2001

Both scatter plots show that the intensity of this relation differs according to the income range. For low-income countries (up to ten thousand dollars) both diagrams show a less strong interaction between the perceived antitrust policy effectiveness and *per capita* income level suggesting difficulties in the earlier stages of development.

Informational asymmetries in the credit and product markets, moral hazard concerns and regulatory deficiencies prevail in less developed nations. That is especially true for Latin American economies such as Brazil, Chile and Mexico. These countries have relatively good antitrust indicators but still have not entirely overcome the challenges of development. Although they have gone through important structural reforms much still have to be done. In other words there are several important variables that also lead to better economic performance and could be addressed by public policy such as the level of educational attainment, income distribution, budgetary transparency and other institutional improvements that should take place simultaneously to the development of antitrust enforcement.

Figure 2 – Per Capita GDP and Competition Law Index
Do antitrust laws prevent unfair competition in your country?



Source: "The World Competitiveness Yearbook" Institute for Management Development. 2001

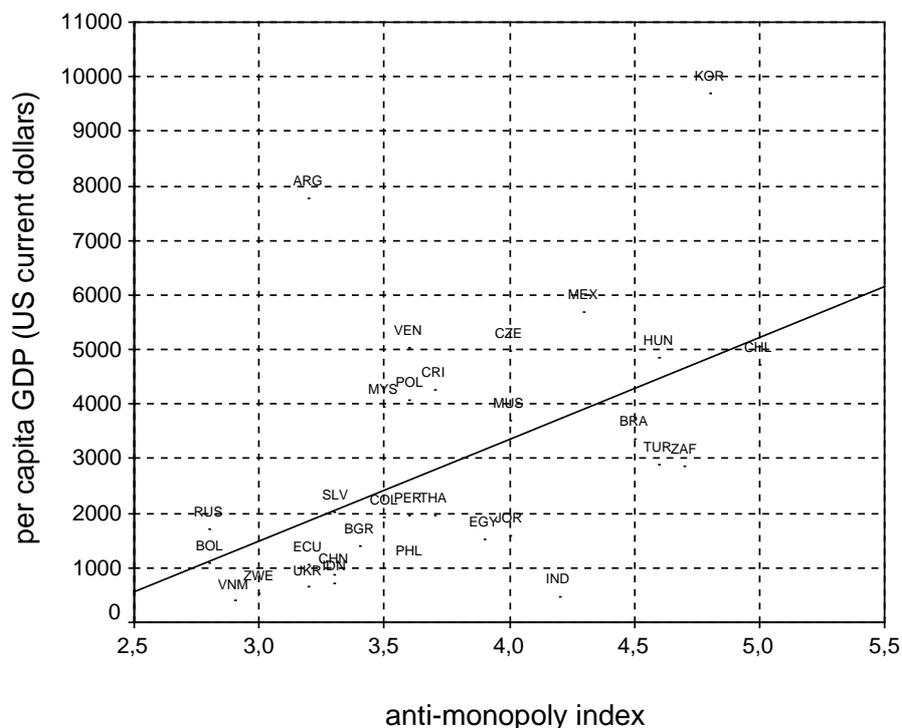
From the provided diagrams it is also possible to identify two other groups of countries: i) the middle-income economies that could be divided into two subgroups, the first one consisting mostly of European nations whose incomes lie between ten and twenty thousand dollars (Portugal, Spain and Greece, for example), and the second consisting mostly of richer European economies (United Kingdom, France, Sweden among others); finally ii) the high-income countries group (Japan, USA, Switzerland among others).

Both groups have similar antitrust performance but the middle-income countries present a clearer positive relationship between perceived antitrust enforcement and *per capita* income than the richest one. That could have happened among other factors due to reforms implemented in the first middle-income identified subgroup in order to join the European Union.

From the description provided in this section we cannot categorically establish a clear and undisputed causal *nexus* from antitrust policy perceived effectiveness to economic growth and development. In other words, it is not clear if antitrust policies lead to high national income or the other way around.

Probably at the earlier stages of development the other institutional concerns referred to above weaken this interaction but it still continues to be positive as can be inferred from Figure 3 (which provides the same kind of diagram for low-income countries only).

Figure 3 – Per capita GDP and Anti-monopoly index (2000) Low-income countries



The provided scatter plots show that the middle-income nations have the strongest positive relationship among the considered income groups, since these economies have implemented the necessary structural reforms that guarantee the effectiveness of antitrust enforcement.

Conclusion

The theoretical models briefly described in this paper deliver several results some of which contradict each other. Investment in R&D for example could be enhanced or jeopardised by competition depending on the theoretical model considered or the kind of innovation taken into account (leap-frogging or gradualist). However, if a gradualist innovation is considered what is a reasonable description of recent technological developments, the R&D race models show that competition leads to an investment increase.

Despite the controversial theoretical and empirical results, the recent experiences of transitional economies, such as the Eastern European countries suggest a positive relationship between competition and economic growth, highlighting the role of antitrust enforcement as a disciplinary device. In this sense the behavioural approach, that deals with the effect of increased competition on the behaviour of firms provide useful insights to the present discussion.

The institutional framework present in these economies is systematically weak, as many market imperfections prevail. These features certainly make the behavioral assumption more insightful than the traditional profit-maximizing firm approach. In this environment competition tends to have a greater impact on the economy than on the industrialized economies, since it provides clear incentive rules, avoids resource unproductive use, reduces costs and increases profits.

The less strong relation between antitrust policies perceived effectiveness and the level of *per capita* GDP might be the result of deficient institutional frameworks in general and not because antitrust policy does not play an important role in developing countries' economic performance.

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Competition Policy and Economic Growth and Development

B. Evidence from OECD Economies

COMPETITION POLICY AND ECONOMIC GROWTH AND DEVELOPMENT

SECRETARIAT NOTE

This session of the OECD Global Forum on Competition will explore the relationship between competition policy and economic growth and development from a number of perspectives. Contributions by Forum participants are being placed on OLIS and on the Forum website. Annex A contains the introduction and summary of the paper that will be presented by the OECD Economics Department (as well as a citation to the Economics Department's website). Annex B contains short summaries of a non-exhaustive list of the most relevant published papers, some of which were prepared by individuals who will be speakers at the Forum. This note briefly pulls together themes identified in the various papers and identifies questions participants may want to discuss. It focuses on the general issues that will be the focus of the first half of the session; these and related issues will be examined from other perspectives during the second half.

In general, most of the written materials (a) address the effects of competition on economic growth, (b) identify barriers to competition in developing economies and policies to remove them, and (c) discuss the characteristics of competition law, policy, and institutions and how those might be tailored to suit particular economies' needs. The Economics Department paper does not have a direct "development" focus, but the implications of its conclusions on the economy-wide impact of competitive markets in OECD economies merit discussion by competition officials from all economies. The papers on the impact of hard core cartels on developing countries provides another perspective on these issues -- one that is of particular importance for competition officials everywhere and for economies that do not have laws banning such conduct.

The effects of competition on economic growth have been measured empirically in the various background papers. They use econometrics and data from a number of countries to address questions such as:

- How much does competition help economic growth (and other measures of economies)?
- How much does competition *policy* help economic growth?
- More specifically, what has been the effect of cartels on developing countries?
- How does more competition domestically affect international competitiveness?
- How does greater openness to international trade interact with domestic pro-competition policy? Are they substitutes or complements? Does the effect depend on the size of country?

Country submissions and some background papers identify specific types of barriers to competition and policies that may help overcome the barriers or otherwise promote competition. A common theme is access to essential inputs. In both developed and developing countries, infrastructure sectors contain "essential facilities." But in developing economies, there may be no or limited access to a much wider range of essential inputs. The inputs may be monopolised, or they may not be supplied at all. Examples include transport services, financial services, and various kinds of professional business services. Moreover, developing economies may lack marketplaces, such as for land. The cause of under-supply of

these inputs may often be government rules, such as licensing systems, or government inaction, such as failure to provide a sufficient legal basis for one or another form of business conduct.

- What characteristics that are common in developing economies serve as barriers to effective competition?
- When does the existence of these characteristics imply regarding the benefits, costs, and means of introducing greater competition?
- What policies can be used to overcome problems caused by the partial or complete lack of essential inputs in potentially competitive markets? What role can competition law play?
- What policies can be used to deal with transitional economic problems without unduly delaying or preventing the evolution of an economy in which society as a whole benefits from market-based efficiencies?

The nature of competition law, policy and institutions is a major topic of many of the country submissions and of some background papers. One theme is how often action or inaction by government institutions or by government officials acting on their own is a problem in transition and developing economies. Another theme is how the heterogeneity of countries is reflected in heterogeneity of “appropriate design” and priorities of competition law, policy and institutions.

- The competition laws of many transition economies apply to unauthorised actions or inaction by government entities and officials that have actual or likely anticompetitive effects. Such provisions are very rare in developing economies that have competition laws. Would this approach be useful in developing economies?
- If an economy is uncertain about the likely effects of enacting a competition law dealing with monopolies, mergers, cartels, what are the pros and cons of alternative ways to "start small?" Alternatives might include (a) creating a small office with only "competition advocacy" authority, (b) starting with a ban on "unfair trade practices," such as fraud, misleading advertising, and appropriating intellectual property, (c) including some rules with a basis in market power considerations, such as bans on tie-ins by utilities, in the ban on unfair trade practices, and (d) banning only hard core cartels, abuse of dominance, or anticompetitive mergers?
- Do objectives and priorities differ systematically between developed and developing countries?
- Outside of the context of the EU and its accession process, to what extent have economies with new competition laws adopted most or all of the provision's of another jurisdiction's competition law? What advantages have been realised? What risks must be avoided?
- Are there characteristics, such as the degree of independence of competition institutions from other parts of government, that are fundamental to an effective competition law and policy?

Annex A: Summary of OECD Economics Department paper

(paper available on Economics Department website:

<http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-280-8-no-2-21578-0,FF.html>)

Annex B: Summaries of a non-exhaustive set of papers related to competition policy and development

Carlin, Wendy, Steven Fries, Mark E. Schaffer and Paul Seabright (2001), “Competition and enterprise performance in transition economies: Evidence from a cross-country survey,” CEPR discussion paper no. 2840, June.

Using an EBRD/World Bank survey of 3,300 firms in 25 countries, the authors found that the degree of competition perceived by enterprise managers has an important and positive effect on the growth of sales and of labour productivity, and also had a positive effect on firms’ decisions to develop and improve their products. The two measures of perceived competition were the perceived number of significant competitors to the firm and the extent to which it believed demand for its product would fall if it raised (real) prices by 10%. Greater market power reduced cost-reducing restructuring.

Cooke, Sarah and David Elliott (1999) “Competition policy issues for APEC economies,” mimeo, July.

This paper addresses four key concerns which may be raised by developing countries considering adopting a competition law or strengthening competition in their economies. These concerns are whether such a law is necessary given trade liberalisation, whether it would damage international competitiveness or lessen the ability to attract foreign direct investment, and whether increased competition would raise unemployment or cause other social problems. The authors summarise the evidence as suggesting that trade liberalisation and competition law are not effective substitutes, that competition law on balance will aid competitiveness, (based on very thin empirical evidence), that competition law will not deter FDI and indeed may help promote it, and that though the short-term social costs of transition to a more competitive economy can be highly significant, they will be insignificant when compared to the long-term costs to the economy of not being competitive.

Dutz, Mark A. and Aydin Hayri (2001), “Does Effective Antitrust Policy Spur Economic Growth?” *mimeo*, October.

The authors tested whether economy-wide antitrust policy or measures of concentration are significantly and robustly correlated with higher rates of per capita economic growth using data from over one hundred countries during 1986-1995. Effectiveness of antitrust policy was measured by answers to a large survey of top executives in 53 countries posing questions about anti-monopoly policy in their country, as well as a measure of mobility of the largest firms. They found that measures of effective antitrust policy are positively associated with residual growth (that is, growth that is not explained by variables for which there is some consensus that they lead to higher economic growth—for convergence (poorer countries have more scope for “catching up”), trade openness, human capital, and investment in physical capital). Additional sensitivity analysis indicates that effective antitrust policy has an impact distinct from that of trade openness.

Dutz, Mark A., Janos Ordover, and Robert D. Willig (2000), “Entrepreneurship, Access Policy and Economic Development: Lessons from Industrial Organisation,” *European Economic Review*, 44(4/6), May, pp.739-747.

The authors provide analysis arguing that two sets of policies—preserving rewards from productive innovation and fostering opportunities for grass-roots entrepreneurship—are key to further economic development through the promotion of entrepreneurship. They argue that mandatory access should be extended beyond the usual essential facilities of public utilities to other elements of the business infrastructure. These elements are local, such as production sites and industrial real estate markets, financial services, transport and logistical services, professional business services, appropriately skilled labour, and institutional infrastructure such as financial regulation and customs enforcement. These effects can be large: One study the paper cited estimated that the increase in competition in trucking in Mexico, due to regulatory reform, provided benefits to representative user companies of 10% of operating margin.

Dutz, Mark A. and Maria Vagliasindi (2000), “Competition policy implementation in transition economies: An empirical assessment,” *European Economic Review*, 44, pp. 762-772.

The authors assess the effectiveness of competition policy implementation in 18 transition economies. The effectiveness is measured in three categories: enforcement, competition advocacy and institutional effectiveness. The first category examines enforcement separately against enterprises and state executive bodies, and also measures the extent to which fines were actually levied. The authors find a “robust positive relationship between effective competition policy implementation and expansion of more efficient private firms.”

Evenett, Simon J., Margaret C. Levenstein, and Valerie Y. Suslow (2001), “International Cartel Enforcement: Lessons from the 1990s” *World Economy: Special Global Trade Policy Issue* 24, pp. 1221-1245.

The authors argue that international cartels are more stable than national ones. They provide three arguments: national borders are a “straightforward way to divide up international markets,” monitoring is facilitated by import and export trade data [but there are difficulties relating “markets” to categories of trade data], and that the retaliatory threat is greater in international cartels (the punishment for cheating on the cartel in one market can be meted out in all markets supplied by the cartel), thus strengthening the cartel’s effect in any single market. Applying a “law and economics” analysis, they suggest that penalties, including corporate leniency programmes, can reduce incentives to cartelize. They note, however, that international cartels are more difficult to prosecute successfully than cartels where evidence of the conspiracy exists domestically, and thus argue for stronger co-operation, larger penalties, and complementary vigilance in other areas of competition policy.

Hoekman, Bernard, Hiau Looi Kee, Marcelo Olarreaga. “Markups, Entry Regulation and Trade: Does Country Size Matter?” CEPR Discussion Paper No. 2853, July 2001.

The authors develop and test a simple model that shows that the effects of barriers to import competition and domestic entry on industry price-cost mark-ups depend on country size. The effect of the former are predicted to be stronger in small countries, and of the latter in large countries. After estimating mark-ups for manufacturing sectors in 41 developed and developing countries, the model is tested and the hypotheses cannot be rejected by the data.

Khemani, R. Shyam and Mark A. Dutz (1995), “The Instruments of Competition Policy and their Relevance for Economic Development,” in Claudio Frischtak (ed.) *Regulatory Policies and Reform in Industrializing Countries*.

The authors argue that an “appropriately designed competition law” should be part of governments’ central framework policies. Such a law, with competition advocacy, complements other government policies aimed at promoting competition by inhibiting increasing barriers to entry into

markets. They note that the common feature of the 23 East Asian countries, which had above-average growth rates as compared with other regions, was a high degree of inter-firm rivalry and exposure to domestic or international competitors. They say that, "Broad questions relating to the likelihood of truly effective administration and enforcement of competition law lie at the center of an active debate regarding the desirability of having such a law in developing and emerging market economies." The concerns raised are that the law might be applied in such a way that the freedom and rewards of markets are taken away, or that the enforcement agency becomes a target of rent-seeking. Long-standing competition regimes suggest certain principles which ought to be reflected in designing the institutional framework for competition policy implementation—independence from political and budgetary interference, publicly accountable, separation of investigation, prosecution and adjudication, built-in system of checks and balances with rights of appeal and transparency, expeditious proceedings and case resolution, and imposition of significant fines, penalties and various remedies. They argue that trade liberalisation is a complement not a substitute to competition policy.

Kovacic, William E. (2002), "Institutional Foundations for economic legal reform in transition economies: the case of competition policy and antitrust enforcement." *forthcoming in Chicago-Kent Law Review*.

The author focuses on competition policy as one part of economic law reform in transition countries. Competition policy has many instruments, including advocacy, education about the merits of market processes, research to support those activities, and antitrust law enforcement. However, countries can follow an intermediate strategy such as phasing in instruments and responsibilities and sharing tasks through regional co-operation.

The paper discusses the dangers of misguided competition law enforcement, but also the rationales for making competition policy central to reform. The dangers include subversion to protect existing patterns of wealth and privilege, discouragement of investment and entrepreneurship, and detraction from other more pressing needs. The rationales include promoting liberalisation, preserving the benefits of privatisation, protecting consumers and government against harmful private restraints on trade, and reducing corruption by removing from public officials the power to provide an illicit economic privilege.

There is growing awareness of significant differences in initial conditions and challenges in transition from Western countries. The initial conditions include substantial resistance to market-oriented reform manifest in competition-suppressing policies at all levels of government, fragile political support for competition agencies, little indigenous expertise in competition law or industrial organisation economics, courts ill suited to adjudicate antitrust disputes, frail transparency safeguards and consequential vulnerability to corruption, and resource and data shortages.

Langhammer, Rolf J. (2000) "Changing Competition Policies in Developing Countries: From Policies Protecting Companies Against Competition to Policies Protecting Competition," *mimeo*, presentation at Workshop on the Institutional Foundation of a Market Economy, World Development Report 2001/2, Berlin, 23-25 February.

The author argues that, since the mid-1980s, the perception of markets in developing countries has fundamentally shifted. The earlier reluctance to apply competition laws in a competition-enhancing way was due to: a) fears that intensified competition would make subsidies and public equity shareholdings obsolete; b) concerns that markets in developing countries were too small to allow for workable competition, and the presumption that losses due to below-scale operation would exceed losses due to monopolisation; c) concerns that control over the tax base through government ownership would be eroded by competition; d) hostility to market economics; e) desire to maintain positive discrimination in favour of

domestically-owned firms. The shift since the mid-1980s has resulted in liberalisation in foreign investment and trade policies and rationalisation of tax policies. These changes engendered more exports, which gave rise to contingent protection measures by industrialised countries. These induced many developing countries to either introduce competition policies or revise the old ones. Thus, differences in competition policies between developing and OECD countries shrink. Despite earlier noting that “it would be misleading to argue that trade liberalisation can fully substitute for competition laws,” the author notes that, for countries with weak administrative capabilities and rudimentary institution building, “enforcing trade liberalisation may still be the most straightforward strategy to help competition to increase.”

Levenstein, Margaret and Valerie Suslow (2001), “Private International Cartels and Their Effects on Developing Countries,” background paper for the World Bank’s World Development Report 2001. version January 9, 2001.

The paper examines the possible effects of recent private international cartels on developing countries by use of five case studies and in estimating the quantitative effect of cartels on developing country incomes. The five case studies are the prosecuted cartels in bromine, citric acid, graphite electrodes, steel tubes, and vitamins. The estimate of cartel effect relies on the following chain of reasoning: It begins with the set of cartels prosecuted by the US or EU in the 1990s where both the members and the markets affected were not limited to one country. Of these, a match between the categories for trade statistics (for goods, *i.e.* excluding services) and the products in which the set of cartels operated was found for 16 products. “Cartel-affected” imports of these products to developing countries was 6.7% of all imports into developing countries. This overstates the cartel effect since the trade data categories are generally broader than the product markets of the cartels, but the lack of trade category “matches” for many prosecuted cartels understates the cartel effect, as does the likelihood that not all cartels are successfully prosecuted. The price effect of the cartels ranges from almost nothing to an estimated increase of fifty percent in the graphite electrodes case.

Maskus, Keith E. and Mohamed Lahouel (2000), “Competition Policy and Intellectual Property Rights in Developing Countries,” *World Economy*, vol. 23, pp. 595-611.

Primarily focused on intellectual property rights and a possible multilateral agreement on competition approaches, one section of this paper explicitly addresses competition policy in developing countries. The authors give examples of interventionist competition policy—weak patent protection, industrial policies aimed at achieving scale economies, industrialisation through protection of state-owned enterprises, subsidies, state aids and procurement policies—and argue that such policy is inherently anti-competitive and counter-productive. They state that, “In many developing countries the public sector is at least as responsible as the private sector for anti-competitive conduct,” and give examples of investment licensing restricting entry and of state trading boards or public enterprises monopolising imports of some products in Tunisia. But they note that developing countries increasingly recognise the longterm net benefits of promoting competition and so are unilaterally strengthening IPR regimes and adopting competition legislation.

World Bank (2002), “Global Economic Prospects and the Developing Countries.”

While generally not focused on competition and development, the report argues for reducing barriers to entry into services and promoting competition in transport, especially liner shipping and air transport. In *Chapter 7 Competition*, the report notes that product market competition increases efficiency and productivity. However, “In developing countries, productivity growth has mostly been attained through technology spillovers from trade, foreign direct investment, licensing, and joint ventures.” [p. 133] It says that a priority for policymakers is to ensure free entry and exit and exposure to international

competition. Government regulation that inhibits entry/exit include factor market regulation (labour regulation, restitution laws in transition countries), budget subsidies or quasi-fiscal support such as soft loans, restrictions on the establishment of new firms, mandatory start-up procedures such as approvals and inspections. One study found that developing countries generally require more procedures to start a new business than industrial countries. The report notes that, "International trade is particularly useful in promoting competitive markets in developing countries, where there are information difficulties, inadequate contract enforcement, and human capital constraints." [p. 143] Further, international trade pressures government to address institutional barriers to competition since these barriers undermine the domestic economy's ability to respond to foreign competition.

WTO (1998) Synthesis paper on the relationship of trade and competition policy to development and economic growth, WT/WGTCP/W/80 18 September.

The paper discusses the relationship of trade and competition policy to development and economic growth. It provides the reasons competition law and policy have been implemented in developing market economies, the interconnections between trade and competition policy in fostering sound economic development, the reservations and/or practical considerations regarding the need for and/or design and application of competition law and policy in developing market economies, and the role of international co-operation in facilitating the implementation of competition policy in developing countries. With respect to the interconnections between trade and competition policy in fostering sound economic development, the paper addresses: (1) the complementarity between trade liberalisation and competition policy in promoting economic efficiency, development and growth; (2) whether open trade and investment policies effectively substitute for competition policy; and (3) whether there are welfare tradeoffs between enforcing competition legislation and attaining "critical mass" for firms to succeed in international markets. On the third main topic, the paper discusses concerns that transition to a competition-based economy may cause social and economic dislocation, whether a competition law needed to be comprehensive, and the priorities for implementing competition law and policy in developing market economies.

UNCTAD (1998) Empirical evidence of the benefits from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development (TD/B/COM.2/EM/10/Rev.1, 25 May)

The paper describes the theory and reviews empirical evidence on the static and dynamic efficiency and consumer welfare benefits of competition, especially that developing from deregulation and liberalisation, mainly with data from developed countries but with some evidence from developing countries. It reviews evidence on the effects of competition on various measures of growth, and of the effect of industrial policy on competition and efficiency. The paper reviews some information on the price effects of control of restrictive business practices and of competition advocacy.

THE CROSS-MARKET EFFECTS OF PRODUCT AND LABOUR MARKET POLICIES

Introduction and summary

OECD countries have pursued product and labour market reforms over the past two decades to increase employment and enhance productive efficiency. For example, countries have adjusted their employment protection and minimum wage legislation, reformed their benefits systems and modified their tax policies with the aim of reducing unemployment and stimulating labour force participation. Moreover, many OECD countries have initiated pro-competitive regulatory reforms of product markets, leading to positive effects on productivity and consumer welfare. However, little attention has been paid to the potential impact of product market regulations on labour market outcomes or of labour market policies and institutions on product market performance.

This chapter reports on recent OECD empirical analysis aimed at shedding some light on the potential long-run cross-market effects of policy reforms in products and labour markets. Focusing on anti-competitive product market regulations in potentially competitive markets (such as legal barriers to entry, price controls, state ownership, administrative burdens and trade and investment barriers), the first section presents quantitative assessments of the impact of regulatory reforms on employment, employment insecurity and earnings inequality. The following section examines the effects of selected labour market policies and institutions on innovation performance and industry structure.

The main message of the chapter is that there are significant cross-market of product market regulations and labour market policies and institutions. This has several policy implications:

- The reduction of barriers to trade and competition in potentially competitive product markets can be a complement to labour market reforms aimed at increasing long-run employment levels of OECD countries.
- At the same time, preliminary evidence suggests that these long-run employment gains do not come at the expense of greater long-run inequality in labour markets or greater insecurity about employment prospects, as proxied by several measures of job turnover and average job tenure. Nevertheless, the impact of regulation on job security appears to differ across different groups of workers and the adjustment costs can be significant for some displaced workers. This points to the need to accompany product market reforms with appropriate labour market policies.
- Depending on the industrial-relations regime, a relaxation of hiring and firing restrictions seems to be either positive or approximately neutral with respect to its effect on innovative activity in individual economic sectors.
- In addition, the potential growth effects of labour market reforms (easing of employment protection, reducing the administrative extension of collective agreements and lowering tax wedges) are likely to be reinforced since they increase specialisation in R & D intensive industries.

competition. Government regulation that inhibits entry/exit include factor market regulation (labour regulation, restitution laws in transition countries), budget subsidies or quasi-fiscal support such as soft loans, restrictions on the establishment of new firms, mandatory start-up procedures such as approvals and inspections. One study found that developing countries generally require more procedures to start a new business than industrial countries. The report notes that, "International trade is particularly useful in promoting competitive markets in developing countries, where there are information difficulties, inadequate contract enforcement, and human capital constraints." [p. 143] Further, international trade pressures government to address institutional barriers to competition since these barriers undermine the domestic economy's ability to respond to foreign competition.

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Unclassified

CCNM/GF/COMP/WD(2002)36

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Mar-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

COMPETITION POLICY AND ECONOMIC DEVELOPMENT

-- Contribution by Fernando Sanchez Ugarte, Chairman of the Federal Competition Commission of Mexico --

This note was submitted by Fernando Sanchez Ugarte, Chairman of the Federal Competition Commission of Mexico, under Session I of the second meeting of the Global Forum on Competition, held on 14-15 February 2002.

JT00122292

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COMPETITION POLICY AND ECONOMIC DEVELOPMENT

Fernando Sánchez Ugarte

Chairman of the Federal Competition Commission of Mexico



Paris, France
February, 2002

COMPETITION AND ECONOMIC DEVELOPMENT



- Competition is an important factor in fostering economic development.
- Economic development comprises:
 - social welfare
 - productivity
 - product innovation
 - competitiveness
 - economic growth
 - income distribution
- Both, economic theory and the empirical evidence support a strong relationship between competition and the above variables.

COMPETITION AND ECONOMIC DEVELOPMENT



➤ Competition is the process of rivalry of firms in the market. It can be analyzed in a static or a dynamic perspective.

➤ Static Perspective

- Competition improves social welfare by bringing market prices closer to the marginal social cost of production.
- Allocative inefficiency arises when the private and social cost of production differ.
- Productive inefficiency arises when production is not carried out at the lowest possible cost.
- Increased competition leads to a once and for all improvement in social welfare.

COMPETITION AND ECONOMIC DEVELOPMENT



➤ Dynamic setting

- Firm dynamics give rise to creative destruction, successful firms gain market share while unsuccessful ones lose market share or disappear.
- Competition leads to a continuous process of efficiency improvement that leads to higher economic growth.

DYNAMIC COMPETITION



- In high-tech markets competition is not static but dynamic
 - ❑ products enjoy transitory monopoly position but are replaced after some time by new and better products
 - ❑ competition is not **in** the market; competition is **for** the market
- Traditional antitrust analysis is not suited to tackle problems of dynamic competition
- Fortunately newly installed competition agencies are hardly called upon to evaluate cases in high-tech markets
 - ❑ they may confine themselves to simpler cases such as merger control and horizontal collusion
 - ❑ there is time for learning by doing

CREATIVE DESTRUCTION



- Competition is a process of creative destruction (Schumpeter)
- Industrial policies and antidumping authorities care about the destructive nature of competition and are often concerned about short-run employment and the survival of national champion industries
- Competition authorities care about the creative nature of competition and tolerate the destruction for the sake of long-term health of the industries
- This may give rise to important controversies

COMPETITION AND ECONOMIC DEVELOPMENT



➤ Empirical evidence suggests a significant relationship between competition and economic development.

➤ This evidence is applicable to specific sectors of production and to cross country studies
(Report by the OECD)

HOW TO ATTAIN COMPETITION?



- Several policies concur:
 - Trade and investment liberalization.
 - Regulatory Reform
 - Privatization.
 - Protection of Property Rights.
 - Institutional Reform
 - Competition Policy

ARGUMENTS AGAINST COMPETITION POLICIES



- Trade liberalization is sufficient to promote competition.
- Welfare losses from reduced competition are insignificant.
- Competition policies are not suited to deal with dynamic competition.
- Competition policies do not take proper account of the destructive nature competition may have.

TRADE LIBERALIZATION AS A SUBSTITUTE



- Trade liberalization is not enough basically for two reasons:
 - ❑ trade liberalization only brings competition for tradeable goods and services
 - most services are non-tradeable
 - tradeability of many goods is limited
 - ❑ competition from abroad is not always so competitive
 - restrictive business practices by multinational corporations
 - international cartels

WELFARE LOSSES FROM REDUCED COMPETITION ARE INSIGNIFICANT



- Arguments
 - early estimates of welfare losses are low (Harberger)
 - where losses are important, as in natural monopolies, regulation not competition policy is the right answer
 - contestability of markets reduces welfare losses
- Counterarguments (Stiglitz)
 - early estimates of welfare losses are incorrect
 - rentseeking behavior
 - raising rivals' costs
 - most markets are not contestable
 - sunk costs
 - strategic entry barriers
 - markets are fairly segmented
 - incomplete information
 - search costs

FOREIGN INVESTMENT AND COMPETITION POLICY



- The implementation of an effective competition policy can be an important factor for enhancing the attractiveness of an economy to foreign investment and for maximizing the benefits of such investment.
 - Increases investor confidence.
 - Creates incentives for more state of the art productive investments.
 - Reduces risk of transferring monopolistic rents and prevents exploitation of consumers.

PRIVATIZATION AND REGULATORY REFORM



- Competition Policy is an essential element to bring about the benefits of privatization and deregulation programmes.
- Without competition policy privatization could replace a public monopoly with a private one.
- If deregulated industries are not subject to the discipline of competition law, could lead to poor performance and abuse of dominant position.
- Greater risk of regulatory capture.

INTELLECTUAL PROPERTY PROTECTION



- The establishment and enforcement of an adequate competition framework that addresses monopoly abuse of intellectual property rights is important to assure the welfare benefits of innovation and intellectual property protection.

INSTITUTIONAL CHANGE



- There is an increasing recognition of the central importance of institutions in the development process.
- The institutional set up that has to be displayed to implement competition policy is an important element in assuring that markets operate efficiently and to the full benefit of the economy.
- Transparent and internationally consistent rules of the game create an adequate environment that induces productive efficiency, investment and innovation.

COMPETITION POLICY AND ECONOMIC DEVELOPMENT



- Much less work has been done about the relation between competition policy and economic development
- The main reasons are:
 - ❑ the strength of competition policy is difficult to measure:
 - existence of a competition authority
 - budget to GDP ratio
 - fines to GDP ratio
 - ❑ other policies interact with competition policy:
 - trade liberalization
 - foreign investment liberalization
 - deregulation
 - privatization
 - ❑ most competition regimes were put into place until the 1990s

COMPETITION AND TECHNICAL EFFICIENCY



- Competition is found to have a curvilinear relationship with technical efficiency within firms (Green and Mayes):
 - ❑ in highly concentrated industries technical efficiency is low
 - ❑ in very atomized industries efficiency is also low
 - ❑ maximum efficiency is reached at industrial concentration ratio's of 40% for the largest 5 firms.

- This underscores the importance of promoting competition and controlling mergers for countries that try to raise the technical efficiency of their industrial base.

EMPIRICAL ANALYSIS OF COMPETITION



- Econometric cross-country study quantifying the effects of privatization, competition and regulation on telecommunications in 30 African and Latin American countries.
 - ❑ Privatization by itself is not necessarily beneficial. However, privatization combined with an independent regulator seems to be correlated with increased connection capacity and payphones per capita.
 - ❑ Competition has a positive influence on telecoms performance:
 - ❑ increased mainline penetration
 - ❑ more payphones
 - ❑ higher connection capacity
 - ❑ lower prices

LACK OF EMPIRICAL STUDIES



- One empirical study by Dutz and Hayri found a positive association between competition policy and economic growth in a sample of over 100 countries.
- There is a need for more empirical work to demonstrate the positive influence of competition policy upon economic performance and development.
- This is important because competition law enforcement is controversial and competition authorities are often under attack from different angles.

COMPETITION AND COMPETITIVENESS



- Michael Porter has conducted studies using a microeconomic and sectorial approach.
- Elements of competitive advantage:
 - Conditions of factors of production.
 - Conditions of domestic demand.
 - Status and interaction of related industries.
 - Degree of rivalry.

COMPETITION AND COMPETITIVENESS IMPLICATIONS FOR GOVERNMENT POLICY



- Governments can influence the share of institutional structure.
- Dynamism leads to competitiveness.
- Geographic concentration of industries.
- Promote education.
- Deregulation and privatization should be a priority
- Mergers and alliance among industry leaders should be prohibited.
- Competition policy should create the institutional framework to enhance competitiveness, not allowing excessive concentration and promoting deregulation. Cooperation among firms in the same cluster should be allowed when it induces improvement and does not eliminate diversity and reduces rivalry.

IMPORTANCE OF COMPETITION POLICY FOR DEVELOPING COUNTRIES



- Summarizing, competition policies have an important role to play for developing and transition economies to:
 - raise the technical efficiency of their industrial base
 - enhance long-run economic growth
 - complement other policies intended to enhance competition in domestic market
 - reduce welfare losses caused by a lack of competition
 - encourage a process of creative destruction enhancing the competitiveness of industries in the long-run to the benefit of the society as a whole.

CONCLUSIONS



- Competition Policy is an important instrument to promote economic development. To attain this:
 - Enhance complementarity with other growth inducing policies.
 - Design competition policy that induces competition.
 - Build up an institutional set up that will assure transparent and consistent application of competition law.
 - Assess the effectiveness of competition policy.

Unclassified

CCNM/GF/COMP/WD(2002)19



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

07-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM MEXICO

-- Session I --

This note is submitted by Mexico as a background material for the Session I of the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120506

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)19
Unclassified

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**COMPETITION, COMPETITION POLICY AND ECONOMIC DEVELOPMENT:
SOME THOUGHTS ABOUT THEIR RELATIONS AND THE IMPLICATIONS FOR
COMPETITION POLICY IN DEVELOPING COUNTRIES**

Introduction

There is a growing consensus that under a wide variety of circumstances competition, both actual and potential, has beneficial effects on social welfare and on various indicators of economic development such as consumer prices, technical efficiency of firms, economic growth, income distribution and last but not least technological innovation. The central hypothesis is that competition, as the moving force, promotes economic development by encouraging businesses to enhance their efficiency, which in turn leads to greater productivity, reduces costs and prices to the consumers and improves the competitiveness of firms and industries. There seems to be a sound theoretical basis to assume the existence of such a positive influence, which is amply confirmed in the literature on the subject. From an empirical perspective there is also a vast literature on the causal relationship between competition, on one hand, and a variety of indicators of economic development, on the other. However, there the picture is less clear. Different studies arrive at widely differing conclusions, if not about the sign, then at least about the magnitude of the supposed influences.

If competition encourages economic development, then competition policy, to the extent that it promotes competition, must have effects upon economic development similar to those of competition itself. However, here the empirical evidence is much weaker yet. This is not surprising and can be attributed to various factors. In the first place, competition policy is not the only policy that seeks to enhance competition in markets. There is also trade and foreign-investment liberalization, regulatory reform and privatization, all of them having an important impact upon competition and not always in the same direction as competition policy. Often it is far from easy to separate one factor from others. In the second place, many of the competition regimes in vigor today were only installed during the last decade of the twentieth century so that an evaluation of their effects, particularly through cross-country studies, may be somewhat premature. In contrast, most trade liberalizations are longer lived and although the assessment of their effects is also inconclusive, there is much more empirical work done on that subject. Last but not least, there are hardly any appropriate quantitative parameters available to measure the strength of competition policy in a country. Where trade liberalization can be measured by average tariff levels, coverage of different types of quantitative import restrictions and the like, measures of the efforts of a competition regime hardly go beyond simple proxies such as a dummy for the presence or absence of a competition authority, the number of years the competition regime has been in force, the ratio of the budget of the competition authority to GDP, etc.. Obviously, this strongly limits the scope for an empirical assessment of the effects of competition policy.

The purpose of this document is twofold. First it is to share some thoughts about the theoretical underpinning of the relation about competition policy, competition and development. It is argued that in a static approach competition contributes to once-and-for-all gains in social welfare but that it is only in a dynamic perspective that competition can be expected to contribute to a permanently higher economic growth. However, dynamic competition is fundamentally different from competition in a static setting. In fact, as argued by various authors, to promote and protect dynamic competition a number of criteria used in traditional competition law enforcement need to be revised completely. Moreover, under the winner-takes-all features of dynamic competition in innovation markets and network industries there is little room for the sort of "gradual unfolding" that is supposed implicit in the word "development". This is particularly

worrisome to developing countries that may be interested in a more stable kind of development and that are wary of the shockwise redistributions of gains, which often occur as a result of dynamic competition.

The second purpose is to report about some recent empirical studies addressing the causal relationship between competition, and more particularly competition policy, on one hand, and economic performance, on the other. With empirical studies we mean systematic econometric efforts to trace some aspects of the relationships mentioned, which go beyond anecdotal evidence about the positive influence that competition or competition policy may have had in some country, in some sector, on some variables representing economic development. Our selection is not at all exhaustive. Just a few examples are given. For a more comprehensive survey of empirical work on the subject matter, see Sanghoon Ahn (2002)¹.

The organization of the document is as follows. In the second section we deal with the relation between competition and various aspects of economic development from a theoretical point of view. For that purpose a distinction is made between static and dynamic competition. The third section is about competition policies. The *raison-d'être* of competition policies is discussed and the importance to distinguish between competition and competition policy is underscored. Then, the interactions with other policies influencing competition are briefly touched upon. In the fourth section we discuss one of the main obstacles to empirical studies in this field, which is basically measurement problems. How to measure the intensity of competition? How to measure the strength of competition policy? etc. In the fifth section we summarize the results of some recent empirical studies in the field: a cross-country study about the influence of competition on price in telephony services, an analysis of the efficiency enhancing role of competition in manufacturing industries in the UK, a study about the effects of competition on the incentives to innovate whose results run counter the Schumpeterian paradigm that to innovate one must be large, and finally a cross-country study about determinants of economic growth among which competition policy is one of them. Section 6 is about the role competition and competition policies can play in developing internationally competitive industries. The section is based on Michael Porter's book "The Competitive Advantage of Nations".² In the final section a summary of the main findings is given and some conclusions are drawn.

Competition and Economic Development: The Theory

By competition we mean the process of rivalry among firms and we call market structures competitive if they are conducive to such rivalry. Competition is characterized by agents who, following their own interests of profit maximization, try to obtain preferential positions in the markets in which they operate (or in which they seek to operate) by the use of competitive parameters such as price, quality, quantity, service, product innovation, etc.. We make a distinction between static and dynamic competition. Static competition is typical for stable mature markets; dynamic competition for markets subject to rapid technological change and product innovation. The instruments of static competition are price, quality, quantity, service etc.; the instruments of dynamic competition are basically technological and product innovation. Both types of competition allow markets to reward good and punish bad performance, thus providing businesses the proper incentives to employ their specific capabilities and information advantages to the benefit of the society as a whole.

Economic development is usually conceived as a process of economic progress in which the inherent potentials of the country under consideration are gradually unfold. Economic development has also a wide variety of dimensions. The ultimate goal is usually considered to be high economic growth

¹ Sanghoon Ahn (2002), "Competition, Innovation and Productivity Growth: A Review of Theory and Evidence", OECD, Economics Department, Working Paper 317, ECO/WKP(2002)3.

² Michael Porter (1998), *The Competitive Advantage of Nations*. Free Press.

together with a reasonable distribution of income and wealth among people in the society. Intermediate goals are such diverse parameters as the level of prices to the consumers, technical efficiency of firms, employment, technological innovation, each of them presumably conducive to economic growth and income redistribution. As a rule economic development is considered as a gradual and continuous process, but in reality progress is often shockwise and irregular.

A Static Perspective

It is generally accepted that under some not all too realistic assumptions - decreasing returns to scale at the supply side, absence of externalities at the demand side and complete information to all market agents - competition in a static market improves social welfare by bringing the market price closer to marginal cost of production. Under less than perfect competition price deviates from marginal costs resulting in allocative and productive inefficiencies. Allocative inefficiency implies missed opportunities to match sellers and buyers in welfare enhancing transactions, resulting in a deadweight loss. Productive inefficiency implies that it is not the lowest-cost producers that serve the market, among others.

What has this to do with economic development? It is easy to see that in the traditional partial equilibrium approach perfect competition, as compared to monopoly or oligopoly, leads to higher real output and lower prices, thus also to a higher domestic product. Moreover, as long as it is supposed that price-cost markups go to equity holders, competition also redistributes income in favor of production factors.

However, in such a setting increased competition leads to a once-and-for-all gain in economic output, not to a permanent increase in economic growth. Moreover, estimates of the magnitude of the deadweight losses from imperfect competition, though heavily dependent on the assumptions made, suggest that they are not very significant. For example, Harberger (1954) found with some heroic assumptions about price elasticities and price-cost margins deadweight losses of the order of magnitude of one tenth of a percent of GNP for the US.³ Other authors come to much higher estimates, but their assumptions are even more heroic and still one has to do with a once-and-for-all gain, not with a lasting increase in growth.⁴

In the same static model competition also enhances productive efficiency, which implies that output is produced by the lowest-cost firms. There, it is implicitly assumed that the cost functions of the firms are the result of a cost-minimization process within the firm, which implies an optimal mix of factors and technical efficiency. In principle, even in the absence of competition firms have incentives to minimize their own costs but under tough competition cost minimization within the firm is often a matter of survival whereas it is more a matter of gaining a bit more or a bit less when competition is weak. Moreover, as under imperfect competition suppliers face a finitely-elastic residual-demand curve they can pass on part of the costs of inefficiency to the consumers, which they can not under perfect competition. Thus, the more competition the stronger the incentives to reach efficiency. Therefore, it is generally believed that fierce competition also enhances technical efficiency within firms.

When the conditions for the proper working of competition are not met in the static model, allocative and productive efficiency may be disturbed, or there may be conflicts between allocative and productive efficiency. The most common example is the existence of increasing returns to scale which

³ See Arnold Harberger (1954), "Monopoly and Resource Allocation", *American Economic Review*, Vol.44, pp. 77-87.

⁴ For a summary of such studies see Paul Ferguson (1988), *Industrial Economics: Issues and Perspectives*, MacMillan, London.

make markets tippy. I.e. the most efficient way to serve the market is through a single firm that forms a natural monopoly. Starting from a situation where several firms, all with decreasing returns to scale, serve the market the natural evolution is towards a situation in which only one of them survives, i.e. there is a tendency for competition to destroy itself. In equilibrium the survivor needs not even be the lowest-cost producer. First-mover advantages may sometimes favor less efficient firms and even if the most efficient firm happens to be the winner, there is a conflict between productive efficiency and allocative efficiency. Productive efficiency calls for a single firm serving the market but allocative efficiency is only reached under competition among many firms. This is the classical argument for price regulation of natural monopolies.⁵

A similar situation occurs when there are positive externalities at the demand side. Such positive externalities are found typically in network industries but are not exclusive to such industries. Positive externalities mean that additional subscribers to the network make it more attractive to existing subscribers to belong to the network. This may cause a snowball effect in demand and the suppliers of competing networks that are mutually incompatible will do everything possible to get their ball rolling. At the end of the road there will only be room for one single supplier which is selected in a winner-takes-all race much like in the case of increasing returns to scale at the supply side. Once again, in such a race first-mover advantages count and there is no guarantee that the winning network is the best or that the winning supplier has the lowest costs. Moreover, the predictive power of static games of this sort is usually limited due to the existence of multiple equilibria.⁶

A Dynamic Setting

Although the above given examples can perfectly be treated in the static setting of one-stage partial-equilibrium games they carry many dynamic elements. Moreover, in assessing the positive influences of competition upon economic development we are more interested in longstanding benefits from competition for growth than in the once-and-for-all gains considered in the static models. Therefore, we turn now to the dynamic picture. First we treat the phenomenon of firm dynamics and creative destruction. Then, we consider dynamic competition in R&D markets for product innovation.

Firm Dynamics and Creative Destruction

In a dynamic setting competition is no longer a one-shot variable; it is a process. As mentioned before, this process of competition rewards good and punishes bad performance by firms. Rewards and punishments come in the form of higher or lower profits but also in the form of market shares. I.e. efficient firms increase their market share, while inefficient firms shrink and eventually exit. Likewise, new firms enter the market and if they are sufficiently efficient they gain a position in it. This gives rise to what is called firm dynamics which implies continuously changing market structures with firms leaving the market and others entering, limited life expectancy for firms, etc.

In a scenario of technological progress competition gives rise to a process of what Schumpeter called “creative destruction”.⁷ Prospective firms lucky enough to adopt the correct new technologies are

⁵ See Kip Viscusi, John Vernon and Joseph Harrington Jr., *Economics of Regulation and Antitrust*, The MIT Press, Cambridge, Massachusetts, 3rd edition, Chapter 10, p. 314.

⁶ There may be as many equilibria as there are participants in the race, each of them corresponding to a specific winner.

⁷ See J.A. Schumpeter (1934), *The Theory of Economic Development*, Harvard University Press, Cambridge.

selected by the process. Firms that do not move, or happen to choose the wrong technologies, are reprovved. The process is also comparable with a Darwinian process of natural selection in which only the most efficient firms survive for as long as it lasts. In this way industries subject to competition undergo a continuous upgrading to the benefit of the surviving firms and the consumers, enhancing the international competitiveness of the industries involved.

Firm dynamics and creative destruction introduce a new dimension in the relation between competition and development. In the static approach an increase in competition would typically give rise to a once-and-for-all gain in social welfare. In the dynamic approach considered here competition leads to a continuous process of efficiency improvement which in turn may lead to permanently higher economic growth rates.

It is important to notice that creative destruction is not limited to a process among firms. It may also happen within firms among different product lines. Successful products continue and are expanded; unsuccessful product lines are abandoned. In this way firms renew themselves and remain competitive. Such creative destruction within firms is usually less painful than creative destruction among firms as long as workers can easily be relocated from one product line to another. At the other extreme, creative destruction may take place among industries as a whole, i.e. all firms in one industry exiting and new firms coming up in other industries. With an open trade regime and comparative advantages moving against specific industries in the country under consideration competition from abroad may cause those industries to substantially contract or completely disappear in the process. In such cases creative destruction may be extremely painful as it may cause many people to lose their jobs.

Particularly the latter type of situations use to be controversial and may put competition authorities in a position conflicting with the objectives of other policies aimed at preserving national industries and protecting employment. The position of competition authorities would typically be to consider the resulting unemployment transitory and to “let it happen” for the sake of the long-term goals of creative destruction. Those concerned with protecting national industries and employment would typically counterargue that it is the adverse circumstances that are transitory and defend temporary protective measures for the industries involved. All too often such “temporary” measures turn out to become permanent in order to keep agonizing industries alive on the shoulder of the taxpayer or the consumer.

In many such cases competition authorities are not directly involved, especially when the instruments employed to protect the industries (antidumping duties, outright subsidies etc.) are not within the reach of their competence. In such cases their role is limited to one of advocacy. However, it also frequently happens that national firms, with the support of public officials pursuing other objectives, try to merge or conspire to collude to the detriment of domestic consumers in an attempt to keep an agonizing industry afloat. This is definitely one of the most controversial situations in which competition authorities in both developing and developed countries may find themselves entrenched.

Dynamic Competition

Firm dynamics indicators are sometimes used as a measure for competition⁸. I.e. in a market in which shares continuously change, failing firms exit and new firms enter, competition is considered intense, whereas in markets with stable shares and low firm mortality competition is considered weak. It should be realized, however, that firm dynamics not only depends on competition but also on technological change and changes in consumer preferences. In mature markets where technological change has come to a

⁸ See, for example, Sanghoon Ahn (2002), op.cit.

level of saturation and consumer preferences are well established fierce competition can go hand in hand with relatively stable market shares and low mortality rates of firms.

Perhaps the best way to express the link between competition and firm dynamics is to make a distinction between static and dynamic competition. Static competition is through price, product quality and quantity, service, etc. and is measured through traditional variables such as concentration indices and price-cost markups. Dynamic competition, on the other hand, is not correctly measured by concentration ratios or price-cost margins. On the contrary, as argued below, intense dynamic competition is often characterized by transitory but extremely high concentration indices and price-cost markups. This makes traditional measures of competition inadequate. Firm dynamics indicators seem to be more appropriate to measure dynamic competition.

Dynamic competition is often described as competition for the market not in the market. Companies compete with each other not by setting low prices for their existing products but by developing new products expecting to enjoy a monopoly position for some time once the new product is successfully patented. Often such products have a limited life cycle and are overtaken after a while by other superior products developed by competitors or by the firm itself attempting to keep competitors at a distance by improving its own product. It is creative destruction at the product level.

In such a scenario temporary reaping of monopoly rents is a necessary condition to make R&D attractive. Thus, high price-cost markups and concentration indices, rather than being a symptom of a lack of competition, are normal consequences of dynamic competition in R&D markets and fighting such abuse of temporary dominance, even though it might lead to a once-and-for-all gain in social welfare in the short run, in the long run it might kill dynamic competition. There is a tradeoff between static and dynamic competition. Therefore, the traditional tools used by competition authorities to evaluate anticompetitive behaviour and mergers in relatively stable markets may be inadequate for assessing such conduct in markets where technology and product characteristics change rapidly, such as communication and information technology, software industries, pharmaceuticals, among others.⁹

One other feature that makes the traditional criteria of competition law enforcement inadequate for application in antitrust cases in high technology markets is the fact that there are usually strong increasing returns to scale. Particularly for high R&D intensive products, to make the first unit is extremely costly and costs are mainly sunk, whereas adding additional units is virtually costless¹⁰. This makes traditional criteria for the assessment of predatory pricing inoperable because any price is above marginal costs. Moreover, imposing short-run profit-maximization obligations upon firms all along the product cycle, as predatory pricing criteria do, could be disastrous for the firms involved. Their first objective is winning the race by expanding sales volumes sacrificing immediate profits; reaping the fruits is handled in the next stage.

The situation is further complicated when there are positive network externalities. In the presence of such externalities the supplier of a network incompatible with competing networks needs a critical mass of sales (or subscriptions) for his own network to “fly”. Therefore, in an introduction phase he would be willing to sell at very low prices, or even giving the services for free in order to build such a critical mass. Such conduct could be perfectly welfare enhancing although it might clash with traditional antitrust standards for predatory pricing. Prohibiting network providers to apply such introductory pricing

⁹ See David Evans and Richard Schmalensee (2001), “Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries”, NBER, Working Paper 8268, www.nber.org/papers/w8268.

¹⁰ See for example David Evans et al., op.cit. or Carl Shapiro and Hal Varian (1999), *Information Rules: A Strategic Guide to the Network Economy*, Harvard Business School Press, Boston, Massachusetts.

schemes may even impede the very emergence of the network because of the possibility that without introductory pricing the necessary critical mass would never be reached.

For the above-mentioned reasons, antitrust intervention in predatory conduct in high-technology markets, where variable costs use to be very low and where demand is subject to positive feedback externalities should be considered with skepticism. Similar concerns apply to tying and bundling practices. In fact, trying to establish a statically competitive market structure (many firms supplying one homogeneous or several competing differentiated products) in essentially dynamically competitive markets may do more harm than good. The case against antitrust intervention in such conduct becomes even stronger when one considers the information disadvantages of antitrust authorities vis-à-vis the real market participants (the producers and the consumers)¹¹.

Competition Policy and Economic Development

Raison-d'Être of Competition Policies

The purpose of competition policies is to protect and promote competition, but ever since the enactment of the first antitrust statutes at the end of the 19th century academics, politicians and business people have wondered why such protection or promotion is necessary. As explained in the previous section one of the circumstances in which, as a general rule, competition does not lead to optimal social welfare is that of natural monopoly. However, it is widely acknowledged that in such circumstances it is not competition policies but regulation that should bring the solution. The theory of market contestability goes one step further by suggesting that even if an industry is characterized by infinite economies of scale, the price behavior of the natural monopolist in such an industry would be disciplined by potential entry of competitors. However, this is an argument to deregulate not to introduce competition policies.¹²

In the presence of positive externalities at the demand side and in markets subject to rapid technological change or product innovation the arguments are much the same. It is recognized that in such markets (static) competition does not lead to optimal social welfare in a dynamic sense but such deviations from the competitive market model cannot be dealt with by means of competition policies. To the contrary, they rather make a case for abstaining from antitrust intervention.¹³

In his book “Whither Socialism?” Joseph Stiglitz argues strongly in favor of competition policy as an instrument to avoid or at least reduce welfare losses resulting from a lack of competition¹⁴. His arguments are threefold. In the first place, he criticizes the theory of contestable markets by underscoring the importance of entry barriers that make the threat of potential entry incredible. In the second place, according to Stiglitz in virtually all markets competition is less than perfect, giving rise to downward-sloping demand curves for individual competitors. Thus, all market players have some market power. In the third place, he argues that welfare losses from reduced competition can be much larger than what Harberger(1954) suggested, due to rentseeking behavior by monopolists or oligopolists.

Stiglitz distinguishes between two types of entry barriers: sunk costs and strategic barriers to entry. As regards sunk costs his argument is that the decision of potential entrants whether or not to enter is not just guided by the existence of profits in the market today. They rather anticipate the reaction of the

¹¹ See David Evans et al. (2001), op.cit.

¹² See Joseph E. Stiglitz (1996), *Whither Socialism?*, The MIT Press, Cambridge Massachusetts.

¹³ See David Evans et al. (2001), op.cit.

¹⁴ See Joseph Stiglitz (1996), op.cit., Chapter 7.

incumbent to their entry and because the costs of the incumbent are already sunk the latter would be ready to cut price down to variable cost to fight entry. Thus in the absence of variable cost advantages for the entrants there would be no hope for them to recover any sunk costs so that they never enter. In other words, if entrants have no other advantages over the incumbent, no matter how small the sunk costs are, they are always sufficient to deter all entry. The difference is that the costs of the incumbent are already sunk whereas the costs of the entrant at the moment they decide are not.

An incumbent can even go further and cut price below variable cost upon the entry of a competitor and he will do so if he expects to drive the competitor out and recoup his losses in the future. Such strategic entry barriers are always present and lead monopoly power, once established, to persist.

Moreover, Stiglitz argues that perfect competition does not exist in reality and that markets are much more segmented than what is generally believed. Individual market players perceive downward-sloping demand curves and base their pricing behavior on that feature. Incomplete information segments markets in the same way as transportation costs do and only small search costs for the consumers may cause potentially competing sellers to raise their prices all the way up to monopoly levels.

Finally, the welfare losses resulting from above-marginal-cost pricing are not limited to the deadweight-loss triangles estimated by Harberger but may include the full rectangle of income transfer from consumers to producers due to rent seeking behavior, i.e. monopolist and oligopolist are ready to waste scarce resources up to the amount of the rectangle in order to get the transfer.¹⁵

Altogether, according to Stiglitz it is far too optimistic to rely on the contestability of markets for disciplining the price behavior of the market players. Monopoly power, or just market power, is persistent and ubiquitous and the welfare losses derived from it are substantial. Therefore, competition policy is necessary.

The Controversial Character of Competition Policies

In most of the literature about competition and economic development no explicit distinction is made between competition and competition policy. It is generally assumed that if competition is good for economic development, the same applies to competition policy. However, it should be realized that enacting a competition law and creating a competition authority to enforce it is not a guarantee that competition will indeed be enhanced. One law is more appropriate than another, one agency may be more effective in its efforts than others and there is always the danger of a perverse application by the authority. At least in the long antitrust history of the US there are plenty examples in which the antitrust laws were interpreted in ways that were later proved to be inadequate and to have done more harm than good to competition.

Moreover, as argued in the foregoing section, the competition that competition policies seek to strengthen is not just a one-dimensional phenomenon. Competition today is different from competition tomorrow and promoting competition today may go to the detriment of competition tomorrow and vice versa.¹⁶ Likewise, there is static competition and dynamic competition and there are tradeoffs between the two. Thus, enforcing competition law is not at all straightforward. Competition laws are no unique

¹⁵ See for instance Jean Tirole (2000), *The Theory of Industrial Organization*, The MIT Press, Cambridge Massachusetts, 11th printing, p.76.

¹⁶ Predatory pricing is the typical phenomenon where competition today is weighed against competition in the future.

blueprints for the actions that should be taken; choices must be made, decisions are frequently controversial and the devil is often in the details.

From the foregoing one might be tempted to conclude that experienced competition authorities would be more effective in promoting competition than competition agencies with a short lived experience and that it would be particularly hard for developing countries to install a competition regime that effectively promotes competition in their economies. Although true to a certain extent, one should not forget that it is mainly the experienced competition enforcement agencies in the developed countries, particularly those of the US and the EU, that face the most difficult challenges in high-technology industries. Some examples are the Microsoft case and the GE-Honeywell merger.

In view of the controversial character of competition law enforcement it is sometimes recommended that newly installed competition regimes in developing countries should confine their enforcement activity to merger control and to comparatively clear cases of horizontal agreements on prices, output and market division, and that they should abstain from more complicated cases involving vertical restrictions, predatory pricing, tying and bundling and other (ab)use of dominance. At the same time it is suggested that they dedicate more resources to competition advocacy directed at removing entry barriers, at deregulation where possible and where this is not possible at making regulatory regimes more competition-friendly. Such recommendations should be taken seriously in order to avoid the danger that competition law enforcement would result in less rather than more competition.¹⁷

Interaction with Other Policies

In this subsection we treat interactions and complementarities of competition policy with other policies. The policies considered are: (i) trade policies, (ii) foreign investment, (iii) privatization and regulatory reform and (iv) intellectual property protection. Finally, we mention some interactions between competition policy and institutional change.

Trade Policies

It has been recognized in various forums and by various authors that international trade and competition policies can complement and buttress each other in promoting trade, market access, global economic efficiency, consumer welfare, and economic development.¹⁸ Exposure to international markets plays a central role as imports directly impose international competitive pressures upon domestic markets. This pressure is also introduced indirectly, through exports, since domestic firms have to compete in the global marketplace.

Furthermore, it is argued that international trade is particularly useful in promoting competitive markets in developing countries, where there are information difficulties, inadequate contract enforcement, and human capital constraints.¹⁹ According to this argument these circumstances could imply that it would

¹⁷ See The World Bank (2001), *World Development Report 2002: Building Institutions for Markets*, Chap. 7, Competition.

¹⁸ For instance, see The World Bank (2001), *op.cit.*, World Trade Organization (1998), Working Group on the Interaction between Trade and Competition Policy, *Synthesis Paper on the Relationship of Trade and Competition to Development and Economic Growth*, WT/WGTCP/W/80 and Shyam Khemani (1997), "Competition Policy and Economic Development", *Policy Options*, October 1997, pp. 23-27.

¹⁹ The World Bank (2001), *op.cit.*

be easier to use an instrument to promote competition that depends strictly on rules, such as international trade, compared with an instrument like competition law, which requires investigations and adjudication.

At the same time international trade can create pressures for the governments of these countries to address institutional barriers to competition in the domestic product and factor markets because these barriers undermine the domestic economy's ability to respond to foreign competition.

It is sometimes argued that trade and investment liberalization can be a substitute for competition policy, and that in economies where high levels of industry concentration prevail, anticompetitive business practices would be less feasible if domestic markets were exposed to international competition. It is considered that in the absence of barriers to trade domestic monopolists or oligopolists could lose their ability to exercise market power irrespective of actual import penetration in view of the threat of potential competition.

Nevertheless, it has been widely recognized that trade liberalization alone is not enough to guarantee competition in all circumstances. The reasons for this include the following factors:

- A large number of markets (e.g. non-tradeables or tradeables with high transportation costs) remain local in nature, and are, therefore, not subject to effective discipline from imports. So the benefits of trade liberalization in goods are often limited by the lack of competition in services.²⁰ This is particularly true for those services that are basic inputs or components of the economic infrastructure, including financial services, telecommunications, transport, and business services. Additionally, the share of services in production and employment in both industrial and developing countries is increasing. Many of the fastest-growing sectors are services –telecommunications, finance.
- Even with regard to tradeable goods, for which formal trade barriers have been removed, competition can be affected by several governmental or other measures including regulations, standards and licensing requirements. For example, there are troubling signs that progress in trade liberalization in developing countries is being rolled back through the increasing use of antidumping measures. In fact, as import tariffs are liberalized, the pressure to invoke countermeasures increases.
- Even in the absence of the type of measures mentioned, the ability of imports to discipline the exercise of market power can be limited by a wide range of anti-competitive practices of firms, particularly those of transnational companies.
- The procompetitive effects of tariff reductions may be diluted if import supply is not very responsive. Moreover, in an environment of floating exchange rates, if domestic firms fail to rationalise high-cost operations and improve productivity, the domestic currency is likely to depreciate, offering new protection from import competition.

Additionally, competition policy allows to address anticompetitive practices of enterprises participating in international trade. There are three broad categories of practices having such effects: (i)

²⁰ It is argued that the WTO's General Agreement on Trade in Services (GATS) has not produced significant liberalization. Current levels of protection in services are as high as, if not higher than those applied to goods 10 or 15 years ago. In many instances the available information on the level of protection suggests that ad-valorem tariff equivalents range from 50 to 100 percent. In general, barriers in transport, financial and telecom services are higher than in business and distribution services. Barriers are higher in developing countries than in industrial countries. See The World Bank (2001), op.cit.

practices affecting market access for imports; ii) practices affecting international markets, where different countries are affected in largely the same way; and iii) practices having a differential impact on the national markets of countries.

Practices falling in the first category include domestic import cartels, international cartels that allocate national markets among participating firms, exclusionary abuses of a dominant position, the unreasonable obstruction of parallel imports, control over importation facilities, vertical market restraints that foreclose markets to foreign competitors, certain private standard setting activities and other anticompetitive practices of industry associations.

Those falling in the second category include international cartels and also some instances of mergers and abuses of a dominant position affecting international markets.

Practices cited as falling in the third category include export cartels and situations in which mergers are benign or even beneficial in one market, but have detrimental effects in other markets. It is generally recognised that these types of practices can have significant detrimental effects not only on trade but also on economic welfare and development in the affected countries.²¹

There is also a growing concern that antidumping measures, carrying the flag of fair trade, are increasingly undermining the beneficial effects of trade liberalization on competition. All too often the complaints about unfair trade by domestic monopolists and oligopolists in underperforming industries with doubtful comparative advantages find an eagerly listening ear of antidumping authorities concerned about employment in the short run. In such cases competition authorities have an important advocacy role to play.

Foreign Investment

The implementation of a transparent and effective competition policy can be an important factor both for enhancing the attractiveness of an economy to foreign investment, and for maximising the benefits of such investment. More specifically, it is argued that competition policy can enhance the attractiveness of an economy for foreign direct investment (FDI) by providing a transparent and principles-based mechanism for the resolution of disputes involving such investment, that is consistent with norms that are widely accepted internationally. This increases investor confidence and therefore the propensity to invest. Vigorous competition in markets, reinforced by competition policy, also helps to maximise the benefits of such investment to host countries, by encouraging participating firms to construct state-of-the-art production facilities, to transfer up-to-date technology into host countries and to undertake appropriate training programmes, while at the same time preventing the exploitation of consumers.

The 1997 *World Investment Report* emphasises the growing complementarity between FDI liberalisation and competition policy as a building block of development.²² It observes that, while FDI liberalisation can help to enhance the contestability of markets, which can provide an important stimulus for greater efficiency, it is not a sufficient condition to achieve this result. Rather, to the extent that FDI liberalisation creates greater freedom for firms to pursue their interests in markets, an effective competition policy and enforcement are necessary to ensure that pre-existing statutory obstacles to contestability are not replaced by anti-competitive practices of firms, thus eliminating the benefits that could arise from liberalisation.

²¹ World Trade Organization (1998), op.cit.

²² See UNCTAD (1997), *World Investment Report: Transnational Corporations, Market Structure and Competition Policy*, United Nations Publication, Sales nr. E.97.II.D.10

The Report also notes that there can be situations where FDI, although approved at the time of entry into a developing country market, is accompanied by ancillary agreements that may involve various restrictions of competition. For example, international franchisers establishing themselves in a country might require local franchisees to source certain inputs from specific sources they control, with the justification that this guarantees quality.

Also inter-corporate alliances that involve agreements between unaffiliated firms are becoming more numerous. Such alliances often involve contractual arrangements that limit the freedom of the parties in various ways. Given the many types of alliances and the different purposes for which they are created, the Report suggests that they constitute a “grey area” of competition law.

Consequently, the Report argues that the ongoing world-wide liberalisation of FDI policies needs to be complemented by the introduction of effective competition laws and policies, to foster a pervasive “culture of competition” throughout the world economy. This will provide governments with practical tools to address anti-competitive structural changes and business practices, and thereby enhance confidence that liberalisation will ultimately serve the best interests of citizens in the liberalising countries.

Privatization and Regulatory Reform

The important potential benefits to the society from regulatory reform and privatisation have been widely recognised. Regarding regulatory reform, it may take the form of deregulation when existing regulation is not needed. In general, however, regulatory reform consists of finding more effective and cheaper ways of regulating. This often involves moving towards incentive-based regulatory systems that rely to the maximum extent possible on market forces.

With respect to privatisation, it has been recognised that state-owned enterprises are generally less efficient than private ones, given that public enterprises are not likely to be allowed to fail and thus lack an incentive to operate efficiently. There are many economic benefits from privatisation, including improved public finances, a greater ability of private firms to raise funds for modernisation, and broader and deeper capital markets. In addition, it is often argued that private ownership of production tends to support democratic institutions, because it results in shared power, whereas public ownership tends to concentrate both political and economic power in the same hands.

To ensure the potential benefits to society from regulatory reform, privatisation must be implemented with careful attention to the underlying goal of using market forces to yield beneficial results. A sound competition law enforced by a strong competition authority is essential to assure the procompetitive potential of an economy and its regulatory regime.

Regulatory reform is also a complement of competition policy because efficient market competition requires a supportive legal and structural framework. One important challenge of regulatory reform specially in countries with economies in transition and in developing countries is to develop such a framework, which also includes a need for transparency in government and business operations.

Competition policy can reinforce, and may even be essential to realise the benefits of privatisation and deregulation programmes. Competition policy can provide a fundamental change in the incentives facing firms that will improve their overall behaviour and performance, ensuring inter-firm rivalry, and preventing the continuation or re-establishment of monopolistic market structures. Without a sound competition policy privatisation could simply replace a public monopoly with a private one.

Similarly, if deregulated industries are not subject to the discipline of a competition law, poor performance and the abuse of market power are likely to continue after deregulation.

It is also argued that the reliance on a comprehensive competition law helps to ensure policy coherence and consistency across sectors. Sector-specific regulatory regimes can also open the door to favourable treatment of incumbent players in an industry, and raise questions as to why one sector should be treated more favourably than another. Additionally, there could be a greater risk of “capture” of sectoral regulators as compared to an agency responsible for a generic competition law.

The advocacy role of competition policy is very important in this respect because competition policy may have objectives conflicting with those of privatisation and deregulation. For example, the privatisation process is influenced by the macroeconomic goal of obtaining financial resources for the government whereas competition policy attempts to ensure long-term efficiency of the economy. Advocacy by the competition authority, particularly with respect to the design of the privatisation schemes and the authorisation of prospective participants in the bidding, is important in this context.

Intellectual Property Protection

Intellectual property rights grant an exclusive right to control the commercial use of inventions for a certain period of time, aiming at creating incentives for innovation. However, by granting this exclusivity they restrict product market competition in the short run.

There is a broad consensus that some form of intellectual property safeguard is needed to protect innovation. All WTO members have made a commitment to implement TRIPS. It is often argued that stronger intellectual property rights benefit developing countries by promoting technology transfer through foreign direct investment, trade, licensing, and vertical integration of multinational firms.

Nevertheless it is an open question whether the potential benefits to economic development from intellectual property rights effectively materialise, specially regarding developing countries. For instance, The World Development Report 2002 considers that the empirical evidence on the potential benefits of intellectual property rights is weaker than might be expected or is mixed.²³

It is also argued that, although ensuring a core level of intellectual property rights protection may increase developing country access to foreign technologies by safeguarding returns for foreign technology producers, excessively strong intellectual property rights can inhibit the diffusion of knowledge. In developing countries, knowledge is built more through access, imitation and diffusion of foreign technologies rather than through local research.

But there are also some potential gains to developing countries from stronger intellectual-property-rights protection. For example, if adaptation of imported technology to local needs requires a significant amount of investment, local firms may be willing to undertake the investment if they can be assured that their intellectual property rights are protected. Intellectual-property-rights systems may also benefit developing countries by protecting indigenous property rights and traditional knowledge. The World Bank considers that to maximise their net gains these countries need to take advantage of the flexibility built into the TRIPS agreement.

The impact of intellectual property rights on development depends on the broader institutional and policy environment. The establishment and enforcement of an adequate competition framework that

²³ See The World Bank (2001), op.cit., p. 146

addresses monopoly abuse of intellectual property rights is very important to prevent that increasing property rights protection could result in welfare losses from monopoly behaviour. Moreover, it is argued that intellectual property rights are more likely to create wealth if they are complemented by open trading rules. More liberal trading rules also reduce the risk of monopoly abuse of intellectual property rights by domestic firms.²⁴

Institutional Change

There is an increasing recognition of the central importance of institutions in the development process, which are interdependent with the human, physical and macroeconomic sides of development. Appropriate design of institutions and institutional change are considered an important source of economic development. A growing body of research links institutional success (and failure) to economic growth and market development over time and across countries. Positive relationships between economic development and these indicators of institutional success have been widely documented.

In this context, competition may provide incentives for institutional change around the world, by modifying the effects of existing institutions. It is also considered that competition may occasionally substitute for other institutions, a role emphasised by the World Development Report 2002.²⁵ In fact, the Report considers that fostering competition is an important element for effective institution building.

For instance, there is evidence that competition can substitute to a certain extent for an effective bankruptcy system because it exerts pressures on inefficient firms to go into liquidation. Similarly, it is sometimes argued that competition can substitute for strong shareholder control in firms in raising productivity growth, particularly in the absence of important external shareholders.

Another example is the influence that competition may have in modifying factor market regulations. In some circumstances, removing or relaxing institutional rigidities to product market competition such as unnecessary entry barriers promotes competition directly and exerts pressures on governments to remove rigidities in factor markets, which can raise adjustment costs in the economy. It can also be argued that uncompetitive product markets allow the persistence of factor market restrictions. Thus, there is clearly a mutual interaction.

Competition from abroad resulting from trade liberalisation may also put pressure upon domestic institutions to change, particularly if such institution hinder the development of internationally competitive industries. There are many examples of such institutional changes triggered by trade liberalisation in developing countries and transition economies during the last two decades.²⁶ Perhaps one of the most important of these changes has been the enactment of competition laws and the institution of competition authorities, following trade liberalisation in many of those countries.

Measurement Problems

One of the questions empirical econometric studies about the relation between competition, competition policy and economic development have to address in how to measure the dependent and independent variables of such experiments. In this section we make some observations about the

²⁴ The World Bank (2001), *op.cit.*

²⁵ The World Bank (2001), *op.cit.*

²⁶ See World Bank (2001), *op. cit.*

difficulties encountered with the measurement of the degree of competition and the strength of competition policy. Most indicators of economic development have a long history of measurement and although they are not without problems we do not discuss them here.

Measuring Competition

Static Competition

The most common way to measure static competition in a market is through concentration indices. For example the joint market share of the four largest firms is such an index. Another measure is the wellknown Hirschman-Herfindahl concentration index. All those measures suffer from the following setbacks. In the first place, they only take into account actual market participation not potential participation. I.e. they only take account of actual competition not of contestability. This shortcoming can be partly addressed by taking production capacities instead of sales to calculate market shares but still concentration indices based on capacities do not take into account the possibility of new entry, which may discipline the behaviour of even the largest market players. A second inconvenience is that concentration indices miss to take account of the degree of agreed or tacit collusion between market players. Sometimes markets with only a few participants are more competed than markets with many players not competing actively. The market for cola drinks is often cited to illustrate this case. A third argument against the use of concentration indices to measure competition is that they are usually very sensitive to the specific way in which markets are delineated. Whether or not a good belongs to a market depends normally on the degree of substitutability with products already in the market, which may be controversial, and adding another imperfect substitute may change the value of a concentration index completely.

A second commonly used measure of static competition is the average price-cost mark-up of the industry considered. If the mark-up is at monopoly level (which depends on the own-price elasticity of demand) there is no competition; if it is zero competition is perfect. Price-cost mark-ups have the advantage of taking into account the effects of potential entry and the degree of collusion between market players, but the disadvantage is that they are much more difficult to estimate. In principle, price-cost mark-ups refer to marginal costs but as marginal costs are theoretical constructs, variable costs are often taken instead. For industries as a whole price-cost margins are often approximated by extranormal-profits-to-sales ratios where normal profits are defined as some industry-averaged profits rate. We do not know of cases where account is taken of industry-specific risk as is done in rate-of-return regulation of prices.²⁷ Evidently, such estimates are very rough approximations of what price-to-marginal-cost ratios really are. Moreover, by measuring the degree of competition through price-cost mark-ups it is assumed from the outset that competition has a disciplining effect upon prices so that econometric exercises about the relation between competition and prices become trivial.

A third indicator that is sometimes used to measure the degree of static competition is import penetration. Evidently, it is a partial measure of competition by only taking into account competition from abroad. Moreover, low import penetration may, on one hand, reflect situations of very concentrated domestic markets shielded from competition from abroad but, on the other, can also be due comparative advantages favouring the country under study even when the domestic market is fairly competed. Likewise, high import penetration may reflect a strong competitive pressure from abroad upon domestic industries as well as strong imports from a foreign export cartel with some sluggish domestic price followers. Thus import penetration ratios should be taken with care.

²⁷ See Kip Viscusi et al., op.cit., chapter 12, p. 366

Dynamic Competition

To measure dynamic competition is even more difficult than static competition. One possibility is to consider indicators of firm dynamics. How many of the five leading firms in an industry are still there ten years later? Similar indicators are such as a count of entry of new firms and of exit of existing ones, mortality rates of firms and life expectancy, etc.. However, such indicators miss to a certain extent the possibility that creative destruction can also take place within the firms. For example, in the pharmaceutical industry there is a good deal of product innovation going on but it is doubtful whether this would show up in indicators of firm dynamics such as the ones suggested above. Another difficulty is market definition. Firms mostly operate in many markets at the same time and new superior products may even eliminate existing markets and put new markets in their place. Dynamic competition does not respect the borders of traditionally defined markets.

Another way to proceed is to go directly to the innovation market. One may for example count the number of patents registered and consider the spread of such patents among different firms. Alternatively, one may consider the number of ongoing R&D projects for specific products as is sometimes done for the antitrust assessment of mergers or joint ventures. Still another possibility is to take the funds spent on R&D and its spread among firms as a proxy for dynamic competition. In the latter case it should be realised that there is a strong element of risk involved in R&D and that there may be important spillover effects of R&D efforts among different products. All of these measures are only rough proxies for dynamic competition.

Competition Policy

To measure competition policy is even more difficult than measuring competition itself. One way to proceed would be to measure it indirectly through its effects, for example by taking measures of competition as proxies for competition policy. However, as explained in the previous section, competition is not just a result of competition policy but influenced by many other factors among which other policies and technological development. Moreover, in light of the possibility of a perverse enforcement of competition law one would like to have an independent measure for competition policy in order to be able to test the hypothesis that indeed competition policy encourages competition and to what extent. To our knowledge no systematic studies of that kind have been carried out, at least no studies of an econometric nature.

Therefore, it is more attractive to measure competition policy directly, i.e. by taking certain indicators of the competition regime itself. Perhaps the simplest way is to take the absence or presence of a competition authority as a dummy, eventually taking into account the learning process through the age of the authority. A fully nondiscrete variable would be the ratio of the yearly budget assigned to the authority to GDP or the amount of fines imposed upon transgressors of the competition law. Alternatively, one can use counts of antitrust cases filed or resolved and in countries where there is a private right of action the number of damage claims brought before courts of justice for violation of the competition laws. Altogether, there are plenty possibilities to quantify the intensity of competition policy directly, each of them having its own advantages and disadvantages. However, econometric studies using such parameters are hard to find.

In the econometric study by Dutz and Hayri about determinants of economic growth which we discuss in the following section one of the independent variables measures competition policy. The variable called ANTITRUST is taken from the Global Competitiveness Report of 1996 and registers the results of a questionnaire held among prominent entrepreneurs in the countries covered by the report.²⁸ The

²⁸ World Economic Forum (1996), *Global Competitiveness Report*, Geneva.

question was: (to what extent do you agree with the statement that) antitrust or antimonopoly policy effectively promotes competition(?). The validity of such a measure is questionable for two reasons. The first is that it does not measure competition policy directly but rather through a subjective perception of its effects. The second is that the answers to the question by prominent entrepreneurs having experiences with antitrust interventions in the past in their own businesses might be biased. Still the study by Dutz and Hayri is the only econometric study we have found with a measure for competition policy that is not a measure for competition.

Empirical Studies

In this section we present the results of a few econometric studies about the relationship between competition or competition policy and economic performance indicators. In the first subsection three studies are dealt with in which competition measures are among the explanatory variables. In the second subsection we treat the study by Dutz and Hayri with the ANTITRUST variable as a proxy for competition policies.

Competition

Prices

We summarise the main results of the paper “An Empirical Analysis of Competition, Privatisation, and Regulation in Africa and Latin America” by Scott J. Wallsten.²⁹ It is an econometric cross-country study quantifying the effects of privatisation, competition and regulation on telecommunications (telephony) performance in 30 African and Latin American countries from 1984 through 1997.

The dependent variables reflecting performance are the per-capita number of mainlines, number of pay phones, connection capacity, number of employees per mainline and prices of local calls. The independent variables are, apart from a number of control variables such as income per capita among others, proxies or dummies for privatisation, competition, regulation and interaction terms. Privatisation and regulation are measured by dummy variables indicating whether or not the incumbent telephone operator is (partly) privatised and the existence of a separate regulator not directly under control of a ministry. Competition is measured by the number of wireless telephone companies not owned by the incumbent. Evidently, this is a very rough proxy for competition based on the assumption that wireless telephony is a sufficiently close substitute of fixed telephony to discipline the behaviour of fixed telephony incumbents.

The results of the study are that privatisation by itself does not generate important benefits. Actually it is negatively correlated with mainline penetration. However, privatisation combined with an independent regulator appears to be correlated with increased connection capacity and payphones per capita. These results suggest that reformers are correct in emphasising that privatisation should be complemented by independent regulation since privatisation without regulation may be costly to consumers.

²⁹ Scott J. Wallsten (1999), “An Empirical Analysis of Competition, Privatization, and Regulation in Africa and Latin America”, The World Bank, May 1999.

As far as competition is concerned the results of the study show that competition has a positive influence on telecom performance. Competition appears to be associated with increased mainline penetration, more payphones, a higher connection capacity and lower prices for local calls. In all four cases the regression coefficient of the competition variable is statistically significant. Thus competition appears to have tangible effects across the board. Consistently with conventional wisdom, a more competitive telecom market increases quantities produced and reduces prices.

Admitting all the shortcomings of the study with respect to model specification, data availability, etc. the results make a strong case for governments to promote competition in telecommunication markets actively in order to improve their performance to the benefit of consumers.

Technical Efficiency

As explained in section 2, in a partial equilibrium approach there are different types of inefficiencies: allocative inefficiencies and productive inefficiencies, all of them resulting in welfare losses. However, in the partial-equilibrium model it is usually assumed that firm-specific cost functions are already the result of cost minimisation within the firms. Technical efficiency is a one of the components of productive efficiency and reflects shortcomings in the cost-minimisation process within the firms. As mentioned before, with or without competition, firms have incentives to eliminate technical inefficiencies, but in the presence of competition these incentives are stronger.

The purpose of this subsection is to discuss the results of an econometric study about technical inefficiency in manufacturing industries in the UK by Alison Green and David Mayes.³⁰ Using an approach based on stochastic frontier production functions to estimate technical inefficiency in almost 20,000 plants in 151 manufacturing industries the authors use an econometric model to explore the determinants of cross-industry inefficiencies, among which the strength of competition and the openness to international trade are the most important explanatory variables. Strength of competition is measured by a five-largest-firm concentration ratio and openness to trade as the ratio of value of imports plus exports to total sales of the industry.

The results are that the ten most efficient industries showed average inefficiencies - i.e. deviations from the frontier - of approximately 15%. They include industries as heterogeneous as cement, footwear and musical instruments. At the other extreme, the least efficient industries showed average deviations as high as 60%. They include industries such as jewellery and brewing.

As regards the way in which competition encourages technical efficiency, it was found that the strength of competition has a curvilinear relation with efficiency, both high and low levels of concentration being associated with higher inefficiency, with the minimum occurring at a concentration ratio of 40%. Studies using similar techniques for the USA and Japan arrived at similar results.³¹ All of them show that an increase in market concentration above a certain threshold reduces technical efficiency.

The lesson that can be learned is that for the purpose of technical efficiency concentration should neither be too high nor too low. Considering the fact that the threshold of 40% for the five-largest-firm concentration ratio is fairly low (in most cases it would correspond to values for the Hirschman-Herfindahl index lower than 1000; i.e. well below the thresholds used for merger control in the US), competition

³⁰ Alison Green and David Mayes (1991), "Technical Inefficiency in Manufacturing Industries", *The Economic Journal*, Vol. 101, May 1991.

³¹ Richard E. Caves and D. Barton (1990), *Efficiencies in US Manufacturing Industries*, MIT Press, Cambridge, Massachusetts.

policy aimed at controlling market concentration, such as M&A control, may, apart from preventing anticompetitive conduct, help companies to avoid technical inefficiency.

Innovation

The quantity of research devoted to study the relation between market concentration and innovation has become the second largest body of empirical literature in the field of industrial organisation, exceeded only by research associated with the relationship between market concentration and profitability. Most of this work has been propelled by the Schumpeterian hypothesis that the firm in a competitive market is the perfect device for resource allocation, but the large monopolistic firm is the “*most powerful engine of progress and... long run expansion of total output*”, thus, “*perfect competition is inferior, and has no title to being set up as a model of ideal efficiency.*”³²

These assertions render into the fundamental and defying hypothesis that *innovation increases with market concentration* and, consequently, competition and competition policy would damage the speed of technical innovation. This conjecture has not only represented a huge challenge to most of the knowledge about the role of competition in traditional economic theory, but it also to data collection and statistical techniques.

Indeed, most of the empirical work is filled with several methodological pitfalls: primitive econometric techniques, inadequate modelling of the feedback mechanism between market power and innovation, inadequate data, loosely specified equations, etc. One of the difficulties lies in how to measure accurately innovation and technological change. Clearly, if there is not a satisfactory measure of this variable, there cannot be an acceptable answer to the effects of competition either. Several measures of innovation have been used in the existing literature; however, the most frequently used has been the number of patent counts. The inconvenience of this approach is that it does not include differences due to the economic value of the patents.

The empirical work on the relation between market concentration and innovation is inconclusive. Scherer (1967) found an inverted U-shaped relationship between R&D and concentration; i.e. up to a certain level of concentration R&D efforts increase with concentration but beyond that level they decrease³³. The critical level resulted to be at a four firm concentration ratio of approximately 55%. Contrary to Scherer’s results Bound et al. (1984) and Pavitt et al. (1987) report a positive association between concentration and innovation at high levels of concentration and a negative association at low levels³⁴. In other words both very large and very small firms tend to innovate more.

In the following we briefly summarise the results of a study by Richard Blundell, Rachel Griffith and John Van Reenen about the relation between market power and innovation.³⁵ The purpose of the study is to “model a count of the number of innovations commercialised by a firm in a year as a function of a

³² J.A. Schumpeter (1942), *Capitalism, Socialism and Democracy*, Harper, New York.

³³ F.M. Scherer (1967), “Market Structure and the Employment of Scientists and Engineers”, *American Economic Review*, Vol. 57, pp. 524-31.

³⁴ J. Bound, C. Cummins, Z. Griliches, B.H. Hall and A. Jaffe (1984), “Who Does R&D and Who Patents?”, in Z. Griliches (ed.), *R&D Patents, and Productivity*, NBER, University of Chicago Press, Chicago and K. Pavitt, M. Robson and J. Townsend (1987), “The Size Distribution of Innovating Firms in the UK: 1945-1983”, *Journal of Industrial Economics*, Vol. 35, pp. 297-316.

³⁵ Richard Blundell, Rachel Griffith and John Van Reenen (1995), “Dynamic Count Data Models of Technological Innovation”, *The Economic Journal*, Vol. 105, pp. 333-44.

firm's market power and its tangible and knowledge capital stock". The authors ran a series of regressions of the number of innovations explained by two sets of variables: (i) firm level variables and (ii) industry level variables. Given that the dependent variable, the number of innovations, is a non-negative integer, the authors use "count data models", which are especially suited to handle this kind of variables. The authors propose a couple of econometric solutions to account for the weak exogeneity and the heterogeneity of the data. Actually, the database indicates the use of a panel data model. To account for fixed effects, a variable is included that measures differences in the innovation capacity of the firms. The data spans a period of eleven years, from 1972 to 1982. It comprises information on 375 firms listed on the London International Stock Exchange and a count of innovations. Around a third of the firms innovated at some point of time.

The main explanatory variables at the firm level are: (i) stock of knowledge, accounting in some way for past innovation experience, (ii) tangible capital stock, measured as the replacement value of fixed capital, (iii) market share in terms of sales and (iv) a fixed effect, which is the average number of innovations by the firm in the period 1945 to 1971. At the industry level the independent variables are: (i) market concentration as measured by the five-largest-firms share in sales and (ii) openness to international trade represented by the share of imports in domestic sales.

The for our purposes most important outcomes of the exercise are that (i) the sign of the regression coefficient for the firm-specific market share is positive and statistically significant and (ii) the sign of the regression coefficient for the industry-specific concentration ratio is negative and also statistically significant. This clearly suggests that there are two counteracting forces at work. On one hand, the *ability* to innovate increases with firm size resulting in more innovation by larger firms, a result congruent with the Schumpeterian paradigm. On the other hand, the *incentives* to innovate diminish with market concentration. These results seem to indicate that when a firm grows in a market its capability to innovate increases but to the extent that its growth leads to a higher market concentration both its own incentives to innovate and those of its competitors decrease.

The main lesson for competition policy seems to be that the authorities should not be all too concerned about the size of the firms per se but rather about the extent to which firm size contributes to market concentration.

Competition Policy

Economic Growth

The only econometric study we have found in which one of the explanatory variables refers to *competition policy*, not just competition, is the article "Does More Intense Competition Lead to Higher Growth?" by Mark Dutz and Aydin Hayri.³⁶ Even in that study, it should be admitted, the strength of competition policy is measured in an indirect manner susceptible to criticism as explained in our section about measurement problems.

The declared objective of the article is to "... investigate whether higher levels of domestic competition, while controlling for the degree of trade liberation, are significantly and robustly correlated with faster current and future rates of per capita economic growth rates". The analysis is organised in two stages. In the first, the authors run six different cross-country regressions, with the average annual growth rate of real GDP per capita as the dependent variable and different groups of explanatory variables. In the

³⁶ Mark A. Dutz and Aydin Hayri (1999), "Does More Intense Competition Lead to Higher Growth?" CEPR, Discussion Paper, No. 2249.

second stage, a correlation is tested between the residual growth rates from the first stage and a set of previously defined variables that tend to reflect the strength of competition policy among others. The reason for dividing the analysis in two stages is that the competition policy variable is only available for a subset of the more than 100 countries considered in the study.

The dependent variable of the exercise is the average annual growth of GDP over the period 1986 to 1995. The main explanatory variables of the first stage are: (i) pre-period GDP (to account for possible convergence³⁷), (ii) trade openness, (iii) life expectancy at birth and (iv) physical capital accumulation. In the second stage the explanatory variables can be grouped in three categories: competition policy, static competition measured by economy-wide concentration indicators and dynamic competition measured by some firm dynamics indicators. As explained in section 4, one of the competition policy variables (ANTITRUST) reflects the answers of top managers to the question: “Does antitrust or anti-monopoly policy (in your country) effectively promote competition?” A second variable (UNFAIR) mirrors the answers to the question: “Do antitrust laws prevent unfair competition in your country?”

The results of most regression experiments are not all too promising. Generally speaking, the quality of the fit as measured by the squared correlation coefficient is low. Still, the variables measuring competition policy are positively related with economic growth in a statistically significant way in most of the experiments. Altogether, the study provides some weak evidence that competition policy is positively associated with long-run economic growth.

An additional objection that can be brought in against the favourable conclusions of the study about the role of competition policies is that the competition policy variables are taken from the Global Competitiveness Report of 1996 whereas economic growth refers to the period 1986 to 1995. This raises some doubt about the direction of the causal relation that may exist between the two phenomena. Still, if competition policies were a stable variable not changing over time, competition policies as of the mid 1990s would mirror competition policies one decade earlier which could have influenced growth during the period 1986 to 1995, but considering the fact that many of the competition regimes of the study were only put into place in the 1990s this objection must be taken seriously.

Perhaps the most important conclusion that can be drawn, not so much from the results of the study but from the way it is carried out, from the lack of precise data on the variables used and, in general, from its shortcomings, is that the present state of the art of empirical studies about the causal relationship between competition policy as the moving force and economic growth as the result is only in its infancy and that much more work need to be done to fill that gap.

Competition and Competitiveness

The Competitive Advantage of Nations

In the past 15 years there has been a dramatic shift of focus in the theories of economic development. There is a whole set of literature that deviates from the use of aggregate models, mainly with macroeconomic variables, and focuses on several analytical tools developed in the field of industrial organisation, using a microeconomic and sector approach.

³⁷ Convergence implies that richer countries (in terms of income per capita) tend to grow slower than poor countries.

The convergence of industrial organisation with management sciences and international economics has produced new analytical models that go beyond a static approach, by looking at the effects of interaction among firms and other dynamic elements of industry structure. Michael Porter has been a leader in the field of strategic management for the past 20 years and in his book “The Competitive Advantage of Nations”, which is the result of collaboration with governments and industry leaders from more than ten countries, he puts together sound evidence about key issues of competitiveness and industry evolution.³⁸

The author undertakes an extensive study in an effort to determine the basic elements that affect a country’s competitive position in a global economy. His methodology emerged from more than 100 case studies of industries in specific countries world-wide, with a more detailed analysis of four cases in Germany, the USA, Italy and Japan. His approach is based on fundamental microeconomic principles of industry analysis and, instead of looking for “macro” elements or using an econometric model, the study tries to determine which factors play a role in helping companies of an industry or sector in a specific country to become world class competitors, by looking at common patterns in a great diversity of cases.

Porter found that national competitive advantage mainly depends on the following four basic elements: (i) the conditions of factors of production, (ii) the conditions of demand, (iii) the status and interaction of related industries and (iv) the degree of rivalry of leading companies in the country. Each of these elements is briefly discussed below.

Elements of Competitive Advantage

The Conditions of Factors of Production

How effectively and efficiently factors are deployed is essential to the development of competitiveness. It is important to distinguish between two different types of factors. Basic ones, such as natural resources, climate, location, unskilled and semiskilled labour, and advanced factors such as communications infrastructure, highly educated personnel and university research institutes. Porter’s main argument is that most factors are not inherited by a nation but must be developed over time through investment. Advanced factors are the essential element of competitive advantage in sophisticated differentiated product markets and in sectors where the constant development of new technologies is a crucial element of competition.

Several examples are given to show that sustainable competitive advantage in a particular industry is achieved with both advanced and specialised factors: “In optics, for example, an important reason why German firms have been able to steadily improve product performance and quality is the availability of graduates from special university programs in optical physics and a pool of highly skilled workers trained in specialised apprenticeship programs”. In Denmark, there are two hospitals specialised in treating diabetes, and they are owned by the two world-ranking insulin producers, Novo Industry and Nordisk Insulin. The USA is a world leader in computer sciences and agricultural technology, among other fields; it is no accident that the best universities in the world to specialise in these areas are in the US. There is no unique set of rules for factor development, but it is clear that international leadership in an industry depends significantly on the capabilities of a country to develop advanced factors.

³⁸ Michael Porter (1998), op. cit.

The Conditions of Domestic Demand

In spite of the effects of globalisation, Porter claims that home demand has a very significant impact on a firm's ability to interpret buyer needs and can provide the necessary initial stimulus for investment and innovation. "Nations gain competitive advantage in industry segments where the home demand gives local firms a clearer or earlier picture of buyer needs than foreign rivals can have". Proximity to buyers is an important element in product and service development. Sophisticated and demanding domestic buyers pressure local firms to meet high standards. For example, it is no accident that the Europeans are the leaders in the fashion sector. Even countries like Spain have become very competitive in the clothing business due, in part, to a relatively sophisticated domestic demand for clothing.

The size of the domestic market can help achieve economies of scale faster. Porter claims that in sectors with heavy R&D requirements or substantial economies of scale in production, the proximity of a large home demand can be helpful in making investment decisions.

Status and Interaction of Related Industries

The presence of world-class industries helps to develop neighbouring segments. There are plenty of examples where competitive supplier industries create advantages for downstream segments, especially by establishing dynamic patterns of process innovation and upgrading. Porter analyses in detail several examples; such as the case of the Italian leather footwear industry. Producers interact with leather manufacturers that gain early insights into fashion trends.

The existence of "clusters" of industries helps to develop specialised factors and distribution channels. There are plenty of examples of world-class companies of the same country in related sectors. Success in one industry can pull through demand for complementary products and services. The best example is the dynamics of the American computer hardware, software, peripherals and database services industries. These elements should be taken into account in implementing competition policy, because co-operation in certain areas, such as R&D, between companies of the same cluster could be beneficial.

Degree of Rivalry

Most relevant for competition policies is what Porter has to say about the degree of rivalry. He claims that the way firms are run is crucial to achieve a sustainable competitive advantage and size need not be a constraint. For example, in Italy, many successful international competitors are relatively small firms. One common element is probably the desire to compete globally and the right mix of governance structure to keep management with the correct incentives to pursue long-term goals.

The author looks into ten nations with leading world positions in specific industries. A common element found in all of them is that they have a number of strong local rivals. "Successful firms compete vigorously at home and pressure each other to improve and innovate". He gives a set of examples: Switzerland in pharmaceuticals (Hoffman-LaRoche, Ciba-Geigy and Sandoz); Sweden in cars and trucks (Saab-Scania and Volvo); Germany in chemicals (BASF, Hoechst, Bayer and others); the USA in computers and software.

Domestic rivalry is not restricted to static price competition; it is rather the race for product differentiation and innovation, which puts pressure on firms to sell abroad in order to grow. Porter goes beyond these arguments to show that there are plenty of examples of geographic concentration of rivals, such as Italian jewellery firms, which are located around two towns, Arezzo and Valenza Po. Similar

examples of firm concentration in successful industries are: Basel, Switzerland (Pharmaceuticals), Hamamatsu, Japan (motorcycles), Route 128 in Boston (minicomputers), Madison Av., New York (advertising). Moreover, intense domestic rivalry depends on new business formation, which can be partially substituted by a home market open to international competition.

Porter warns that competition policy has to watch carefully any kind of direct co-operation among domestic competitors, not necessarily the same type of co-operation of firms in the same cluster mentioned above, but in many cases the excuse of avoiding duplication and achieving economies of scale can eliminate diversity and inhibit the rate of industry improvement.

Stages of Competitive Development

National competitive development can be divided in four stages: (i) factor-driven, (ii) investment-driven, (iii) innovation-driven and (iv) wealth-driven. These stages do not explain everything about the evolution of competitiveness in a country, but they highlight some attributes of a nation's position in a specific period of time. The first three stages are associated with rising economic prosperity and the fourth with a decline.

Factor-Driven Stage

Throughout this period, basic factors are the essential source of advantage. The country competes on prices, mainly in commodity sectors or segments of industries where unskilled labour is required. Technology is sourced from abroad. Nations in this stage of development are very sensitive to world economic cycles. Porter claims that there are only two countries that have been able to achieve prosperity by using natural resources at the core of their national development: Australia and Canada.

Investment-Driven Stage

During this stage, the country invests aggressively in both human and physical infrastructure, and industries acquire more complex product and process technology, usually through licenses. Firms still compete in price-sensitive segments, with high demand-elasticities, but process technology is near state of the art. Home demand, in general, continues to be unsophisticated, but improving. During this stage there are continuous gains in employment creation and some basic factor costs start to increase. More important, domestic rivalry increases; traditional monopolies start to fall through deregulation and by opening the economy to international competition.

Innovation-Driven Stage

In this stage the country becomes competitive in specific industries and clusters. Companies not only improve technology in these sectors, but they create their own innovation base, accelerating improvement and increasing rivalry of domestic competitors, not in price, but in the race for intellectual property and diversification. The leading firms develop global strategies and factors are specialised and upgraded. In general, domestic demand becomes more sophisticated in this stage and adds to the "incentive-driven process of improvement". World-class supporting industries are developed.

Wealth-Driven Stage

During this stage firms are more concerned about preserving their position. They try to influence government policy to insulate themselves. There are widespread mergers and acquisitions, which should be a serious concern for competition authorities. Domestic rivalry is usually reduced and companies depend more on customer loyalty than on continuous improvement to retain customers. Cumulative investment can sustain competitive advantage in certain fields for a long period of time, such as the arts and highly specialised forms of higher education.

Implications for Government Policy

The author outlines a set of premises for government policy towards industry:

- The government can influence the shape of an institutional structure, such as trade policy, and help develop areas where externalities are present, such as education and environmental quality.
- Dynamism leads to competitiveness, not short-term cost advantages. The government should not interfere in determining relative prices; it should help to develop a framework so that the correct incentives filter through every sector of the economy.
- Geographic concentration of competitive industries is a common characteristic. The government can help develop better infrastructure to facilitate the creation of new companies and help extend the benefits of competitive clusters.
- In factor development, education is the basic element that governments should focus on, by helping enhance standards and investing in complementary infrastructure.
- Deregulation and privatisation of state monopolies should be a priority to enhance industry competitiveness. In describing national agendas, for the USA the author argues that: “a backing away from antitrust enforcement in the area of mergers, has undermined some positive developments that have taken place in the area of deregulation. Mergers and alliances among leading competitors should be prohibited.” Porter goes further to emphasise that these mergers should not be allowed, whether they are domestic or foreign.
- Regarding competition policy, the author concludes that governments should only help create the institutional framework to enhance competitiveness, not allowing mergers of leading firms in the same segment of an industry and promoting deregulation in most industries. Co-operation among companies of the same cluster should only be allowed when it has a positive effect on the rate of industry improvement, and does not eliminate diversity and reduces rivalry.

Summary and Conclusions

From a theoretical point of view competition enhances social welfare by bringing prices closer to marginal costs of production and by so reducing the allocative and productive inefficiencies that may occur under monopoly or oligopoly. In a static approach competition reduces price and increases output to consumers; thus increased competition brings a once-and-for-all increase in real product. In a dynamic setting competition has the additional feature that it generates a process of what Schumpeter called “creative destruction”, i.e. inefficient firms disappear while existing and emerging efficient firms grow in the market, and obsolete products are continuously being replaced by improved products. Such creative

destruction leads to ever increasing levels of productivity and in this way competition not only induces a once-and-for-all gain in real output but contributes to higher economic growth on a permanent basis. At the same time competition creates the proper incentives for firms to enhance their competitiveness and, in general, to employ their specific capabilities and information advantages to the benefit of the society as a whole.

There are a few wellknown exceptions to this general picture. First, in the presence of pervasive economies of scale competition tends to destroy itself and attempting to keep competition alive may lead to productive inefficiencies. Second, in the presence of network externalities prices close to marginal costs as a result of fierce competition may occasionally impede welfare-enhancing networks from emerging so that too much competition may reduce welfare. Third, in the process of product innovation a distinction should be made between static and dynamic competition. To provide the proper incentives for product innovation temporary monopoly positions for patented products should be allowed. Not allowing the exclusive exploitation of IPRs would frustrate the innovation process. Thus, there is a trade-off between dynamic and static competition.

Competition polices, to the extent that they effectively promote the competitive process and whenever they achieve to take proper account of exceptions such as the ones we just mentioned, will also have a positive effect on real output in the static sense and on economic growth in the dynamic sense. However, to achieve a higher economic growth on a lasting basis it is necessary that the process of *creative destruction* has its course. This may put competition authorities in a position diametrically opposed to the position of other authorities more concerned with short-term employment considerations. The competition authority would typically underscore the *creative* character of competition, other authorities its *destructive* character.

Competition policies are even more important because many markets are more segmented than what is generally believed. Incomplete information by customers and even small search costs may give rise to significant price-cost mark-ups. Markets are far from contestable because of strategic conduct by incumbents deterring entry so that dominant positions may be very persistent. All these factors, together with rent-seeking behaviour by dominant market players, may lead to substantial welfare losses.

Conflicts between competition and other policies may arise particularly where those policies interact. There are important interactions and also complementarities with trade and foreign investment policies, privatisation and regulatory reform, and intellectual property protection, among others. An important concern for competition authorities is the increasing use of antidumping measures rolling back previous trade liberalisation attempts.

As regards the empirical testing of the relationship between competition or competition policy and economic development indicators such as price levels, technical efficiency, innovation and economic growth, it should be admitted that for most variables involved there are serious problems of measurement. For static competition there are quantitative measures such as concentration indices and price-cost mark-ups, each of them with their own specific inconveniences; for dynamic competition indicators of firm dynamics or product dynamics (e.g. patent counts) are sometimes used. Measuring the strength of competition policy is even more problematic. Usually such measures do not go beyond simple dummies and proxies such as the existence or not of an independent competition authority, the ratio of the budget of that authority to GDP, etc. In the only empirical cross-country study we have found in which such a competition policy variable figured among the explanatory variables of the exercise, the measure used for competition policy was based on the subjective answers of topmanagers to the question whether they believed that competition policy in their country was an effective instrument in promoting competition.

There is a long tradition of empirical studies about the relation between competition and different variables reflecting performance. In fact a good deal of the literature on the structure-conduct-performance paradigm in the field of industrial organisation falls into this category. In this document we have given a few examples of empirical studies about this relation: one study confirming the positive influence of competition upon performance indicators in the telephony industry in a sample of 30 African and Latin American countries; one study suggesting a curvilinear relationship between concentration and technical efficiency in 151 manufacturing industries in the UK, and one about the relation between industry concentration and innovation also in the UK finding that there are usually two forces at work. First, large firms have more capabilities to innovate. But second, large firms have, to the extent that their size increases market concentration, less incentives to innovate.

Empirical work about the relation between *competition policies* (not competition) and economic performance are much scarcer. Often, it is simply taken for granted that competition policies enhance competition and thus have the same influence on performance indicators as competition itself but evidently this is not satisfactory. In a cross-country study covering more than 100 countries a positive association was found between the perceived effectiveness of competition policy and long-run economic growth. However, the study has many shortcomings which undermine to a certain extent the credibility of its outcomes. We conclude that empirical work on the relation between competition policy and economic performance is only in its infancy and that much work has to be done to fill that gap.

Finally, domestic competition is considered to be of crucial importance for the development of clusters of internationally competitive firms and competition authorities should watch with care co-operation and mergers going on in those industries.

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Competition Policy and Economic Growth and Development

C. International Cartel's Impact on Developing Countries

Unclassified

CCNM/GF/COMP/WD(2002)34



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

07-Mar-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

PRIVATE INTERNATIONAL CARTELS AND DEVELOPING ECONOMIES

-- Contribution by Simon J. Evenett, World Trade Institute --

This note was submitted by Simon J. Evenett under Session I of the second meeting of the Global Forum on Competition, held on 14-15 February 2002.

JT00122107

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)34
Unclassified

English text only

Private International Cartels and Developing Economies

Simon J. Evenett
World Trade Institute

Research Programme

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Valerie Y. Suslow (U of Michigan)

★ Research conducted for:

ICPAC
World Development Report 1999/2000
World Economy

Research Scope

- ✦ General focus: private international cartels in the 1990s.
- ✦ Specific focus: five case studies of international cartels and their effects on developing economies.
- ✦ Sources: Enforcement agencies' press releases and speech, court records, general business press and specific industry publications.

Principal findings

- ✦ Prevalence: 39 cartels (includes 5 ongoing investigations).
- ✦ Diverse international membership of cartels: 31 economies (including 8 developing economies).
- ✦ Duration: 24 cartels lasted at least 4 years
- ✦ Effect on developing economies' imports: US \$81.1bn from just 16 cartels. Likely to be an underestimate.

Principal findings

- ✦ Price falls after cartels have been broken up are of the order of 20-40 percent.
- ✦ Cartel formation triggered by substantial price falls.
- ✦ Need to keep an open mind on the effects of international market integration and cartel formation and survival.
- ✦ After enforcement actions, many cartel members merge, acquire one another, or engage in strategic alliances and joint ventures. Post-enforcement monitoring may be needed.

Unclassified

CCNM/GF/COMP/WD(2002)25



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

07-Feb-2002

English text only

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INTERNATIONAL CARTEL ENFORCEMENT: LESSONS FROM THE 1990s

-- Note by Simon J. Evenett, Margaret C. Levenstein, and Valerie Y. Suslow --

-- Session I --

This note is submitted by Simon J. Evenett as his contribution to Session I of the Global Forum on Competition, to be held on 14-15 February 2002. It is only available in PDF format.

JT00120512

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)25
Unclassified

English text only

International Cartel Enforcement: Lessons from the 1990s

Simon J. Evenett, Margaret C. Levenstein, and Valerie Y. Suslow¹

ABSTRACT:

The enforcement record of the 1990s has demonstrated that private international cartels are neither relics of the past nor do they always fall quickly under the weight of their own incentive problems. Of a sample of forty such cartels prosecuted by the United States and European Union in the 1990s, twenty-four lasted at least four years. And for the twenty cartels in this sample where sales data are available, the annual worldwide turnover in the affected products exceeded US\$30billion. Prevailing national competition policies are oriented towards addressing harm done in domestic markets, and in some cases merely prohibit cartels without taking strong enforcement measures. In this paper we propose a series of reforms to national policies and steps to enhance international cooperation that will strengthen the deterrents against international cartelization. Furthermore, aggressive prosecution of cartels must be complemented by vigilance in other areas of competition policy. If not, firms will respond to the enhanced deterrents to cartelization by merging or by taking other measures that lessen competitive pressures.

1. INTRODUCTION

In its 1997 Annual Report, the World Trade Organization (WTO) highlighted the growing significance of international cartels for policymakers, noting “there are some indications that a

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growing proportion of cartel agreements are international in scope.”² Increasing trade liberalization may, by increasing competition in formerly protected national markets, have increased firms’ incentive to participate in cartels. These cartels undermine international integration and decrease the benefits of liberalization to consumers. International cartels may also undermine political support for liberalization if citizens believe that private barriers to trade are simply replacing government-created ones.

Our analysis of recent investigations and prosecutions of international cartels yields two findings. First, cartels are neither relics of the past nor do they always fall quickly under the weight of their own incentive problems. Even where cheating eventually undermines a cartel, consumers may have been burdened by years of increased prices, and enduring barriers to entry have often been created by strategic cartel behavior. Second, aggressive prosecution of cartels can deter collusion, but only where sufficient international cooperation exists to gather evidence and prosecute offenders so that cartel participants actually have something to fear.

In what follows we argue for a more comprehensive approach to attacking distortionary cartels in the international marketplace. Prevailing national anti-cartel policies are oriented towards addressing the harm done in domestic markets, and in some cases merely prohibit cartels without taking strong enforcement measures. In this paper we propose reforms to national policies and to international cooperative arrangements that will strengthen the deterrents against international cartels and reduce the strategic creation of entry deterrents.

Section 2 of this paper discusses three types of international cartels. Section 3 examines two types of international cartels that were active over the last decade: illegal “hard core” cartels and legal export cartels. We provide an overview of the prevalence and characteristics of these cartels and discuss the long-term effects of cartel-created barriers to entry. In Section 4 we examine the deterrent effect of current national competition laws, and in section 5 we assess the recent experience with bilateral cooperation in international cartel investigations. Finally, in Section 6 we address the role that the WTO (or other international body) might play in promoting competition. We discuss other modifications to national competition

² WTO (1997), p. 40.

policies to the same effect. We argue that the criminalization of price-fixing is critical to deterring prospective international cartels and for gathering evidence to prosecute existing cartels. Furthermore, we argue these aggressive measures must be complemented by vigilance in other areas of competition policy, such as merger reviews and investigations of collaborative ventures between corporations. Otherwise, firms will respond to the enhanced deterrents to cartelization by combining with or acquiring rivals or by taking other measures that lessen competitive pressures.

2. TAXONOMY OF INTERNATIONAL CARTELS

a. Three Types of International Cartel

There are a wide variety of organizations that could plausibly be described as international cartels, and to structure the analysis in this paper we distinguish between three types: Type 1 are the so-called “hard core” cartels made up of private producers from at least two countries who cooperate to control prices or allocate shares in world markets. Type 2 are private export cartels where independent, non-state-related producers from one country take steps to fix prices or engage in market allocation in export markets, but not in their domestic market.³ Type 3 are state run, export cartels.⁴

Although we briefly comment on policies toward export cartels, we restrict the greater part of our analysis to Type 1 cartels.⁵

b. The Basics of Cartel Performance and Implications for Antitrust Policy

The economic theory of cartels has two implications for antitrust policy that are particularly germane to this discussion. First, economic theory identifies the incentive to sell above

³ Note, however, that not all export associations allocate market shares or fix prices. In his study of US firms which formed export associations that were reported under the Webb-Pomerene Act, Dick (1996) found that about twenty percent engaged in neither of these activities; their cooperation was limited to promotion and marketing.

⁴ For a broader account of the different types of anticompetitive horizontal arrangements between firms (which is not focused exclusively on the international dimension) see Lande and Marvel (2000).

⁵ State-run export cartels (Type 3 cartels) are motivated by a range of political as well as economic factors that distinguishes their behavior and effects from the profit-maximizing corporations that form private international cartels (Type 1 cartels) considered here.

agreed quotas, or below cartel prices, as a source of instability underlying all cartels. This has implications for how governments might allocate scarce antitrust resources, since one might want to identify which firms are most likely to be able to overcome the incentive to cheat and direct antitrust resources there. Unfortunately, economic theory does not identify deterministic relationships between industry or firm structure and cartel success. Rather, theoretical advances have established that an infinite number of outcomes are possible, ranging from perfectly competitive prices to perfect collusion.⁶ In addition, the success or failure of a cartel in an industry is likely to depend on a host of factors, such as the legal environment, demand for the products in question, the terms of the cartel agreement, managerial skill, and industry history. Worse still, some of these factors are inherently unobservable. Aware of these difficulties, Sutton (1998) argues that a “bounds” approach should guide empirical analysis of cartels. This approach recognizes that there are certain *necessary but not sufficient* conditions for cartel success, which bound the circumstances under which successful cartelization can occur.⁷ Outside of the bounds entry may be “too easy” or coordination “too difficult” for a cartel to survive in a particular industry. Inside the bounds, cartels may succeed. One implication of this view is that antitrust enforcement should focus its resources on industries inside these bounds.

All else equal, international cartel agreements are more likely to fall inside the bounds because national borders are a straightforward way to divide up international markets. The ability to monitor competitors increases the likelihood of cartel success—and firms in an international cartel can monitor exports and imports, using published trade and customs data. If these heightened incentives to cartelize outweigh any difficulties associated with organizing a conspiracy among members that have different cultures or languages, then this is an argument for focusing antitrust resources on international cartels.

The second implication of cartel theory for antitrust policy also stems from cartels’ underlying fragility. A successful cartel must take actions to counteract the incentive to defect. Such actions include mechanisms to increase the cost to defection: making cheating more

⁶ See Sutton (1998) and Tirole (1988) for the relevant theoretical analyses.

observable; making cheating more difficult to undertake; creating mechanisms to punish cheating. Cartel agreements can also include mechanisms that increase the returns to cooperation, such as the creation of barriers to entry. The longer a cartel operates the more likely that it will establish industry practices or barriers that facilitate anticompetitive practices in the future. Barriers to entry created by the cartel, either through tariffs, patent pools, or distribution agreements will not necessarily disappear with the cartel's demise and may well limit future entry and stifle innovation. Firms may move beyond cartel conspiracies to outright mergers, achieving in essence a more stable and consolidated cartel. Therefore, in addition to the classic (static) deadweight losses, over time cartels are likely to distort resource allocation through other means.

Looking forward a little, in section 4 we describe how antitrust policy can take advantage of the ever-present incentive problems faced by cartel members. Measures can be taken to increase these members' incentives to defect, to limit the mechanisms by which cartels can punish defectors, and to prevent the creation of barriers to entry. And in the next section, the potential for strategic behavior by cartel members (during and even after a conspiracy has been terminated by competition authorities) suggests that a more collaborative approach to tackling international cartels is required than is currently employed.

3. CONTEMPORARY INTERNATIONAL CARTELS

a. "Type 1" International Cartels

(i) International Cartels: Prevalence, Formation, and Duration

There have been numerous recent international price-fixing prosecutions by the US Justice Department and the European Commission. From these, we have created a sample that we believe includes nearly all international cartels that were successfully prosecuted by the US or the EC for fixing prices during the 1990s.⁸ These cartels operated in a variety of industries,

⁷ See also Evenett and Suslow (2000) and Levenstein and Suslow (2002).

⁸ In order to be included in the sample, a cartel must involve more than one producer; include firms from more than one country; have attempted to set prices or divide markets in more than one country; and begin or end in the 1990s.

including chemicals, metals, paper products, transportation, and services. Their members included some of the largest corporations in the world. The markets affected by these cartels have annual sales of well over \$30 billion.⁹

There are forty cartels in the sample with members from over thirty countries (Table 1). The typical international cartel of the 1990s had firms from two or three countries. Some cartels included firms from four or five countries, and, in the cases of shipping cartels, as many as thirty countries. As expected, given that these are DOJ and EC cases, most of the alleged conspirators are European and US firms. It is not unusual, however, to find Japanese or South Korean participation.

Cartels, being secretive organizations, rarely announce their formation. Empirical research on cartel formation is therefore limited to evidence gathered from cartels operating in a legal (or tolerant) environment or from evidence collected in antitrust prosecutions. Theoretical research on the timing of cartel formation has focused on the effects of business cycles on cartel formation. The available evidence on the formation of the 1990s international cartels suggests that these cartels often were formed following a period of declining prices, but these price declines were not generally associated with macroeconomic fluctuations (Levenstein and Suslow 2001). Anecdotal industry evidence suggests that they were the result of increasing competition and market integration.¹⁰

Figure 1 shows the pattern in duration for 1990s sample of international cartels. The average duration of cartels in the 1990s sample of DOJ and EC prosecutions is 6 years.¹¹ Some of these cartels lasted for two decades before antitrust intervention. Other cartels lasted less than a year. Twenty-four of these forty cartels lasted for at least four years, certainly long enough

⁹ Due to lack of data, this figure includes revenues for only about half of the industries in Table 1.

¹⁰ Levenstein and Suslow (2002) reaches a similar conclusion when analyzing a different sample of international cartels. Most of the cases they study report cartel formation during a period of falling prices, but this is not always, or even usually, associated with falling demand.

¹¹ This measure probably understates the duration of these cartels as it reflects the public, legal record of the years for which the member firms were found or pled guilty to cartelization. The actual start of a cartel agreement may precede the starting date alleged in public documents because an antitrust authority may not have had strong enough evidence of a cartel's initial operations or the authorities may have chosen not to bring that evidence to court as part of a plea arrangement. For these two reasons our measure understates the actual

to have had a significant impact on consumers. This finding is consistent with conclusions drawn from other samples of cartels. Average duration is generally in years, not decades; there are cartels that do survive decades, others that can't get started, and many in between.

Levenstein and Suslow's (2002) survey of cross-section studies of historical international cartels comes to a similar conclusion. The mean cartel episode length in these studies varies from 4 to 8 years, with a range from one year to several decades. This high variance undoubtedly reflects both true variation in cartel longevity and scholars' selection bias for either very successful, long-lived cartels or those with an interesting history of on-again off-again episodes. Whatever the biases involved, it is clear that cartels are not "short" or "long" lived; they are both. There are also industries that followed the pattern of the Canadian oil industry, in which the failure to sustain collusion led to consolidation of the industry (Grant and Thille 2001). In the next section, we look at this issue and its antitrust implications more closely.

(ii) Strategies for Survival: Building Barriers to Entry and Deterring Defections

The potential profits associated with successful cartelization create a financial rationale for firms to devise means to overcome the short-term incentive to deviate from a cartel agreement; to frustrate entry by new firms; and to prevent detection by competition authorities. Some cartels have turned even to government policies to achieve their ends, employing anti-dumping laws, quotas, regulations, or import surveillance, and other forms of statistical reporting. Cartels have also employed a variety of private measures, including vertical restraints or the use of a common sales agent, patent pooling, joint ventures, and mergers (either during or after the conspiracy period).

For the most part, the public record on 1990s price-fixing cases does not discuss measures taken to block entry. Perhaps this is because such evidence is not necessary for a criminal conviction in the US, where price fixing is *per se* illegal. However, there are many examples

duration of collusion. See Suslow (2001) for a fuller discussion of measuring the duration of international cartels.

of activities that may have been attempts to deter or block entry in these and other industries (Table 2).

Some cartels turned to government restrictions to block entry by outsiders.¹² For example, China has presented vigorous competition in the world citric acid industry, which is otherwise highly concentrated. US producers twice tried to use anti-dumping duties to insulate the US market from Chinese imports of citric acid, once during a cartel conspiracy and once after. Both times the petition was denied. Producers in the ferrosilicon cartel pursued similar tactics, using US anti-dumping duties to protect the cartel from Chinese and other imports (Table 2).¹³

Technological restrictions are also used to maintain cartel market power. For example, steel producers that were fixing the price of steel beams “restrict[ed] the flow of information . . . in order to freeze out any new competitors,” according to Karl Van Miert, a former EC competition commissioner.¹⁴ In another recent case, members of a graphite electrode cartel “agreed to restrict non-conspirator companies’ access to certain graphite electrode manufacturing technology.”¹⁵ These cases build on a history of cartel attempts to restrict information about technology to create barriers to entry.¹⁶

Finally, there is case-specific evidence of the use of strategic alliances and joint ventures to limit or control entry. One of the most striking examples is in the Oil Country Tubular Goods (OCTG) market, which are the seamless steel pipes used in the oil and gas industry. In December 1999, the EC convicted four European and four Japanese steel manufacturers of price fixing. No evidence was found indicating that they blocked entry or potential entry into the OCTG market. However, since the breakup of the cartel, every member of the cartel has joined one of three international alliances. The largest of these, with a 25 percent market

¹²This section draws on research by the authors on a few cases selected from Table 2. See Levenstein and Suslow (2001).

¹³ Pierce (2000) provides an account of the ferrosilicon case and more generally on how petitions for relief against dumping can, in his view, facilitate cartelization.

¹⁴ “European Commission Fines Steel Makers \$116.7 Million” *Wall Street Journal Europe* February 17, 1994.

¹⁵ “Japanese Subsidiary Charged with International Conspiracy to Fix Prices for Graphite Electrodes in the US” US DOJ Press Release, February 23, 1998.

¹⁶ See, for example, Reich (1992).

share of world OCTG, is led by Techint. Techint controls Dalmine, the Italian member of the cartel, Tamsa, a Mexican tube producer, and Siderca, an Argentine steel producer. They are known jointly as the DST group. Tamsa is currently under investigation by the Mexican Federal Competition Commission for abuse of monopoly power (in a case that appears unconnected to the EC charges). NKK, another leading producer and former cartel member, has formed an alliance with DST, as has a Canadian producer. Three of the Japanese ex-conspirators have formed an alliance in which they use a single joint sales agency. Mannesmann and Vallourec, the German and French cartel members, have formed a joint venture to which they have transferred all their OCTG production. They are also engaged in steel tube joint ventures with Corus (formerly British Steel), another former cartel member that has exited the OCTG market.

These kinds of activities might be particularly effective in limiting the entry of producers from developing countries. In several commodity chemicals markets, incumbent firms have been willing to accommodate Chinese entry since the break-up of a cartel, but they have done so by establishing joint ventures between former cartel participants and their Chinese competitors. These arrangements give Chinese producers access to the world market, but may do so at some cost to competition. Of course, both entrants and established producers could have other, welfare-enhancing motives for joint ventures, such as sharing technology, local market expertise, or capital. These explanations for joint ventures are not mutually exclusive, but joint ventures (and mergers) in industries known to have a history of international price fixing should be carefully scrutinized by regulatory authorities.¹⁷

We have presented evidence of anti-competitive actions taken by contemporary international cartels to create barriers to entry through mergers and joint ventures, and to manipulate certain governmental policy tools, such as protective tariffs and anti-dumping duties, either during or after a conspiracy. While some of these actions may be appropriate under certain circumstances, their appearance in an industry that has recently attempted to cartelize should raise concern about possible anti-competitive effects.

¹⁷ There are several industries, including bromine and steel, that appear in both the 1990s cartel sample and the historical sample of a century before. See Levenstein (1997).

b. "Type 2" Export Cartels

(i) Legal Status

Export cartels are associations of firms that cooperate in the marketing and distribution of their product to foreign markets. The competition laws of virtually all countries exempt such export cartels from prosecution by domestic authorities. A summary of these exemptions is provided in Table 3. In some legislation, exemptions for export cartels are explicitly motivated by mercantilism: a desire to increase national exports and give national firms a competitive advantage relative to firms based in other countries. In most cases, however, this exemption is *implicit* in national competition laws, which cover only those activities affecting the domestic markets and typically export activities are presumed not to affect domestic markets. Several countries do, however, provide specific exemptions from domestic laws for cartels that would otherwise violate domestic laws as long as their activities are restricted to export markets. Japan, Mexico, and the United States all have such legislation. Japan and the US require that export cartels register with a governmental agency to receive an antitrust exemption. In most cases, however, no registration is required, so there is very limited information regarding the number or activities of export associations.

When the US passed the Webb-Pomerene Act in 1918, which exempts American export cartels from some of the U.S. legal provisions against cartelization, most of its trading partners did not prohibit cartels.¹⁸ The US was then a relatively small player in many international markets, and those markets were effectively controlled by legal international cartels dominated by large European producers. Foreign cartels took actions to bar entry from non-members, but US firms were not allowed by US law to join these international cartels. US firms were therefore blocked from exporting to these markets. In such an environment, exemptions for export cartels were most likely export-promoting, even if they did not necessarily increase competition in foreign markets much.

¹⁸ Subsequently, the Export Companies Trading Act of 1982 provided further legal exemptions to registered U.S. export cartels.

Presently, the likely effect of these exemptions for export cartels is to make it more difficult for national governments to exchange information and evidence regarding the activities of suspected international cartels. This is because nations are reluctant to provide information about those acts that their exporters engage in which they consider to be legal under their own laws. However, recent reforms of competition law in EC countries have restricted or eliminated export cartel exemptions in some member states. For example, Germany's new competition law explicitly omits its earlier provision for exemption and registration of export cartels. The UK's 1998 competition law omits mention of the Fair Trading Law's provisions for exemption and registration of export cartels.

Where countries have provided explicit exemptions for export cartels these do not appear to be widely used by international cartels. For example, there is no mention of the existence of a Webb-Pomerene Association in any of the recent international cartel convictions obtained by the US Justice Department.¹⁹ The registration requirement may deter cartel participants from availing themselves of the exemption. Firms engaged in price-fixing may prefer secrecy to a limited immunity that might bring them to the attention of competition officials.

(ii) Prevalence of Export Cartels

Few countries require that firms organizing an export association formally register with the government (Table 3). It is therefore almost impossible to track the number of these associations internationally. In the US, however, the Webb-Pomerene and the Export Trading Company Acts require registration with a federal agency. The number of registered Webb-Pomerene associations in the US hit a peak of 62 in 1930, and has declined fairly steadily through the years.²⁰ By 1989 the number of Webb-Pomerene associations had declined to twenty-four. Put into context, this number is quite small and represents only a fraction of US trade. Dick reports that these associations covered 2.3% of US exports in 1962 and a mere 1.5% in 1976.²¹ The limited information available from other countries shows a similar

¹⁹ However, the European Commission took action against a cartel of U.S. wood pulp producers, whose cartel was registered in the U.S. under the Webb-Pomerene Act.

²⁰ Unfortunately, we have not been able to obtain data on the number of associations registered under the Export Trading Company Act.

²¹ Dick (1992), p. 97.

pattern. The OECD reported in 1984 that between 1972 and 1982, the number of export cartels in the UK held constant, the number in Germany declined slightly, and the number in Japan declined markedly.²²

(iii) Activities of Export Cartels

In some cases, exporting firms cooperate by engaging in price fixing: either agreeing to sell their exports at the same price or to sell them through a single, joint sales agency that will accomplish the same thing. Firms may also use cooperative export organizations to jointly market products. While the latter type of activity may lessen competition, it may also allow firms to achieve sufficient scale to participate in foreign markets. In many cases, this outcome is more pro-competitive than the mergers or joint ventures to which firms might otherwise turn to achieve the necessary scale for global competition. Consequently, policies toward export cartels ought to distinguish between the various motivations for cooperative export organizations.

Where countries do require reporting or registration of cooperative export organizations, it may be possible to determine which activities such organizations engage in. Several studies by Andrew Dick find that US Webb-Pomerene Associations had little anti-competitive effect in part because they also served to lower the cost of exporting.²³ One reason for the limited use of these associations by recent international cartels may be that they consist only of US exporters, with little ability to control other nation's markets.

(iv) Anti-Competitive Effects of Export Cartels

The anti-competitive impact of export cartels may be more significant in some markets or countries than others. For example, at a recent meeting of competition policy-makers at the OECD, some countries voiced concern "that export or import cartels could inflict [harm] on trade and market access ... and argued that such cartels should lose any exemption they might enjoy from national competition law. Others ... questioned the importance of such cases and argued that ... such exemptions do not immunize such cartels from prosecution by the

²² OECD (1984).

affected country. Others pointed out that affected countries might have difficulty obtaining the necessary evidence located abroad ...”²⁴ A recent article in the *Journal of Competition Law and Policy* made a similar point, arguing that Mexico has been harmed by the activities of legal export cartels based in other countries. While prosecution of these cartels is possible under Mexican law the lack of cooperation from other countries means that information gathering is difficult and prosecution almost impossible.²⁵

There is little mention of legal export cartels in recent reports on international antitrust from the OECD and the U.S. International Competition Policy Advisory Committee.²⁶ This suggests that certain leading members of the American antitrust community do not feel that this is an issue that severely affects consumers or those domestic producers who compete with foreign export cartels. The OECD’s report on *Hard Core Cartels* “urges ... reviews by competition authorities ... of [export cartel] exclusions [but] does not regard further action in this area to be a priority in connection with its program for bringing about more effective action against hard core cartels” (OECD 2000a, p. 28).

Having laid out the main features of contemporary international cartels, and conveyed a sense of their prevalence in the 1990s, we now examine the effectiveness of current anti-cartel enforcement regimes.

4. THE DETERRENCE APPROACH TO INTERNATIONAL CARTEL ENFORCEMENT

Before assessing the recent increase in international cartel investigations, it will be useful to lay out—from a traditional “law and economics” perspective—the incentives supplied by national anti-cartel enforcement regimes and penalties.²⁷ This analysis will then motivate a discussion of the inadequacies of national anti-cartel enforcement in a world of many legal jurisdictions.

²³ Dick (1992, 1996).

²⁴ “Summary” *OECD Journal of Competition Law and Policy* 1:4 (1999), p. 10.

²⁵ Wise (1999), p. 67.

²⁶ ICPAC (2000) and OECD (1999).

²⁷ For a recent exhaustive survey of the law and economics literature see Kaplow and Shavell (1998). Our discussion focuses on the incentives supplied by public enforcement practices. Private suits—brought for damages by cartel victims—that are permitted in some jurisdictions, may reinforce these incentives.

From the law and economics perspective the objective of anti-cartel laws should be to deter, and where necessary punish, firms who engage in this undesirable act.²⁸ Three characteristics of cartels are germane to understanding the incentives supplied by anti-cartel enforcement. First, cartels typically involve secret agreements between firms. Second, the objective of these agreements is to secure pecuniary gains for cartel members. Third, sustaining the cartel requires careful attention to crafting incentive compatible agreements between firms.

A group of firms will be *collectively* deterred from cartelizing a nation's markets if that country's antitrust authority is expected to fine them *more than* the gains from participating in the cartel.²⁹ Assuming that the firms are risk neutral; there are no costs to the firms in defending themselves before a fine is imposed; the pecuniary gain from cartelization equals G ; and the probability of the antitrust authority detecting and punishing the cartel equals p , then a fine f that equals or exceeds (G/p) will provide the necessary collective deterrent. An important insight is that even though cartel agreements are typically secret—and so the probability of detection and punishment p is low—so long as p is positive there exists a fine that will collectively deter cartelization.³⁰ Secrecy may impede investigations, but deterrence is still in principle feasible. These arguments may also provide a rationale for why some nations, such as the United States, Germany, and Switzerland, have made the maximum fines for cartel members a function of the pecuniary gain from their illicit activity.³¹

²⁸ As a testament to the influence of this perspective it is worth noting that the Ministry of Commerce in New Zealand recently published a report on the effectiveness of the deterrence provided by that nation's enforcement practices and courts which was explicitly built on the lines of reasoning discussed in this section. See Ministry of Commerce, Government of New Zealand (1998).

²⁹ It is theoretically possible that a cartel agreement reduces the costs of its members. (Indeed, should such an agreement result in considerable reductions in the marginal costs of the parties to that agreement then, compared to a perfectly competitive benchmark, the formation of a cartel could be welfare improving.) Under these circumstances Landes (1983) demonstrated that the optimal fine should be based on the net harm to consumers, rather than on the total pecuniary gain to the cartel members. In the absence of such cost reductions, the net harm to consumers will exceed the pecuniary gain to cartel members, and so basing fines on the former could form the basis of an effective deterrent also.

³⁰ This simple calculation can be extended in a number of ways, see Government of New Zealand (1998). Perhaps the most important extension is to include enforcement costs, which leads to the finding that the optimal enforcement of cartels may result in some less distortionary cartels not being prosecuted. We thank Bob Hahn for reminding us of this point.

³¹ Although this section focuses on the deterrent effect of state antitrust enforcement, it should be borne in mind that some jurisdictions permit private suits by those entities whose interests are hurt by a cartel. In principle, the expectation of damages won by those interests can act as a deterrent to cartelization too.

Antitrust officials have exploited the “incentive compatibility” problems faced by cartels through the introduction of corporate leniency programs. These programs—which offer reduced penalties to qualifying firms that come forward with evidence of cartel conduct—induce members to “defect” from cartel agreements. These programs have also been motivated by the observation that the successful prosecution of cartels typically requires evidence supplied by at least one co-conspirator.³²

The US corporate leniency program, last revised in 1993, can be rationalized in these terms. Currently only the *first* firm to come forward with evidence about a currently uninvestigated cartel is *automatically* granted an amnesty from all US criminal penalties. This encourages a “winner takes all” dynamic, where members of an otherwise successful cartel each have an incentive to be the first to provide evidence to US authorities.³³ A second feature is that even if a firm is not the first to approach the US authorities, such a firm can gain a substantial reduction in penalties by admitting to cartel practices in *other* markets that are (at the time of the application for leniency) uninvestigated. This provision has set off a “domino” effect in which one cartel investigation can result in evidence for subsequent investigations. Since these changes, and others, were introduced the US has received on average one amnesty application per month, approximately twelve times the previous rate.

Jurisdictions differ considerably in whether they impose criminal penalties in cartel cases. In particular, few jurisdictions permit the incarceration of business executives responsible for cartelization.³⁴ US officials strongly believe that criminal penalties including the threat of incarceration are essential deterrents to cartelization.³⁵ How does a law and economics

³² At the core of such leniency programs lies the incentive to give evidence in return for reduced (or even no) punishment for criminal acts. Some members of the Bar have pointed out that this incentive may well distort the information offered to enforcement authorities and the statements that former conspirators are willing to make in court. See “The World Gets Tough on Price Fixers,” *New York Times*, June 3, 2001, section 3, pages 1ff.

³³ The German Bundeskartellamt (Federal Cartel Office) revised their corporate leniency program in April 2000 to include such a provision too. Dr. Ulf Boge, President of the Bundeskartellamt, argued in explicitly economic terms as follows: “By granting a total exemption from fines to the first firm that approaches us we want to induce the cartel members to compete with each other to defect from the cartel.” See Bundeskartellamt (2000).

³⁴ Although the criminality of cartel behavior has considerable implications for international cooperation and evidence sharing, the role of these sanctions as a deterrent is what concerns us presently.

³⁵ See, for example, Hammond (2000) who argues: “based on our experience, there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials. Corporate fines are simply not sufficient to deter would-be offenders. For example, in some cartels, such as the graphic electrodes cartel,

approach assess this claim? First, incarceration involves costly losses in and re-allocation of output: managers' productivity is less during their period of incarceration, and resources must be devoted to the construction and operation of prisons. If these were the sole considerations, then incarceration would be a less desirable alternative to fines. However, given the low probability of punishing a cartel and the sizeable gains from engaging in such behavior, the minimum fine that would deter a cartel may in fact bankrupt a firm or its senior executives. Bankrupting a firm that has been engaged in cartel behavior could actually reduce the number of suppliers to a market, resulting perversely in less competition and higher prices. Furthermore, personal bankruptcy laws bound from below what corporate executives can lose from anti-cartel enforcement. Incarceration may provide—through the loss of freedom, reputation, social standing, and earnings—the only remaining means to alter the incentives of corporate executives. This argument is particularly important because the use of stock options in executive compensation packages provides very strong incentives to senior executives to maximize firm earnings and stock market value.

The second “law and economics” argument is that incarceration is needed to reduce or eliminate the expected harm caused by repeat offenses. There may be legitimate concern that executives who have successfully arranged explicit agreements to carve up a market will, after the cartel is broken up, attempt some other form of anti-competitive practice. The imposition of fines alone may not induce a firm's shareholders to replace the offending executives, especially if the latter can convince shareholders that the fine was a “cost of doing business” and that the benefits from implicit collusion (which they expect to secure in a market that is well known to them) will soon flow. Here, a clean break with the past may be needed, with incarceration simultaneously removing the relevant executives from their posts and acting as a threat to incoming senior executives not to attempt re-cartelization. Antitrust officials must also weigh the stronger deterrent effect of incarceration against the higher levels of evidence that are required to secure criminal convictions. The threat of incarceration

individuals personally pocketed millions of dollars as a result of their criminal activity. A corporate fine, no matter how punitive, is unlikely to deter such individuals.” Mr. Scott Hammond is the Director of Criminal Enforcement at the US Department of Justice. In interpreting his remarks it is worth bearing in mind that the maximum fine under US law for individuals convicted in engaging in cartel behavior is \$350,000 which given

exacerbates the difficulties that national antitrust officials face in securing evidence and testimony from cartel participants, which in terms of the framework outlined above effectively lowers the probability of detection and punishment p .

The law and economics perspective explains why national antitrust enforcement may be particularly ineffective in deterring international cartels. First, the ability of executives to organize cartels (including attending meetings and the writing and storing of agreements) in locations outside the direct jurisdiction of the national antitrust authority where the cartel's effects are felt can effectively reduce the probability of punishment p to zero. For example, in 1994 the US case against General Electric, which along with De Beers and several European firms were thought to be cartelizing the market for industrial diamonds, collapsed with the trial judge citing the inability of US enforcement authorities to secure the necessary evidence from abroad.³⁶ Second, constraints on the ability to collect evidence and to interview witnesses abroad imply that the probability of punishment p is lower than it might otherwise be. Increasing the fines f imposed may not, given the substantial reduction in p and the limits imposed by bankruptcy, be sufficient to deter cartelization. In sum, supplying the right deterrent is more difficult when conspirators can hatch their plans abroad.

Third, in a world of multiple markets the gain from cartelizing a single additional market may well exceed the cartel profits from that market alone. As the number of markets in which a cartel operates increases, each cartel member can be more successfully deterred from cheating on the cartel agreement in *any one market* by the threat of retaliation by other members in *all the markets* in which the cartel operates. This "multi-market effect" implies that the extension of an international cartel into a new market can raise prices in all of the markets a cartel operates in. Therefore, the fine that will deter cartelization of a new market must take account of the consequent increase in the cartel's total profits, not only on the extra profits being earned in the newly cartelized market. At present, even those antitrust authorities that base their fines on the illicit gains from cartelization do not consider the cartel's gains from outside their jurisdiction and so current practices are unlikely to deter multi-market cartels.

recent trends in executive compensation is likely to be much less than the potential stock-option and other gains paid to an executive whose firm's profits have increased due to participating in a cartel.

Finally, the effectiveness of national leniency programs is compromised by firms' participation in cartel activities in many nations. A firm may be reluctant (to say the least) to apply for leniency in a single jurisdiction if that leaves them potentially exposed to penalties in other jurisdictions. Furthermore, even though a firm may be willing to offer evidence on cartel activities in many nations, a national antitrust authority will only value information on activities within its jurisdiction. Both factors reduce the benefits of seeking leniency.

5. RECENT TRENDS IN INTERNATIONAL CARTEL ENFORCEMENT

The 1990s saw a sea change in official attitudes towards cartel enforcement. At the start of the decade, only one industrial nation—the United States—was taking aggressive action against international cartels, and these actions were criticized by other governments as an improper extraterritorial application of domestic U.S. antitrust laws.³⁷ By decade's end, several high profile enforcement actions have convinced policymakers in other industrial countries that stronger measures against international cartels ought to be taken. Consequently, corporate leniency programs have been revised or introduced in several countries, international norms for and reforms of cartel enforcement have been proposed at the OECD, and bilateral cooperation developed between a few jurisdictions.

Much of this change had its origins in the events that followed the revision of the US corporate leniency program in 1993. As noted above, this revision led to a dramatic increase in international cartel prosecutions. Although US enforcement actions were motivated by their effects within US borders, the potential cross-border effects of these cartels and the substantial evidence proffered during leniency requests did not go unnoticed in other nations.³⁸ The European Commission introduced its own corporate leniency program—but its

³⁶ Waller (2000).

³⁷ Concerns about extraterritorial applications of these US laws reached a point where several industrial countries actually passed “blocking statutes,” whose intent was to prevent their antitrust authorities, police and other national investigative agencies, and firms from cooperating with US enforcement actions outside American borders. The changing attitudes of antitrust officials to extraterritoriality are detailed and then discussed in First (2001).

³⁸ US officials have, through speeches, interviews, and written articles, extensively discussed their enforcement record in this area. In part, this effort is motivated by the view that the deterrent effect of the US enforcement regime depends somewhat on its public profile. Many of these speeches can be downloaded from the web site of the Antitrust Division of the US Department of Justice (www.usdoj.gov/atr). A cynic might argue that the \$1.7

success has been less impressive than its US counterpart in part because automatic amnesty is not assured to the first firm that reports cartel behavior.³⁹

Although cartel enforcement has increased in both the EU and in Japan, investigations remain hampered in both jurisdictions, albeit for different reasons. It has proved too difficult to reconcile the underlying tenets of the Japanese legal code with the introduction of a corporate leniency program. This restricts the flow of information on cartel behavior to the Japanese Fair Trade Commission (JFTC), and is a source of considerable concern, as the JFTC appears to devote few resources to other means of uncovering cartels. That said, Japan (and Korea) have recently reduced the number of permitted exceptions to their anti-cartel laws.

More vigorous enforcement in the EU has been impeded by the inability of European Commission (EC) officials to search the private homes of business executives resident in Europe for evidence of cartel agreements. Worse still, European Community Law only allows civil sanctions on undertakings (such as firms). Individuals cannot be sanctioned for antitrust offenses under Community Law but can be subject to penalties under any relevant national laws. Even so, since the late 1980s the EC has prosecuted over twenty international cartels with fines rising to above 100 million ECUs in recent years.

Recognition of the difficulties faced by national anti-cartel authorities in investigating international cartels has led to several initiatives between governments and within the OECD. Recent experience suggests that there are two circumstances where bilateral cooperation offers the most promise (by raising the probability of an international cartel being punished). First, if a nation's laws make cartelization or conspiracies to cartelize criminal offenses, then that nation may be able to invoke the provisions of any Mutual Legal Assistance Treaties (MLATs) that it has signed with other nations. These treaties differ in scope (including coverage of antitrust offenses) and in the commitment to extend bilateral cooperation. The US-Canadian MLAT, signed in 1985, is perhaps the best example of how this form of bilateral cooperation has been effective in prosecuting international cartels (Waller 2000). Of

billion of fines imposed by the U.S. federal antitrust authorities in the 1990s may well have encouraged overseas interest in cartel enforcement actions.

course, this mechanism is only available to those jurisdictions that have signed MLATs that cover antitrust matters.

The second route by which cooperation between national antitrust officials is effected is through explicit bilateral agreements on antitrust matters. This route is very much in its infancy, and is best characterized by the 1999 agreement between Australia and the US. This agreement provides for each party to the agreement to request assistance from the other party irrespective of whether the alleged corporate actions in question are criminal acts under the requested nation's law. The bilateral assistance envisaged at the time of signing includes providing, disclosing, exchanging, and discussing evidence as well as taking various steps to secure evidence from persons, undertakings, and other entities.⁴⁰ Even more recently, a working group of officials from competition policy authorities in the Nordic countries proposed enacting legislation to enable them to exchange pertinent information in cartel cases (OECD 2000a).

A critical stumbling block in most bilateral cooperative efforts is the exchange of business information or what many legal practitioners refer to as "confidential business information."⁴¹ The fear that corporate secrets and future planning will, if shared with a foreign antitrust authority, be used inappropriately or leaked to rival firms has long resulted in many bilateral cooperation agreements on antitrust matters containing very restrictive provisions for the exchange of confidential business information and very broad understandings of what information is considered confidential. But cartel investigations typically refer to prior (and occasionally current) corporate practices; the evidence required is largely documentation of meetings and agreements between conspirators; prosecutions generally do not require

³⁹ It is noteworthy in this respect that the German and British competition policy authorities have chosen to revise their corporate leniency programs along US, not EC, lines.

⁴⁰ It should be noted that such assistance typically requires the use of enforcement resources in the requested countries. Therefore, the benefits of enhanced international cooperation should be compared to the opportunity costs of those resources in other activities, including domestic antitrust enforcement. Having said that if the purpose of a request for cooperation is to obtain information that another agency has collected, then sharing of such information between authorities may save resources in the requesting nation. For example, the Australian authorities requested and received case materials from the U.S. on the vitamins conspiracies—saving the former considerable time, effort, and expenditures (First, 2001).

⁴¹ In the view of some this stumbling block has seriously circumscribed cooperation between the EC and US in cartel investigations, see Stark (2000) and Waller (2000).

reference to firms' forward-looking strategic plans. Thus, the fear that legal future plans will be exposed appears to be exaggerated.⁴² Finally, existing international cooperation on tax and financial securities permits for far more exchange of business information than under bilateral antitrust agreements, especially when there is the suspicion that fraud or some other illegal act has taken place. The extension of cooperation to anti-trust matters can easily build on these existing practices.

Many of the recent reforms in national anti-cartel enforcement and in bilateral cooperation must be seen against the backdrop of significant and ongoing discussions at the OECD. In 1998 these discussions culminated in the Council of the OECD adopting a "Recommendation ...Concerning the Effective Action Against Hard Core Cartels."⁴³ The essence of this recommendation is two-fold: to call upon member nations to enact anti-cartel laws that can effectively deter cartelization and to lay out common principles to guide cooperation between antitrust authorities—cooperation which the Recommendation clearly endorses as in OECD members' interests. In 2000, the OECD issued another report documenting the steps taken since the Recommendation was adopted. This report noted that while some nations had eliminated exemptions to their cartel laws, revised corporate leniency programs, or allowed greater exchange of business information, less progress has been made on facilitating bilateral cooperation on cartel investigations than had been hoped. Nevertheless, these OECD initiatives demonstrate an emerging consensus on the undesirability of international cartels—which may well spur enhanced enforcement actions, both domestic and cross-border.

Taking together the conceptual concerns (raised in section 4) about the effectiveness of national enforcement measures against international cartels, and the promising yet nascent bilateral cooperation described above, we conclude that at present the cumulative effect of national enforcement systems is unlikely to provide sufficient deterrence to international cartels. Several options for reform are considered in the next section.

⁴² A recent detailed analysis of the arguments advanced in support of restricting the exchange of business information in cartel investigation by the OECD came to a similar conclusion (OECD 2000a).

⁴³ This recommendation is reproduced in an appendix to OECD (2000a).

6. OPTIONS FOR REFORM

Any proposed reform to international cartel enforcement should be assessed, in large part, on the deterrent it provides to firms to cartelize markets in the first place. That deterrent's strength depends on the firms' perceptions of the probability of getting punished and the size of any expected penalty. Although the pecuniary gains from cartelization may result from raising prices across the globe, recent enforcement experience suggests that much of the evidence and many of the people responsible for international cartelization are to be found in the nations where the headquarters of globally-oriented firms are located. Table 1 shows that those headquarters tend to be situated primarily in industrial nations. This suggests that although calculations of the pecuniary harm should in principle shift from the national to the global, *at present* reforms to the "investigative technology" probably need only focus on cooperation between the industrial nations.⁴⁴

As a first response, it is tempting to advocate creating a global enforcement authority with powers to collect evidence, conduct interviews, and then compute the global gains from cartelization and levy the appropriate fines. In principle, such a proposal could overcome the deficiencies of the current system of national enforcement and bilateral cooperation. However, at this juncture no nation appears ready to pool sovereignty in such an aggressive manner, or to allow its citizens and firms to be punished by such a body. The EC's relatively weak enforcement powers against price-fixing and the like are a testament to the reluctance of EU members, who have been pooling sovereignty in other areas for decades, to cede powers in cartel cases—even though the distortions to the free flow of goods and services across European borders that cartels can engender are widely acknowledged.⁴⁵ Without denying the intellectual appeal of such a far-reaching solution, we turn our attention to more modest and perhaps more likely reform options.

⁴⁴ However, the growing tendency for firms in developing economies to undertake overseas transactions suggests that the time may well come when the "investigative technologies" (referred to in the text) should be extended to beyond the industrial nations.

⁴⁵ See Waller (2000) for an account of EC anti-cartel enforcement.

The first and least ambitious reform option would involve extending the US-Canada or US-Australia bilateral cooperation agreements on antitrust to all industrial countries. Such a reform would go some way to remedy the current deficiencies in evidence collection and information sharing, increasing the probability of cartel members being caught and punished. To ensure some degree of uniformity in the agreed forms of bilateral cooperation, this reform would probably be best effected through the signing of a plurilateral agreement between these industrial nations, rather than through multiple bilateral agreements.⁴⁶ Such a plurilateral agreement need only refer to the modalities of inter-agency cooperation.

The second option builds on the first and tries to address the deficiencies of the current system of national corporate leniency programs. The plurilateral agreement (discussed above) would be extended in two ways. First, a provision should be introduced so that firms can simultaneously apply for leniency in multiple jurisdictions and have those applications evaluated on the totality of the evidence of cartelization presented. Second, to reduce the uncertainty faced by the “first” firm to come forward with evidence about a currently uninvestigated international cartel, corporate leniency programs should state the *minimum (non-zero)* degree of relief from penalties.⁴⁷ Such a reform would further increase the incentive of any cartel member to “defect,” making cartelization harder to sustain.⁴⁸

Although these two reform options can be thought of as improving the investigative technology, the pecuniary gains from cartelization would still be calculated on a nation-by-nation basis. The third option takes initial steps to remedying this deficiency. Once the investigation turns to the matter of calculating pecuniary gain, this inevitably controversial step could be turned over to a pre-selected panel of qualified and independent experts, who reside in the signatories to the plurilateral agreement.⁴⁹ This panel would present estimates

⁴⁶ However, such an agreement would require considerable changes to the EC’s anti-cartel enforcement system.

⁴⁷ For example, nations could commit to give the first successful applicant for leniency at least a 50% reduction in any fines that are subsequently imposed. Of course, there is nothing sacrosanct about the 50% figure.

⁴⁸ These first two reform options do not rule out expanding the agreement to allow one antitrust agency to take the lead in a cartel investigation that might have ramifications for multiple jurisdictions, with other parties to the agreement providing whatever assistance is necessary. This might economize on enforcement resources, potentially enabling more actions to be taken within given budgets.

⁴⁹ The fact that such a panel would consider the cartel’s effects in more than one nation’s markets is not what makes this step controversial from an economic point of view. Rather, in order to perform this task the panel

(with associated estimated standard deviations) of the cartel's gains across all the affected nations that are parties to this agreement.⁵⁰ The panel would break down its estimate of the total gains to the cartel from each nation's markets, which enforcement authorities would take into account when penalizing cartel members or when making their case to a court to penalize cartel members.

The obvious disadvantage of this latter reform option is that gains from cartelizing non-signatories' markets are not taken into account. Given the non-trivial amounts of information required to come up with a sensible estimate of cartel's pecuniary gains, it is naïve to blithely insist that any supranational panel estimate the global consequences of a cartel. Instead, this plurilateral agreement should have open accession clauses to enable non-members that have developed both national enforcement capabilities and which have attained a pre-specified degree of international anti-cartel cooperation to join. Furthermore, thought could be given to informing non-signatories that their interests are affected by a cartel in return for a commitment to treat leniently any firm that has volunteered information during the investigative stages.⁵¹

Taking these proposals together, a reform process could unfold over time in which industrial countries move from their current arrangements to the first through third options. Strengthening national anti-cartel laws and commitments to enforcement are a necessary prerequisite. The enhanced cooperation will foster trust between antitrust agencies, which is

would have to estimate the prices and quantities that are likely to have prevailed in the absence of the cartel. This involves making assumptions—which may be difficult to validate—about the underlying market structure and about the likelihood and nature of strategic interaction between the cartel members that, in the absence of a cartel, might have taken place. See White (2001) for a discussion of these issues within the context of the U.S. actions against the lysine cartel.

⁵⁰ The panel would have access only to that evidence which is required to compute these estimates, and provisions for confidentiality and restrictions on the use of any information supplied could be established. The panel could be supported by qualified staff.

⁵¹ Even though the gain calculation would take into account the cartel's effects in a number of signatories' markets, the fines and penalties in this third reform option would still be imposed by national authorities. This does not violate the apparent unwillingness of nations only to penalize cartel members for the harm done in their own jurisdictions. Requesting, insisting, and even advocating that signatories impose fines on the worldwide pecuniary gain—which includes the cartel's gains in non-signatories markets—flies in the face of this established practice. Countries that allow private civil suits for damages could also expand their jurisdiction in international cartel cases to allow consumers in countries that were not party to plurilateral agreements to seek redress in the home countries of the cartel members.

essential if agencies are to have any faith in the intent and capacity of others to use the ample discretion built into most anti-cartel laws to successfully conduct international cartel investigations. Admittedly such a process would not immediately lead to the creation of a supra-national anti-cartel agency, but it does not prevent such an agency from being created eventually. Furthermore, the experience of mutual cooperation and assistance, combined with increasing harmonization of antitrust laws would provide the basis for nations to create such an agency if they should choose to do so.⁵²

An alternative to these three reform options that has been proposed is a plurilateral or multilateral agreement at the World Trade Organization (WTO). Such an agreement could involve commitments to enact and enforce an anti-cartel law, and to cooperate with investigations launched abroad. As there is less than ten years of experience with international anti-cartel investigations, it is doubtful that *best practices* in enforcement have evolved to such a stage that they could be codified in an agreement. This implies that any such multilateral agreement would probably have to be based on *minimum* substantive standards and implementation procedures. Investigative and prosecutorial discretion are likely to remain and it not obvious how a WTO dispute panel might assess whether a government used that discretion in a manner entirely consistent with the agreement. The likely outcome is that only those antitrust authorities that have not followed certain minimal procedural steps would be found in violation, an outcome that is unlikely to result in significant increases in the probability that cartel members will be punished. Finally, such a WTO agreement is unlikely to ensure that the penalties for cartelization are based on the worldwide pecuniary gains. For all of these reasons a WTO agreement is, at present, unlikely to remedy the deficiencies of national anti-cartel enforcement. However, the international agreements described earlier could provide the basis for strengthening anti-cartel enforcement in countries that currently are not willing or able to adopt and enforce stronger anti-cartel laws.

⁵² First (2001) makes a similar point—namely that recent cooperative efforts to investigate international cartels portend the development of international competition law.

A WTO agreement could be crafted (or the GATT agreement amended) to explicitly address two forms of privately-orchestrated and trade-related cartels.⁵³ First, laws which permit recession cartels, where firms under considerable competitive pressure—potentially from imports—to engage in market division, could be banned on the grounds that the WTO already has well-established safeguard mechanisms.⁵⁴ Second, disciplines could be placed on legally-sanctioned export cartels. Given the discussion in section 3 there appears to be a justification for letting small firms share the considerable fixed costs of marketing and exporting; the objective should be to prevent such arrangements from resulting in consumer welfare losses. Two disciplines could be imposed on laws granting exemptions for export cartels: notification and unimpeded entry. Notification would involve the publication of the names of the members of such cartels, which will facilitate monitoring by antitrust officials in the importing country. A requirement that entry to such arrangements be unimpeded would help both reduce any market power that is enjoyed by existing members, and make coordinating any restrictive business practices more difficult.

7. CONCLUSION

International cartels are a nontrivial impediment to the flow of goods and services across borders. Recent enforcement experience suggests that widespread cartelization in certain industries has affected many nations' markets. This might not be a concern if national antitrust laws provided a sufficient deterrent to international cartels—however both *a priori* reasoning and the fragmentary record of international cooperation in this area suggests that this is not the case. In particular, three aspects of cartel enforcement need reform. First, the probability of a cartel being punished is considerably reduced by the current patchwork of bilateral cooperation agreements on evidence collection and sharing with foreign jurisdictions.

⁵³ It is a separate, and important, matter whether WTO-disciplines should be imposed on state-run export cartels. Arguably these cartels can distort trade flows and the allocation of resources, just like privately-run cartels. Furthermore, since governments (and not firms) are signatories to WTO agreements then it could be argued that disciplines against state-run cartels would be easier to enforce than those requiring governments to take action against domestic privately-run cartels.

⁵⁴ For an overview of the legal statutes on recession cartels in industrial nations see Waller (1996). Feibig (1999) provides an excellent account of both the use of crisis (or recession) cartels in Europe and the tendency for competition law considerations to be trumped by industrial policy considerations during acute periods of industry contraction.

Second, penalties based on national assessments of the pecuniary gains to cartelization are unlikely to deter cartels that operate in many countries' markets. Third, vigilance should not end with a cartels' punishment, as former price-fixers often try to effectively restore the *status quo ante* by merging or by taking other steps that lessen competitive pressures and raise prices. Unless a pro-efficiency approach drives all competition policy enforcement, the benefits created by keen international cartel enforcement will be eroded by lax enforcement in other areas.

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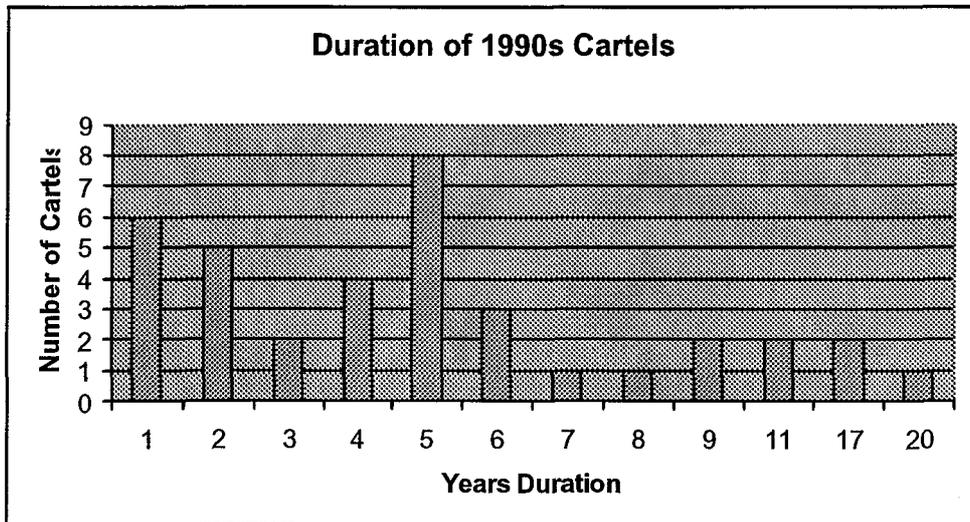
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Figure 1: INTERNATIONAL CARTEL DURATION IN THE 1990s



Source: Levenstein and Suslow (2001), Table 1.

Table 1
COUNTRIES WITH FIRMS CONVICTED OF PRICE FIXING BY THE
UNITED STATES AND THE EUROPEAN COMMISSION DURING THE 1990s

Country	Cartel
Angola	Shipping
Austria	Cartonboard, citric acid, newsprint, steel heating pipes
Belgium	Ship construction, stainless steel, steel beams
Brazil	Aluminum phosphide
Britain	<i>Aircraft</i> , steel beams
Canada	Cartonboard, pigments, plastic dinnerware, vitamins
Denmark	Shipping, steel heating pipes, sugar
Finland	Cartonboard, newsprint, steel heating pipes
France	<i>Aircraft</i> , cable-stayed bridges, cartonboard, citric acid, ferry operators, <i>methionine</i> , newsprint, <i>plasterboard</i> , shipping, sodium gluconate, stainless steel, steel beams, seamless steel tubes
Germany	<i>Aircraft</i> , graphite electrodes onboard, citric acid, aluminum phosphide, lysine, <i>methionine</i> , newsprint, pigments, <i>plasterboard</i> , steel heating pipes, seamless steel tubes, vitamins
Greece	Ferry operators
India	Aluminum phosphide
Ireland	Shipping, sugar
Israel	Bromine
Italy	Cartonboard, ferry operators, newsprint, stainless steel, steel heating pipes, seamless steel tubes
Japan	Graphite electrodes, lysine, <i>methionine</i> , ship transportation, shipping, sodium gluconate, sorbates, seamless steel tubes, thermal fax paper, vitamins
Luxembourg	Steel beams
Malaysia	Shipping
Mexico	Tampico fiber
Netherlands	Cartonboard, citric acid, ferry operators, Ship construction, sodium gluconate, Tampico fiber
Norway	Cartonboard, explosives, ferrosilicon
Singapore	Shipping
South Africa	Diamonds, newsprint
South Korea	Lysine, <i>methionine</i> , ship transportation, shipping
Spain	<i>Aircraft</i> , Cartonboard, stainless steel, steel beams
Sweden	Cartonboard, ferry operators, newsprint, stainless steel
Switzerland	Citric acid, laminated plastic tubes, steel heating pipes, vitamins
Taiwan	Shipping
UK	Cartonboard, explosives, ferry operators, newsprint, pigments, <i>plasterboard</i> , shipping, stainless steel, seamless steel tubes, sugar
US	<i>Aircraft</i> , aluminum phosphide, bromine, cable-stayed bridges, cartonboard, , citric acid, diamonds, ferrosilicon, Graphite electrodes, isostatic graphite, laminated plastic tubes, lysine, maltol, <i>methionine</i> , pigments, plastic dinnerware, Ship construction, ship transportation, sorbates, Tampico fiber, thermal fax paper, vitamins
Zaire	Shipping

Source: Levenstein and Suslow 2001, Table 1. Note: Products in italics are currently under investigation.

Table 2

**EVIDENCE FROM HISTORICAL CASE STUDIES AND FROM RECENTLY PROSECUTED CARTELS:
ARE CARTEL MEMBERS ATTEMPTING TO CREATE BARRIERS TO ENTRY?**

Industry	Conspiracy Dates (approximate dates for recent cartels, first year of cartel for historical studies)	Does anecdotal evidence point to firms accommodating entry or creating barriers to entry? If so, how?
Bromine	1885	Raising pharmaceutical standards; vertical rent sharing/exclusive contracts
Bromine	1995-98	Appear to be accommodating entry of developing country producers. Establishing joint ventures.
Cement	1922	Vertical integration
Diamonds	1870s	Vertical integration
Citric Acid	1991-95	Firms tried to block entry by twice requesting anti-dumping duties to protect the US market from Chinese citric acid imports. Once during the conspiracy (in 1995), and once after (1999). Both times the petition was denied.
Ferrosilicon	1989-91	Five of the six major US manufacturers pled guilty and were fined. These same manufacturers asked for antidumping duties to be placed on Brazil, China, and other countries as well. These tariffs were approved and levied in 1993-94. When the International Trade Commission found out about the price-fixing conviction, however, they reversed the tariffs. The Commission said that industry leaders had been fixing prices during the very time period that they had testified that there was intense price-based competition. (Charleston Gazette, 8/28/00)
Graphite Electrodes	1992-97	Cartel agreement specified that firms agreed to restrict non-conspirator companies' access to certain graphite electrode manufacturing technology.
Ocean Shipping	1870s	Deferred rebates for customers conditioned on cooperation with cartel; predatory pricing
Oil	1871	Tariff
Parcel Post	1851	Vertical rent sharing; network economies; 1 st mover reputation
Railroad/Oil	1871	Vertical rent sharing
Seamless Steel Tubes (Oil Country Tubular Goods)	1990-95	Appear to be accommodating entry. Several cartel participants have, since the breakup of the cartel by the European commission, entered into joint ventures with firms based in developing countries.
Steel Beams	1988-94	Restricted flow of information in order to freeze out any new competitors
Vitamins	1990-99	No direct evidence of creating barriers to entry, other than a request for anti-dumping duties in 1999 (no decision yet?). After the breakup of the cartel, mergers of cartel members were approved by competition authorities.

Source: Historical case studies based on Levenstein and Suslow (2002), Table 16. Recent cartel evidence based on Levenstein and Suslow (2001).

Table 3

National Exemptions to Competition Law for Exporters⁵⁵

Country	Exemption	Reporting Requirement
Canada	Export activities that do not affect domestic competition	None
Estonia	Activities that do not affect the domestic market	None
Germany	Repealed by 1999 amendments to the Act Against Restraints of Competition	Notification and approval requirements depend on the nature of the exemption
Hungary	Activities that do not affect the domestic market	None
Japan	Agreements regarding exports or among domestic exporters	Notification and approval of industry administrator required
Latvia	Activities that do not affect the domestic market	None
Lithuania	Activities that do not affect the domestic market	None
Mexico	Associations and cooperatives that export	None
Portugal	Activities that do not affect the domestic market	None
Sweden	Activities that do not affect the domestic market	None
United Kingdom	Apparently removed by 1998 Competition Law	Formerly, agreements had to be furnished to Director General of Fair Trading
United States	Webb-Pomerene Act: Activities that do not affect domestic competition Export Trading Co Act: Exemption similar to W-P Foreign Trade Antitrust Improvement Act – Exemption from Sherman and FTC acts	Webb-Pomerene Act: Agreements must be filed with FTC Export Trading Co. Act: Certificate of Review provided by Commerce Dept

⁵⁵ Information above is drawn from OECD (1996), American Bar Association (1991), and OECD (2000b).

Capacity Building and Technical Assistance

Unclassified

CCNM/GF/COMP(2002)5



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

01-Feb-2002

English - Or. English

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP(2002)5
Unclassified

OECD Global Forum on Competition

**TECHNICAL ASSISTANCE IN COMPETITION LAW AND POLICY:
BENEFICIARIES' VIEWS OF THEIR NEEDS AND PREFERRED DELIVERY METHODS -
IMPLICATIONS FOR PROVIDERS**

-- Secretariat Note, Session II --

This note is submitted as a basis FOR DISCUSSION during Session II of the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

English - Or. English

JT00120243

Document complet disponible sur OLIS dans son format d'origine
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**TECHNICAL ASSISTANCE IN COMPETITION LAW AND POLICY:
BENEFICIARIES' VIEWS OF THEIR NEEDS AND PREFERRED DELIVERY METHODS –
IMPLICATIONS FOR PROVIDERS**

1. Introduction; Summary of non-Members' contributions

1. This session of the Global Forum provides an opportunity for an informal exchange between providers and beneficiaries of competition policy technical assistance. The providers include OECD competition delegates, who may be joined in some cases by officials from their national funding agencies, as well as the secretariat of various international organisations. The beneficiaries are non-Members from all parts of the world – about 35 economies in all – which are at differing stages in both economic development and consideration/enactment/implementation of competition law and policy. Non-Members have been invited to share their views on such matters as what their needs are, what delivery methods are most effective, and what skills and experience providers should have. The goal of the discussion is to seek ideas on how assistance can be provided more effectively. In that regard, it should be understood by all that agencies which fund technical assistance have been invited to participate because the discussion may have implications for their policies; their presence does not mean that this is a forum for negotiating or for a detailed inquiry into their policies.

2. In order to help prepare for this session, the Secretariat invited non-Members to submit papers addressing assistance issues, to complete a table on the assistance they have received, and to respond to a questionnaire on their views concerning various issues. As of 31st January, seven non-Members¹ have submitted papers, which are being circulated as separate documents, and eleven completed the table and the questionnaire. The questionnaire responses of all eleven are discussed in this note. To the extent practicable, Non-Members questionnaire responses are set forth in Annex A, and the listings of the assistance they received has been consolidated in a table contained in Annex B.²

3. The questions posed to non-Members may be divided into four topics – their greatest needs for assistance, the best kinds of assistance, the most important skills and experience for assistance providers, and the desirability of greater co-ordination of assistance. In general terms, the responses suggest the following:

- *Needs for assistance.* Non-Members believe that more assistance is needed, but their needs vary. Some need assistance on drafting or amending competition laws or other legal instruments. Non-Members with competition laws generally emphasise the need for (a) assistance on practical, day-to-day matters relating to running a competition authority or running an investigation, and (b) staff training and analytical assistance. (One non-Member, Côte d'Ivoire, reported not receiving any assistance since 1994.)
- *Methods of delivering assistance.* Non-Members' responses do not indicate that any particular method of providing assistance is most useful, but the responses help identify the pros and cons of different methods. Seminars, conferences, and workshops provide less in-depth training for a larger number of officials, are more likely to reach high-level officials,

and may promote beneficial networking. Long-term internships in which the intern works on cases provide very good training for the intern, but may have limited benefit for others, especially if, as is often the case, the intern is not a high level official. The usefulness of resident advisors is in part a function of how long the assignment is, how experienced the advisor is, and how the receiving authority uses the adviser.

- *Skills and experience of providers.* Because most needs relate to institutional and operational issues concerning the running of a competition authority or a competition investigation, experienced current or former competition officials are generally more qualified to provide assistance than academics, private practitioners, or other contractors without such experience. In addition, assistance from current authorities can promote useful networking. Private consultants can also be useful, however, partly because they may present alternative points of view. Detailed knowledge about the beneficiary is often unnecessary, but it is always important that a provider have a willingness to listen and an understanding that even the most basic competition policy principles can have different policy implications in economies with different levels of development and legal, cultural, and other traditions.
- *Co-ordination.* Lack of co-ordination among providers is not identified as a problem.

2. Background; Summary of prior Competition Committee work

4. More than a decade ago, when countries in Central and East Europe and the former Soviet Union began their transition from centrally planned to market-based economies, various OECD Members and international organisations launched programmes to provide transition economies with technical assistance, capacity building, and policy dialogue. Since then, the political trend towards greater reliance on market competition and the economic trend towards globalisation integration have led to growing interest in competition policy – and enactment of competition laws – by developing economies in many parts of the world.

5. In June 1999, the OECD Secretariat identified two sets of issues resulting from the increased interest in and enactment of competition laws. First, on the policy level, the Secretariat suggested that the Competition Committee should consider ways to have more frequent and interactive meetings with their counterparts in non-Member competition authorities. While not a direct result of that suggestion, this Global Forum addresses that goal. Second, on a more technical level, the Secretariat suggested that the Committee's Working Party No. 3 review the various ways in which assistance is supplied and consider whether it could be improved through identifying best practices or improving co-ordination. The Committee agreed, and the Secretariat then issued a questionnaire and prepared a note concerning Members' assistance activities and views on the best means of providing assistance, as well as the activities of international organisations. A revised version of this note is being circulated as further background for discussion in the Forum.

6. At its February 2001 meeting, the Working Party considered the need for and delivery of assistance with substantial input from UNCTAD, the World Bank, and the WTO. The discussion was generally regarded as useful, but it had relatively little input from the beneficiaries of capacity building. The meeting included Observers that currently receive OECD and other assistance, as well as some Members that received large amounts of assistance until recently, but representatives of these economies did not actively participate in their capacity as present or former beneficiaries. To obtain more input from beneficiaries, delegates suggested that the topic be pursued in the OECD Global Forum. The Secretariat later proposed to address it this February since OECD co-ordination with the organisers of France's anniversary celebration for the Conseil de la Concurrence will permit participation by more non-Members than usual.

7. As background for discussions in the Forum, it is useful to review the main points that emerged last February from Members' questionnaire responses, the contributions from UNCTAD, the World Bank, and the WTO, and the discussions during the meeting. In general, Members' responses showed the following with respect to the nature of their assistance activities.

- Based on the resources available, number and variety of activities, and geographic coverage, the OECD Members that have been the major providers of technical assistance have been Australia, Japan, the US, and the EC. All of them have substantial agencies for funding international assistance, and all of their agencies in fact funded considerable competition policy assistance. Much of this funding goes to private contractors, and much of that funding goes not to specific competition policy projects but to broader "market development" projects that include components that are directly or indirectly related to competition policy.
- Countries with more limited resources use a number of different means to get the most from what they have. Some, such as Finland, have focused on a limited number of nearby countries. Others, such as Denmark, have established and maintained contacts with beneficiaries through low-cost activities carried out at home, such as hosting study visits by beneficiaries. In addition, many providers with limited resources have economised hosting few or no events but sending panellists to events organised and sponsored by others. The record of Canada and Mexico illustrate this latter strategy.
- In general, countries with no or a less developed competition policy and law enforcement capacity typically receive a lower level of assistance than beneficiaries with a more developed competition record. This presumably reflects, among other things, donors' assessment of potential beneficiaries' readiness to use the assistance. Decisions about what economies should receive what level of assistance also take into account other factors, including general foreign policy considerations and economic importance.

8. Members' questionnaire responses and the discussion at the February meeting addressed the same issues that non-Members addressed in their contributions to the Forum, but also covered some additional issues as well. In general, the following views were expressed:

- Delegates said that more competition policy technical assistance is needed, but there were no suggestions on how the resources needed to provide it could be raised. One provider that delivers much of its assistance in one-off events requested by beneficiaries noted that some requests do not reflect a serious interest, but rather a view that competition policy is "fashionable" or that a donor has insisted it seek assistance in this area. It was agreed, however, that real demand is substantial and substantially exceeds supply.
- No general conclusions were drawn with respect to the most efficient forms of assistance in general or for particular situations.
- Most delegates believed – for the same reasons as non-Members – that in general, experienced current or former competition officials are more qualified to provide assistance than academics, private practitioners, or other contractors without such experience. Major donors provide most of their competition-related funding through private contractors, and delegates discussed whether technical assistance could be improved in a cost-effective manner if a larger share of the funding were provided to competition authorities.
- While there was support for this idea, there was even stronger emphasis on the point that competition authorities also face personnel constraints; some said they could not provide

more assistance than they are at present, even with more funding. Some possible solutions were mentioned but not discussed at length. For example, funding might be provided to a competition authority under terms that let it choose what to do on their own and what to contract out. It was also noted that competition authorities might seek funding to hire assistance providers. No general conclusion was reached.

- In addition, delegates differed in the degree to which they can and do work with their funding agencies to provide a competition policy perspective in designing assistance programs and choosing private contractors.
- Co-operation in providing technical assistance is problematic or even impossible when a country provides all or most assistance through private contractors. The Secretariat has found private contractors unwilling to co-operate except in one instance when a funding agency directed a contractor to co-operate. An issue in the case of the EU is that its funding authority is unable to fund DG Competition participation in assistance organised by others; this increases the difficulty of presenting an EU perspective, which is often important for beneficiaries.
- In general, Members did not actively co-ordinate their technical assistance with each other or with international organisations, though some co-ordination results from Members' co-sponsoring or sending representatives to OECD and other seminars that use international panels. EU Member States provide some assistance on behalf of the EU. Korea and the US have both co-sponsored events with the OECD. Australia and Japan are both involved in regional co-ordination within APEC.
- There appears to be little co-ordination between international organisations that provide technical assistance (OECD, UNCTAD, World Bank, and WTO) and regional organisations, though some APEC/OECD co-ordination exists (largely between APEC countries that are OECD Members and the OECD Secretariat).
- There is significantly more co-ordination among OECD, UNCTAD, the World Bank, and the WTO. Avoidance of duplication results both from informal contacts and from differences in the organisations' criteria for and means of providing assistance. In general, UNCTAD and the World Bank focus more on less developed countries. Moreover, while UNCTAD holds some training seminars, many of its events involve more general policy dialogue involving a broad range of countries. The World Bank has also held some training seminars, but it focuses on providing in-depth, long-term assistance to a small number of countries. The WTO's technical assistance is more recent and consists primarily of large conferences. OECD outreach events consist almost entirely of training seminars and smaller meetings, and is directed to a range of countries that is narrower than UNCTAD's or the WTO's, and broader than the World Bank's. The four programs complement each other, and active co-operation is increasing. (Secretariat members from the four organisations recently met to explore ways to increase co-operation even further.)
- In general, many delegates considered additional co-ordination of assistance limited to providing some sort of a clearinghouse to be desirable, but there was no consensus on what sort of clearinghouse might be useful and cost-justified. UNCTAD's website provided the most information. Neither UNCTAD nor the OECD had plans or funds to engage in the active follow-up that would be involved in maintaining a real clearinghouse even for planned events. If a clearinghouse sought to include requests for assistance, statements by potential donors regarding their geographic and substantive areas of interest, and other potentially

useful information, maintaining it would be very costly. Also, some of this kind of information could be politically sensitive. Even more politically sensitive would be any form of co-ordination that sought to assess need, assess donors' programs, and engage in any "steering."

3. Definitions

9. Various institutions assign use somewhat different terms to describe different kinds of assistance, and when they use the same terms they often assign somewhat different meanings. It may therefore be useful to provide some definitions before engaging in further analysis.

- For purposes of this note, "*technical assistance*" and "*capacity building*" are synonymous terms referring to assistance in considering, drafting, and implementing competition laws and other laws directly relevant to market competition. It includes assistance with respect to institutional issues and "competition advocacy" as well as assistance focused on enforcement. In addition, technical assistance (the term generally used in this note) includes only assistance provided directly or indirectly by countries or organisations with substantial experience and expertise to those with significantly less experience and expertise. Foundations and other non-governmental entities sometimes provide similar assistance on their own, as opposed to on behalf of governments, but this note addresses only assistance by governments and international organisations. In and of itself, *law enforcement co-operation* is not technical assistance, though technical assistance can include assistance in connection with a law enforcement matter.³
- This note uses the term "*policy dialogue*" to refer to the kind of discussion that occurs at meetings of the Competition Committee, the OECD Global Forum on Competition, UNCTAD, and the WTO Working Group on the Interaction between Trade and Competition Policy, and that is apparently contemplated in the International Competition Network. Policy dialogue differs from technical assistance in that the discussion is among equals even though the dialogue may have as one of its purposes the sharing of some economies' expertise for the benefit of others.

4. Benefits of technical assistance

10. The main function of technical assistance is to increase a beneficiary's ability to consider the desirability of adopting some form of competition law or policy, and to draft, enact, and implement a law or policy that is tailored to its particular needs. This function is emphasised throughout non-Members' contributions, with particular emphasis on the *transfer of practical know-how* to their officials. Such transfer of know-how involves learning both from more experienced competition experts as well as from peers, *i.e.*, from other beneficiaries of technical assistance facing similar problems.

11. In addition, non-Members identified two other functions that technical assistance may serve in some circumstances. Events may provide opportunities for *networking*, thus paving the way for informal and perhaps even formal co-operation and future technical assistance by establishing personal and institutional contacts. In addition, events may provide *political support* for competition among the general public and policy-makers of beneficiaries. One of Russia's contributions – a paper by Mr. Ilya Yuzhanov, Minister, Russian Ministry of Antimonopoly Policy and Support of Entrepreneurship – illustrates this point. Mr. Yuzhanov invited representatives of other ministries to OECD-organised high-level meetings on bringing competition to natural monopoly sectors, wrote a preface to a publication of the main points of

those meetings, and invited OECD Secretariat members to participate in a public meeting and news conference when the publication was released in Russian.

5. General categories of needed assistance

5.1. *Legislative assistance*

12. Beneficiaries' expressed needs depend, first and foremost, on whether or not they have a competition law. Economies without a competition law seek information relevant to their assessment of the desirability of such a law and also *legislative assistance*. Vietnam, for example, welcomes assistance in drafting its first competition law. Economies with a competition law may need similar assistance if they are considering amendments to the competition law or are preparing secondary legislation, regulations, or guidelines. Estonia, Indonesia, Kenya, Lithuania, and Romania all mention the need for such assistance. Romania, for example, is working on merger notification rules. Legislative assistance is also needed sometimes in connection with drafting or amending a law in some related area, such as natural monopoly regulation.

5.2 *Institutional and operational issues, including an authority's relationship to others*

13. For economies with a competition law that is not being amended, the main need is for assistance relating to (a) running a competition authority and (b) running law enforcement investigations. The *institutional issues* involved in the former are very important. Indonesia mentions such issues generally, while Kenya specifically mentions assistance on ways of structuring a competition agency, and Russia found consultations by the EC on decentralised competition law enforcement very useful. Brazil mentions "establishing procedures" as one of the most important topics.

14. In addition, many aspects of competition advocacy require assessment of how a competition authority should relate to sectoral regulators, other government institutions, NGOs, and the general public. Kenya, Lithuania, and Tunisia also mention a need for *assistance in competition advocacy* because competition culture needs to be established and strengthened in the course of economic transition and development. In particular, Lithuania desires "assistance for implementation of the awareness-raising campaign" aimed at "the public sector and judiciary" as well as the "business community and administrative bodies."

5.3 *Law enforcement assistance*

15. By far the largest expressed needs relate specifically to competition authorities' *law enforcement work*, and the dominant theme seems to be that it should be *practical assistance relating to day-to-day issues*. As in the case of other topics, one determinant of economies' needs is the extent to which they have developed their competition enforcement systems. For instance, Indonesia states that at its stage, all topics are useful. Chile also notes that it has not identified any topics that could be qualified as not useful in building its technical capacity, but also stresses the importance of gearing assistance to its specific needs. In that connection, Chile currently considers it necessary to receive technical assistance on criminal enforcement.

16. Estonia agrees that all topics relating to its daily work are useful, but notes that "very specific topics" are less so, while Kenya downplays the importance of assistance relating to "competition theory." Both of these comments on less useful topics may be manifestations of the clear theme that assistance

should be practical, but it would be interesting to hear what topics Estonia considers too specific and to confirm that Kenya's comment means that given its needs, "competition theory" is too general a topic.

17. One element of this law enforcement assistance is staff training. Kenya, Indonesia, Lithuania, and Tunisia all stress the importance of staff training. Brazil also describes training staff as one of the most valuable forms of assistance. Training the judiciary is also mentioned by Romania as necessary and useful assistance.

18. Moreover, one of the most important elements of staff training is investigation techniques. Thailand considers its greatest need to be the methodology to investigate and assess cases such as tie-in sales, price discrimination, predatory pricing, *etc.* Indonesia and Romania mention "investigation techniques" in general, while Kenya specifically identifies "investigations into cartel activities." Lithuania mentions the alignment of investigation, enforcement and reporting methodologies with international best practice and EC rules.

19. Looking to the past different Non-Members specifically mentioned assistance relating to different kinds of conduct as having been most useful, with:

- Lithuania mentioning mergers and cartels;
- Chile mentioning mergers and the analysis of activities that constitute new forms of abuse of dominant position;
- Estonia referencing first mergers and then cartels and abuse of dominance against natural and "unnatural" monopolies;
- Indonesia mentioning cartels, bid rigging and abuse of dominance by "unnatural" monopolies;
- Kenya and Thailand mentioning mergers, cartels, abuse of dominance by natural and "unnatural" monopolies with equal importance;
- Romania referencing the enforcement of cartel, abuse of dominance and state aid rules; and
- Tunisia mentioning the enforcement of abuse of dominance rules against "unnatural" monopolies.

20. Thailand mentions assistance concerning hard-core cartels as having been potentially valuable, noting that:

It is a topic that is always being raised in the negotiation forums of the WTO. We have therefore prepared ourselves in respect of these issues for the new round of the negotiations.⁴

6. Most useful methods of providing technical assistance

21. Although several beneficiaries mention that any form of assistance is welcome, three forms received the most attention: (i) conferences, seminars and workshops; (ii) internship programmes, (iii) long-term resident advisors. Other technical assistance methods, such as consultations and publications – either combined with the above or on a stand-alone basis – are also mentioned by a number of non-Members. Based on non-Members' specific comments, the following discussion addresses the pros and cons of all these technical assistance methods from the viewpoint of the three functions non-Members identified – acquiring practical know-how, engaging in networking, and obtaining political support.

6.1 *Seminars, workshops and conferences*

22. Seminars, workshops and conferences (hereinafter “seminars”) are mentioned most often as the most useful form of assistance. No single seminar participant obtains the level of experience and practical know-how that a good internship can provide (see below), but a seminar can provide less detailed know-how to a larger number of people. For instance, Estonia praises seminars because they have enabled all officials to participate and acquire knowledge, and Latvia says that case-study seminars are most useful because the staff know the law but need more information on practical experience. Further, regional seminars provide opportunities of learning from other beneficiaries, and seminars with panellists from several different competition authorities can have enhanced credibility and utility.

23. Moreover, since seminars are relatively short, they are more easily attended by high-level officials from beneficiaries – officials who are better placed to bring about policy or procedure changes at home based on the assistance they receive. Moreover, such high-level officials are often the ones for whom networking is most important. Brazil mentions that conferences and seminars have been the best solution to bringing professionals dealing with competition matters together.

24. As a useful method to transfer practical know-how, Estonia says that the most valuable are practical trainings where current cases are discussed and analysed with the assistance of advisors. Chile states that case-study seminars have been a useful method to discuss both issues already encountered by the beneficiary and both ones that it has not yet faced:

[P]articipating in the case-study based seminars organised by the OECD has been an excellent opportunity to realise that many issues and cases are very similar in different countries and have raised the same concerns when they are addressed by the competition agency. Regardless of the fact that some topics have already been seen by the agency, the opportunity to explain our procedures, analyses and outcomes generates a kind of ‘peer’ scrutiny that results in impartial opinions which evaluate the agency’s work.

For the other part, analysing issues that have not been addressed before by our agency, provides us with tools and overviews that help us gain knowledge for future cases that will probably have to be addressed.⁵

25. Further, Chile finds that regional case-study seminars are more successful in motivating participation and are more useful for learning:

Our experience is that case-study based seminars are more useful if many countries participate with their own views. The discussions that arise and the different standpoints provide key elements that help the participants gain technical experience.

[...]

The study of real cases seen by other agencies, that may be in course of investigation or terminated with final judgements, provide us with excellent tools for analyses. This system generates an active participation and new relevant questions are put forward by participants.⁶

26. Seminars can effectively serve the two other functions of technical assistance, networking and political support. As mentioned above, seminars are relatively short, which facilitates attendance by high-level officials of both providers and beneficiaries. Seminars are also attended by more recipients. These features facilitate networking. When held in a beneficiary’s capital and addressing the right audience (*e.g.*, policy-makers or judges) or combined with an open session, seminars may also provide substantive and

political support to the beneficiary's advocacy efforts.⁷ Publications, *e.g.*, background documents and proceedings of seminars, may also provide effective political support to beneficiaries. As noted above, the Russian Antimonopoly Ministry mentions support it received from being able to invite officials from other Ministries to high-level meetings on natural monopoly reform, issuance of publication based on the meetings, and the combined open meeting and press conference held in connection with issuance of the publication. In this connection Latvia argues that involving state institutions other than competition authorities would be a useful forum of advocacy that might increase funding for competition authorities:

The dissemination of knowledge on competition legislation in different state institutions has stimulated reaching of economic reform' aims in more rapid terms. In this aspect it would be useful to involve other state institutions in technical assistance projects to competition surveillance sphere especially these institutions responsible for economical policy realisation. Thus possibly attraction of additional resources would be promoted for competition surveillance sector from national budgets what is very critical especially in markets of rapidly growing states.

6.2 *Internship programmes*

27. Assuming that an intern has an opportunity to work alongside of the staff of the receiving competition authority, an internship may be the most direct and most effective way of transferring practical know-how to an individual. In this sense, internships may be the most useful form of assistance for some; for example, Thailand states that internship would be the most valuable because it permits learning by practising." Côte d'Ivoire would also prefer interships. However, internships also have disadvantages.

28. The benefits of internships depend on various factors, including their duration and the degree to which an intern is integrated into the provider's activities. Moreover, internships are expensive and each one provides experience to only one person. Therefore, the success of internship very much depends on the skills of that recipient, on how successfully the recipient might transfer the lessons learned to his or her colleagues, and on how much the recipient might eventually change the approach of his or her institution to certain issues on the basis of the experience gained during the internship. Higher-level interns are more likely to be able to apply their new-found knowledge in ways that provide general benefits to his or her office, but higher-level officials are the least likely to be able to be away from the office for long enough to accept an internship.

29. A useful method for interns to share experiences with their colleagues back home is to summarise in writing what they learned during the internship. Israel applied this method with success, and reports that

[b]ased on the internship experience, [interns] drafted (and circulated to their peers) extensive documents summarising what they learned about the views and experience of the ... agencies [providing the assistance] in specific industries and scenarios. These documents have proved extremely useful for IAA work because they provide case handlers with insights on various competition considerations that arise in the course of their work.⁸

30. Internships have limited usefulness as regards the other two functions of technical assistance, networking and political support. Internships may pave the way for future technical assistance and co-operation by establishing institutional and personal contacts between the provider and the beneficiary. For instance, Israel finds that:

internships were helpful because they allowed the IAA to learn the detailed structure of [the] agencies [providing technical assistance] (and create personal ties with some of its staff). These benefits facilitate future co-operation between the agencies.⁹

31. However, internships do not provide broad networking opportunities, and they provide little if any political support for beneficiaries.

32. *Study visits* at more experienced competition authorities may be a more realistic alternative to internships where resource limitations or mandatory prohibitions prevent assistance providers from offering effective internship programmes. Study visits transfer less know-how, but their shorter duration makes them less costly, and they do contribute to establishing contacts and to the transfer of practical know-how. For instance, Lithuania sent its press official for a very useful one-week study visit to the Swedish Competition Authority to see how that authority's press team works.

6.3 Resident advisors

33. Several non-Members have had a good experience with resident advisors, and found such programmes useful. Estonia and Thailand specifically mention the benefits they received. In addition, during the early to mid-1990's, such programmes were provided to the competition authorities of current OECD Members from Central Europe – the Czech Republic, Hungary, Poland, and Slovakia. They have not made submissions concerning those programmes, but in general they were considered very valuable. Because few of the non-Members' contributions dealt extensively with resident advisors, the following analysis takes into account information about these earlier programmes.

34. The value of long-term advisors depends on a number of considerations, including the duration. This note treats stays of six months or more to be "long-term." In addition, advisors will be able to become useful more quickly if they have prior international experience and if they are given some training – or at least time to study – concerning the economy and its competition-related laws.

35. Of course, as Estonia notes, the experience and skills of the individual advisor – on institutional as well as investigation issues – is another determinant of a programme's value to a beneficiary. Without experience in foreign assistance or at least adaptability, even the most knowledgeable advisor might provide limited assistance. Kenya notes that unless assistance is "domesticated" and "owned by" the recipients, it is likely to be of little benefit. The skills and experience most valuable in connection with providing technical assistance in general are discussed below.

36. Finally, perhaps more than any other form of assistance, the value of resident advisors is dependent on the receiving authority and its advisor finding a way of working together to maximise the advisor's productivity. In general, the more successful programmes were those in which the authority's high-level officials informally sought advice on the issues they faced, while also making the advisor available to case handlers that had questions. Where high-level officials did not use the advisors as informal "assistants," they sometimes created work for the advisors to do by, for example, instructing each case handler to brief the advisor whether or not the case handler had any interest in receiving advice. In such situations, the costs of having advisors increase and the benefits decrease. These are generalisations, however; one of the benefits of advisor programmes is that, in principle, they can be shaped (and reshaped) to meet a beneficiary's needs.

37. In sum, if supported by their competition authority and sent for longer periods (six months or more), experienced and adaptable competition officials sent as advisors can provide assistance that is more tailored to the beneficiary's situation, and covers a wider set of issues, than other forms of assistance.

Advisor programmes do not provide the extensive experience to a single trainee that is provided by internships, but they can provide training to a substantial number of people and could include intensive work with a few people.

38. The major difficulty with such programmes is that they are costly (and therefore rare). For the providing economy and its competition authority, the costs are substantial, especially if the advisor receives training or study time before going on a mission of six months or more. Tunisia has not had resident advisors, but it notes that when assistance providers lack knowledge about the beneficiary they need a longer adaptation period, which also increases the cost of such programmes. In addition, Lithuania points to a case in which the busy schedules of competition officials selected as advisors interfered with a particular advisor programme:

Although the Twinning Project [with the EC and some of its Member States] has progressed successfully, its Working Programme was not completed during the initial period of the project. The main reason of the delay was related to the planned visits by short- and medium-term experts. They have remained below schedule because many experts have experienced difficulties in getting the necessary leave from their home administrations.¹⁰

39. Depending on the level of the advisor, this form of assistance may serve the two other functions of technical assistance, networking and political support. Personal and institutional contacts created by the programme may pave the way for future technical assistance and might facilitate informal and perhaps formal co-operation between the provider and the beneficiary. The presence of an advisor is unlikely to provide political support, but the advisor may have ideas and contacts that are useful in obtaining such support either through advocacy techniques or through arranging for international support at the political level.

6.4 Other technical assistance methods

40. In addition to the above, beneficiaries identify other useful methods of technical assistance, such as consultations and publications. These might be easily combined with some of the above technical assistance methods,¹¹ but might also be provided on a stand-alone basis. The following analysis briefly elaborates on how consultations and publications might be useful for beneficiaries.

6.4.1 Consultations

41. Consultations, either in the form of meetings or written exchanges, require relatively limited resources and provide beneficiaries with tailored advice and know-how concerning a pressing specific problem. For instance, the Russian Federation regards consultations by OECD and EC experts on draft legislative amendments very useful.

42. Consultations also provide possibilities of networking, and can provide some political support to beneficiaries if they involve sufficiently high-level officials. In the Russian Federation's view, visits by heads of established competition authorities can effectively contribute to the competition advocacy efforts of beneficiaries' competition authorities.

43. Consultations, in particular concerning draft legislation, require substantive knowledge about the beneficiary, which has seriously limited their usefulness to Tunisia. As discussed further below, Thailand makes a similar point concerning a guideline-writing project.

6.4.2 *Publications*

44. Indonesia finds that publications are one of the most useful types of assistance. Similarly, the Russian Federation points out the usefulness of the publications sponsored by UNCTAD and the EU in Russian, while Chile finds that assistance presenting comparative studies on competition law is very useful as a means of acquiring knowledge about foreign experience. Baltic countries have received useful assistance through annual written analyses of their law enforcement activities in the framework of the OECD's Baltic Regional Programme. Côte d'Ivoire mentions that it would need assistance to be able to subscribe to academic literature.

45. Publications are often relatively cheap and can be used effectively in various settings. Apart from their effectiveness in transferring know-how to a large number of recipients – in particular if translated into the beneficiary's language – such publications contribute to the competition advocacy efforts of the beneficiary's competition authority. Russia's use of the recent OECD publication was noted above. Also, Lithuania found it quite useful to receive technical assistance in drafting easy-to-understand information brochures.

7. **General issues concerning the organisation and provision of technical assistance**

46. This part covers three general issues concerning the organisation and provision of technical assistance: (i) the advantages and disadvantages of single-economy and regional events; (ii) the skills and experience required of an assistance provider; and (iii) the bureaucracy of organising assistance.

7.1 *The advantages and disadvantages of single-economy and regional events*

47. For various reasons, beneficiaries appreciate both single-economy and regional assistance, and they regard both as very useful. In general, single-economy assistance is praised as it allows for a more specific and detailed discussion (Estonia), which is tailored to the beneficiary's practical needs (Lithuania, Thailand, Romania), and provides solutions to existing problems (Lithuania). In regional events, no single beneficiary has as much influence on the topics to be covered, which Estonia and Thailand point out can mean that any given beneficiary may find some of the topics at a regional event are not so important to it. In addition, Romania notes that regional events are less conducive to in-depth analysis of key issues.

48. Regional assistance also has advantages, however. It gives a broader viewpoint of every topic (Indonesia) and provides opportunities to exchange experiences with, and learn from, other beneficiaries (Estonia, Lithuania, Romania, Tunisia). Some regional events even allow for some kind of peer review among beneficiaries. Lithuania states that the OECD's Baltic Regional Programme has been providing each Baltic competition authority with annual written evaluations of selected issues, plus seminars that combined elements of the Competition Committee's policy dialogue and peer review with capacity-building activities that targeted topics identified by the evaluations. In addition, Chile finds that:

the opportunity [provided by regional case-study seminars] to explain our procedures, analyses and outcomes generates a kind of 'peer' scrutiny that results in impartial opinions which evaluate the agency's work. The sole presence of officials from a foreign agency or other country, which interact with the personnel, provides an opportunity to exchange viewpoints and to express freely opinions between peers.¹²

49. Further, a number of contributions note that regional assistance helps in establishing personal and institutional contacts that may lead to informal and perhaps even formal co-operation.¹³ Regional events might also receive public coverage more easily than single-country events, and thereby provide effective

political support for beneficiaries – not only for the beneficiary hosting the event, but to a certain extent also for other participating beneficiaries.

50. Besides these general pros and cons, the advantages and disadvantages of single-economy and regional assistance may depend on the topic. Kenya notes that an event for the creation of a national legal framework and institutions should be a single-economy event, whereas events dealing with merger control and price fixing cartels may be more advantageous if organised on a regional basis. Further, Brazil opines that:

[i]f the topics covered by an event concern exchange of jurisdictional experience on antitrust matters, regional events are to be more fruitful than a single-country one. Otherwise if the recipient country is implementing its laws a single-country event yield better results than a regional one. In short, the effectiveness of the event depends substantially on the relative position of a country with respect to its own antitrust laws implementation.¹⁴

7.2 Skills and experience required of an assistance provider

51. The questionnaire for non-Members asked them to rank four factors relating to the skills and experience of an individual assistance provider. Their ranking was as follows (going from the most important to the least important):

- i. experience working in a competition authority;
- ii. detailed knowledge of beneficiaries' actual legal, institutional, and economic systems;
- iii. experience in providing assistance to transition or developing economies; and
- iv. knowledge of competition law and policy systems in different parts of the world.

In addition, non-Members discussed the reasons for their rankings.

52. In general, beneficiaries' reasons for assigning a high ranking to experience in a competition authority are similar to those that delegates noted in February 2001 – the fact that so many assistance needs relate to running a competition authority and running a competition investigation. Perhaps the clearest example noted in the contributions is Russia's comment on the value of EC advice concerning decentralised competition law enforcement. No professor or private practitioner without competition enforcement experience could address such a topic with as much authority and credibility as an appropriate official from a large competition authority.

53. Lithuania adds the following concerning the advantages of competition officials:

Assistance provided by the current competition officials is the most effective and valuable. In addition to their working experience within the relevant competition authority, currently working competition officials usually possess much more updated information and knowledge of the competition law and policy developments both in their country and different parts of the world.¹⁵

54. Lithuania also notes a disadvantage to current competition officials, which is that officials in a twinning programme experienced difficulties in getting away from their home administration and often been unable to provide as extensive assistance as desired.

55. Tunisia, also, mentions that private consultants often lack relevant practical experience. Moreover, "beyond practical experience," Tunisia notes that assistance by competition officials allows for

an exchange of views and facilitates requests of information, potentially paving the way for further technical assistance and future co-operation.

56. This general preference for assistance providers with competition enforcement experience does not mean that assistance from private consultants is not valuable. For one thing, Estonia notes that private consultants have often very different points of views, and discussions with them gives competition officials an opportunity to see also the other side of some issues. Brazil believes that the effectiveness of assistance by competition officials and private consultants depends on the authority's stage of development, and for Brazil "assistance from current competition officials has brought more results." Estonia and Lithuania agree that the necessary qualifications depend on the topic. For example, if a competition authority is not seeking "practical advice" but rather needs information about general (or very specific) legal issues, Lithuania says that a private consultant, especially a professor, may be preferable. Similarly, Indonesia faces circumstances in which it needs advice about Indonesia-specific economic or legal issues, in which case foreign advisors' experience is not as important as local consultants' knowledge.

57. Non-Members did not say much about the importance of attributes other than experience in a competition authority. Both Thailand and Tunisia, however, made brief but important contributions. Tunisia referred generally to the length of time that it takes for an assistance provider to become knowledgeable about a beneficiary's economy and law. Detailed knowledge about a beneficiary's situation is not necessary for all kinds of assistance, but it is always important for an assistance provider to have a willingness to listen and an understanding that even the most basic competition policy principles can have different policy implications in economies with different levels of development and legal, cultural, and other traditions. Experience in providing assistance to other economies can help produce this understanding, though it is not necessary or sufficient. Thailand describes a situation in which it found advisors to be insufficiently adaptable:

We received technical assistance ... a few years ago to draft guidelines for implementing our Competition Act. The problem that we faced was the difference in business culture, ways of life, concept of the Act, *etc* that caused the misunderstanding when drafting the guidelines. [Assistance] needs to be adjusted to correspond with the situation in Thailand. Furthermore, the consultants always have their own scope of work and they will not provide any other assistance beyond their own scope. This is one of the limitations of the assistance.¹⁶

7.3 *International co-ordination*

58. None of the beneficiaries have reported of any instances where lack of co-ordination effectively led to a problem. Moreover, none suggest enhanced co-ordination of technical assistance. In fact, some, for instance Estonia, fear that co-ordination would be disadvantageous as it could sometimes result in further delays in the already lengthy procedures of applying for assistance. Lithuania fears that increased co-ordination could also slow down the implementation of already adjudicated projects. In contrast, Brazil states that although a lack of co-ordination among providers has not created any problems, it could do so.

7.4 *The bureaucracy of organising assistance*

59. Several beneficiaries find the current bureaucracy of applying for technical assistance unnecessarily burdensome. Estonia advocates for more speedy application processes in general, whereas the Russian Federation mentions that

[o]ne of the main weak points of the provided technical assistance is a *high bureaucracy*. Sometimes a very long period is needed from the getting of principal decision to provide the technical assistance till the beginning of the project.¹⁷

60. The Russian Federation also finds that the administration of technical assistance projects sometimes puts too heavy a burden on beneficiaries:

Sometimes in case of technical assistance for short term events a recipient is requested to provide a sponsor with a lot of calculations and data what makes a big additional pressure on the staff taking in mind very limited human and technical resources in antimonopoly structures in transition countries.¹⁸

8. Factual data on technical assistance received by beneficiaries

61. Responses to the questionnaire include factual data about various aspects of technical assistance received by beneficiaries, namely (i) the proportion of multi-year programmes and one-off events; (ii) the proportion of assistance taking place abroad and in the beneficiary's economy; and (iii) the proportion of seminars, advisor and internship programmes. This information is helpful in interpreting individual economy's responses to other questions, though it is insufficient to permit generalisations concerning how differences in these proportions might correlate with other variables, such as region, level of development, or quantity of assistance received.

62. Beneficiaries reported various levels of multi-year programmes and one-off events. Tunisia reported limited assistance consisting exclusively of multi-year programmes. Brazil, Estonia, Lithuania and Romania have had between 66-80% of their assistance as multi-year programmes. Kenya reported limited assistance consisting of only one-off events. For this question, differences may in part reflect differing interpretations of the questionnaire. For example, Indonesia reported that almost 90% of its assistance was through one-off events, but the World Bank and some donors have been providing support for some time.

63. Responses show similar differences as regards the location of technical assistance. Some beneficiaries, such as Estonia, Kenya, and Romania, have been receiving technical assistance predominantly in their economy, with technical assistance received abroad ranging between 10-30%. Some others have been receiving more assistance abroad than at home. Lithuania has been receiving only 40% of its assistance in Lithuania, whereas Tunisia and Brazil have been receiving only 20% of assistance delivered at home. Indonesia reports having received an equal proportion of assistance in Indonesia and abroad.

64. Beneficiaries provide diverging data about the proportion of various types of assistance, as well. For Estonia, Lithuania, and Romania, seminars and conferences have not exceeded 60% of assistance, and a substantial share of assistance received has been advisor and internship programmes, with internship programmes/study visits usually accounting for a smaller share. In contrast, for Kenya "[a]lmost one hundred percent assistance has been seminars and conferences." Tunisia reports that it has received limited assistance exclusively in the form of seminars and internships, and had no resident advisors. Brazil has received around 80% of its assistance through seminars, and the rest by resident advisors, who "provide around fifty percent of the conferences and seminars." Indonesia states that it has received an equal proportion of seminars and conferences, and advisor and internship programmes.

9. Issues for discussion

65. It is hoped that non-Members will discuss their views on the following topics, among others:

- their greatest needs, and the assistance needed to meet those needs.
- the forms of assistance they find most useful, either generally or for particular purposes, including seminars, internships, and resident advisors.
- the skills and experience that are important for an assistance provider, including:
 - experience working in a competition authority;
 - detailed knowledge of beneficiaries' actual legal, institutional, and economic systems;
 - experience in providing assistance to transition or developing economies; and
 - knowledge of competition law and policy systems in different parts of the world.
- the potential benefits and costs of further co-ordination of assistance.

66. The facts and views presented by beneficiaries will provide the basis for a broader consideration of all the foregoing topics. In addition, the following broader issues also merit attention:

- whether the need for and supply of technical assistance is in balance, and if the need exceeds the supply, what steps might be taken to increase supply.
- whether competition officials consider it desirable and possible for their authorities to play a greater role in the provision of technical assistance without interfering with their other responsibilities.
 - If so: what are Members' reactions to the following possibilities?
 - receiving a larger share of available funding, with discretion to provide assistance through its staff or to use their expertise to shape technical assistance projects and select qualified private subcontractors.
 - receiving resources to cover the costs of having employees dealing specifically with technical assistance.
 - If not: do Members think it would be desirable and possible for competition authorities to be more active in advising funding agencies on the design of technical assistance projects and the selection of qualified private contractors?

NOTES

¹ Estonia, Israel, Kenya, Latvia, Lithuania, Russia and Tunisia.

² Responses were received from Brazil, Chile, Estonia, Indonesia, Kenya, Lithuania, Thailand, and Tunisia. They are incorporated into the annexes. Responses from Côte d'Ivoire and Latvia are discussed in the text but are not in the annexes.

³ The paper submitted by Mr. Ilya Yuzhanov, Minister, Russian Ministry of Antimonopoly Policy and Support of Entrepreneurship, notes that “[s]ometimes it is difficult to specify what kind of relations do you have – international co-operation or technical assistance.” Experience of and needs for capacity building and technical assistance, Address by Mr. Ilya Yuzhanov, Minister, Russian Ministry of Antimonopoly Policy and Support of Entrepreneurship before the OECD Global Forum on Competition, 14 February 2002..

For an account of enforcement co-operation as a type of technical assistance, *see* Brazilian Actual Experiences in International Co-operation in Cartel Cases, Submission by Brazil to the OECD Global Forum on Competition, 14-15 February 2002.

⁴ Questionnaire, Submission by Thailand to the OECD Global Forum on Competition, 14-15 February 2002.

⁵ Experiences of, and needs for, capacity building or technical assistance, Submission by Chile to the OECD Global Forum on Competition, 14-15 February 2002.

⁶ Experiences of, and needs for, capacity building or technical assistance, Submission by Chile to the OECD Global Forum on Competition, 14-15 February 2002.

⁷ The forthcoming 3rd Thematic Meeting of the Competition Law and Policy in SEE Regional Flagship Initiative held by the OECD in Belgrade (FR Yugoslavia) in March 2002 will have an extra half-day session open for local policy-makers, press and public.

⁸ Experiences in Capacity Building and Technical Assistance, Submission by Israel to the OECD Global Forum on Competition, 14-15 February 2002.

⁹ Experiences in Capacity Building and Technical Assistance, Submission by Israel to the OECD Global Forum on Competition, 14-15 February 2002.

¹⁰ Experiences of and Needs for Capacity Building or Technical Assistance, Submission by Lithuania to the OECD Global Forum on Competition, 14-15 February 2002.

¹¹ According to the Russian Federation, assistance programs involving different aspects of competition law enforcement and policy are very useful, as they “enable the beneficiary’s competition authority to organise activities parallel in many areas, such as study of new trends of foreign antitrust experience, discussion of amendments to legislation, joint consideration and discussion of the most important cases, *etc.*” The Russian Federation also praises the flexibility and usefulness of “*ad hoc* operative legal consultations on draft laws, methodologies and other normative documents or proposals” such as the ones provided by the OECD and the EU to Russia. Experience of and needs for capacity building and technical assistance, Address by Mr. Ilya Yuzhanov, Minister, Russian Ministry of Antimonopoly Policy and Support of Entrepreneurship before the OECD Global Forum on Competition, 14 February 2002.

¹² Experiences of, and needs for, capacity building or technical assistance, Submission by Chile to the OECD Global Forum on Competition, 14-15 February 2002.

¹³ For instance, the annual OECD Vienna Seminar on Topics in Competition Policy allows for meetings among Baltic, CIS and Southeast European competition officials. Similarly, the annual competition policy

seminar organised in the framework of the OECD Baltic Regional Programme, the meetings of the Competition Law and Policy Regional Flagship Initiative organised by the OECD and its organising partners in the framework of the Stability Pact for Southeast Europe, and the OECD-South Africa seminars for the Southern African Development Community provide a unique opportunity for regional meetings.

- 14 Answers to OECD Questionnaire on Technical Assistance Experiences and Needs, Submission by Brazil to the OECD Global Forum on Competition, 14-15 February 2002.
- 15 Experiences of and Needs for Capacity Building or Technical Assistance, Submission by Lithuania to the OECD Global Forum on Competition, 14-15 February 2002.
- 16 Questionnaire, Submission by Thailand to the OECD Global Forum on Competition, 14-15 February 2002.
- 17 Experience of and needs for capacity building and technical assistance, Address by Mr. Ilya Yuzhanov, Minister, Russian Ministry of Antimonopoly Policy and Support of Entrepreneurship before the OECD Global Forum on Competition, 14 February 2002.
- 18 Experience of and needs for capacity building and technical assistance, Address by Mr. Ilya Yuzhanov, Minister, Russian Ministry of Antimonopoly Policy and Support of Entrepreneurship before the OECD Global Forum on Competition, 14 February 2002.

ANNEX A
BENEFICIARIES' RESPONSES TO THE TECHNICAL ASSISTANCE QUESTIONNAIRE

This annex includes the 9 responses submitted by Brazil, Chile, Estonia, Indonesia, Kenya, Lithuania, Romania, Thailand, and Tunisia to the OECD's questionnaire on technical assistance by 31 January 2002.

BRAZIL

1. It would be useful if you could provide as much as reasonably possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-2001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issues raised below.

See annexed table.

2. Based on your experiences:

What topics have been most and least useful, and why?

One of the most useful instruments of co-operation has been the exchange of information on antitrust matters such as hard core cartels, both at formal basis because it provides adequate legal framework, and informal basis because it provides quickly responses when necessary.

As could be seen on the annexed table below, the participation in seminars and conferences has been an equally important mean of co-operation between Brazilian and foreign antitrust authorities and representatives of the private sector.

What kinds of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

Conference and seminars have been the best solution to bring professionals dealing with antitrust matters together. However informal exchange of information is not the best way to deal with the necessity of official documentation that sometimes has been demanded in our formal procedures.

What are the advantages and disadvantages of single-country and regional events? Does the answer depend on the topic being covered? Please explain.

If the topics covered by an event concern exchange of jurisdictional experience on antitrust matters, regional events are to be more fruitful than a single-country one. Otherwise if the recipient country is implementing its laws a single-country event yield better results than a regional one. In short, the effectiveness of the event depends substantially on the relative position of a country with respect to its own antitrust laws implementation.

Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?

- (1) Experience working in a competition authority?
- (4) Experience in providing assistance to transition or developing economies?
- (3) Knowledge of competition law and policy systems in different parts of the world?
- (2) Detailed knowledge of your actual legal, institutional, and economic systems?

What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

The answer to this question is similar to the one regarding single country and regional events related above, i.e. it depends on the antitrust institutions development's degree. For the Brazilian case the assistance from current competition officials has brought best results than the others alternatives.

Approximately what share of the assistance you receive consists of multiyear programs, and what share consists of one-off events?

We believe that almost eighty percent consists of multiyear programs, such as seminars and conferences.

Approximately what share of the assistance you receive takes place in your economy, and what share is abroad?

Approximately 80% of the assistance received takes place abroad.

Approximately what share of your assistance are seminars and conferences, and what share are resident advisors or internships in other economies?

Approximately eighty percent of the assistance consists of seminars and conferences. We also believe that resident advisors provide around fifty percent of the conferences and seminars.

3. Have there been instances when an apparent lack of co-ordination among providers has been a problem for you? Please explain. Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?

Although the lack of co-ordination among providers has not been a problem for us, it could bring us problems such as wastefulness, ineffectiveness of efforts, delays, etc.

4. What do you currently consider your economy's greatest need in terms of competition law and policy assistance?

Similarly the method used on item 2 above we will rank the following questions in order of importance.

- (2) Drafting a competition law? Drafting secondary legislation/regulations?
- (1) Implementing a competition law?
- (4) Against abuses of dominance by natural monopolies?
- (3) Against abuses of dominance by "unnatural" monopolies?
- (1) Against cartels?
- (2) Against anti-competitive mergers?

**If assistance in implementation is the need, what kind of assistance would be most valuable?
Establishing procedures, training staff, other?**

Once the law has been drawn and implemented the subsequent work such as establishing procedures and training staff becomes one of the most valuable forms of co-operation.

5. Please provide any other information or comments you wish to contribute.

CHILE

To address this issue we will follow the questionnaire sent by the OECD, and will try to provide as much information in the clearest way possible.

1. Topics addressed in technical assistance and general aspects.

In our experience, we have not found any topics that could be qualified as not useful for building our technical capacity. Although some topics are more interesting, considering that they could be under present investigation and there is immediate concern over them, all topics, approaches and analyses are considered useful for the FNE's objectives.

For example, participating in the case-study based seminars organized by the OECD has been an excellent opportunity to realize that many issues and cases are very similar in different countries and have raised the same concerns when they are addressed by the competition agency. Regardless of the fact that some topics have already been seen by the agency, the opportunity to explain our procedures, analyses and outcomes generates a kind of "peer" scrutiny that results in impartial opinions which evaluate the agency's work.

For the other part, analyzing issues that have not been addressed before by our agency, provides us with tools and overviews that help us gain knowledge for future cases that will probably have to be addressed.

Nevertheless, it is very important to consider the level of development of each countries' competition policies, in order to provide consistent and useful assistance in technical matters. Many countries in Latin American have still not enacted competition laws; others have years of enforcement, and there are countries that are implementing their new statues and structuring their antitrust institutions.

In this line of thought, there are some topics that are limited to problems that new agencies or countries who do not have agencies or legislation need to address. In these topics, countries like Chile can have an important opinion and can provide technical assistance on these matters.

It is important to explain that the FNE is organized as a specialized agency that deals exclusively with antitrust enforcement. Our law came to force in October 1973, but we have antitrust statutes since late 1950's. We do not enforce consumer protection statues like many Latin American authorities.

2. Forms of assistance

We had the chance to participate in case-study seminars and conferences throughout the years 1999 to 2001.

The case study system has been a great experience, and stands upon a recognized high level of capacity, expertise and understanding of the OECD officials and experts who develop these programs. The study of real cases seen by other agencies, that may be in course of investigation or terminated with final

judgements, provide us with excellent tools for analyses. This system generates an active participation and new relevant questions are put forward by participants.

Regarding internships, our experience is as providers of technical assistance. Officials from Costa Rica have visited the FNE for short terms and completed a program that included presentations by our experts and the analysis of current cases. Our objective is to provide an outlook of our law, the procedures involved and the ways to approach different anti-competitive activities .

Our experience is that case-study based seminars are more useful if many countries participate with their own views. The discussions that arise and the different standpoints provide key elements that help the participants gain technical experience.

Considering our last experiences in short internships, single country participation provides a unique opportunity for officers of both parties to interact and discuss everyday concerns and also to deal with complex inquires. These programs have been an excellent experience for both parties and we will try to develop others. We are in preliminary talks with competition authorities from Panama in this matter.

3. Skills of the assistance provider

From our view, as recipients of assistance, the expertise of the providers is of great importance. The ability to analyze cases that are presented summarily and to give certain key elements to the resolution of the problems is of great importance.

Nevertheless, and from a point of view of assistance providers, for us the sole presence of officials or experts from a foreign agency or other country, which interact with the personnel, provides an opportunity to exchange viewpoints and to express freely opinions between peers. This instance is of great importance for it helps reach a global view of the work done by the agency.

Chile is participating in the Free Trade Agreement of the Americas negotiations (FTAA-ALCA). In that forum, the delegations have established in almost all rounds of negotiations a session for technical assistance, although it is not part of the formal negotiations.

This has been a great experience, specially for countries that do not have competition laws, and has proved that not necessarily great expertise is needed to provide assistance and generate case-based discussions.

4. Our needs for technical assistance

Our agency has powers to enforce competition law in many fields, including regulated markets that were part of the privatization process in Chile. This reflects the vast areas that are addressed in our investigations.

The FNE has an experience of nearly 30 years in competition enforcement. It is a prestigious government institution with a clear technical profile. Our Antitrust Commissions, which are independent bodies, also have a great tradition of enforcement and its decisions have positively influenced many markets and established many “bright lines” for competitors to guide their activities.

Nevertheless, competition issues become every day more complex. New markets and businesses arise and international trade creates continuous upheavals in the marketplace.

The analysis of activities that constitute new forms of abuse of dominant position is a topic that is important for us to address. Our institutional structure does not consider mandatory or compulsory merger control nor the review of acquisitions and take over operations, but we've conducted investigations that analyzed concentration processes.

It is important for us to enhance our technical capacities to investigate the activities developed by firms which hold a high market share and may engage in abuses of its position.

Also, due to the fact that some mergers and acquisitions are investigated, our agency needs to learn from the different approaches to merger analysis.

There is another aspect that is very important for us. It is necessary to gain knowledge through technical assistance of the different law statues that deal with the criminal enforcement of certain conducts. Our agency finds an important issue to address the possible limitations or the eventual substitution of criminal measures or sanctions, which are contemplated in our law, with other measures. It is important to take account of the benefits and the negative effects of these changes.

In that sense, comparative studies on competition law, presented or provided as technical assistance activities, is a field that the FNE finds very useful in order to acquire knowledge of foreign experiences and improve our institutions.

ESTONIA

1. It would be useful if you could provide as much as reasonably possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issues raised below.

2. Based on your experiences:

What topics have been most and least useful, and why?

A All topics have been useful considering our everyday work. Especially useful have been procedural rules, since in this area the knowledge is most needed. Less useful have been very specific topics, since they are not so important in our everyday work.

What kinds of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

Most useful have been probably seminars, since it has enabled all officials of the Competition Board to participate and acquire knowledge. In gaining practical skills the most useful have been placements in other countries competition authorities. These placements have been more useful than theoretical training since it has provided us opportunities to see the actual proceeding of cases. According to our experience, the quality of an advisor varies largely, we have had some very good advisors and their assistance has been remarkable.

What are the advantages and disadvantages of single-country and regional events? Does the answer depend on the topic being covered? Please explain.

Yes, the answer depends on topic being covered. The advantage of single-country event is that it gives the participants an opportunity to deal with specific issue with greater detail. The advantage of regional event is that it gives one an opportunity to compare its experience with the experience of colleagues. Disadvantage of regional event is that sometimes it may happen that problems being discussed are not so similar. As an example some specific provision of law or etc.

Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?

Experience working in a competition authority?

Very important

Experience in providing assistance to transition or developing economies?

Important

Knowledge of competition law and policy systems in different parts of the world?

Important, could be an advantage

Detailed knowledge of your actual legal, institutional, and economic systems?

Very important

We consider also the dedication of an assistance provider as an important part of successful assistance.

What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

Both kinds of assistance are very important. Private consultants have often very different points of views from that of competition officials and that gives us an opportunity to see also the other side of some issues. Everything depends of course on the topic being covered.

Approximately what share of the assistance you receive consists of multiyear programmes, and what share consists of one-off events?

2/3 of assistance we receive consists of multiyear programmes and 1/3 of one-off events.

Approximately what share of the assistance you receive takes place in your economy, and what share is abroad?

10 % of assistance we receive takes place abroad and 90 % in our economy.

Approximately what share of your assistance are seminars and conferences, and what share are resident advisors or internships in other economies?

60 % of assistance is seminars and conferences, 30 % is advisors and 10 % are study visits.

3. Have there been instances when an apparent lack of co-ordination among providers has been a problem for you? Please explain. Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?

We have fortunately had no such experience. Disadvantage could be that sometimes the application for assistance is delayed and so is our need for assistance. Taken into consideration fast development of competition problems, the process of application of assistance should be also faster.

4. What do you currently consider your economy's greatest need in terms of competition law and policy assistance?

Drafting secondary legislation/regulations?	Very important
Implementing a competition law?	Very important
Against abuses of dominance by natural monopolies?	Important
Against abuses of dominance by "unnatural" monopolies?	Important

Against cartels?

Important

Against anti-competitive mergers?

Very important

**If assistance in implementation is the need, what kind of assistance would be most valuable?
Establishing procedures, training staff, other?**

Training staff using case-study method. We have established that most valuable are practical trainings where current cases are discussed and analysed with the assistance of advisors.

5. Please provide any other information or comments you wish to contribute.

INDONESIA

1. It would be useful if you could provide as much as reasonably possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-2001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issues raised below.

We have received technical assistances from World Bank, Bundeskartellamt (GTZ project, Rep. of Germany), ELLIPS (USAID) and Japan FTC (JICA Projects). The assistances including advisory, staff training, studies, training of related external bodies, conferences or seminars on competition and dissemination of Indonesia competition policies and many others.

2. Based on your experiences:

What topics have been most and least useful, and why?

The most useful topics for Indonesia are competition policies in relation with Indonesia competition's laws and investigation techniques of competition cases. In this early stage, no topics are not useful or least useful for KPPU.

What kinds of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

The most useful assistances are continues advisory and training, series of seminars/conferences and design and publish of publication materials. These kinds of assistances strengthen KPPU and related bodies capabilities on facing competition cases.

What are the advantages and disadvantages of single-country and regional events? Does the answer depend on the topic being covered? Please explain.

Regional events give a broader viewpoint of every topics being covered. In the borderless world, we will knowledge the competition cases interrelating among the regional countries.

Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?

Besides knowledge of competition law and policy, KPPU requires investigative report and analysis skill, information system knowledge and supports. From our opinion, the rank should be:

- Detail knowledge of our actual legal, institutional and economic systems.
- Experience working in a competition authority
- Knowledge of competition law and policy systems in different parts of the world
- Experience in providing assistance to transition or developing economies.

What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

Yes, the answer depends on the topic being covered. In many occasion, local consultants give more clear assistances than foreigners do.

Approximately what share of the assistance you receive consists of multiyear programs, and what share consists of one-off events?

Most of the assistances we received are one-off events (almost 90 percents).

Approximately what share of the assistance you receive takes place in your economy, and what share is abroad?

Approximately 50-50.

Approximately what share of your assistance are seminars and conferences, and what share are resident advisors or internships in other economies?

Approximately 50-50.

3. Have there been instances when an apparent lack of co-ordination among providers has been a problem for you? Please explain. Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?

The lack of co-ordination has happened once or twice. It happened when person in execution not in favour of or refuse to comply the agreed schedule or activities.

4. What do you currently consider your economy's greatest need in terms of competition law and policy assistance?

**Drafting a competition law? Drafting secondary legislation/regulations?
Implementing a competition law?**

**Against abuses of dominance by natural monopolies?
Against abuses of dominance by "unnatural" monopolies?
Against cartels?
Against anti-competitive mergers?**

Our economy's greatest need in terms of competition law and policy assistance is implementing a competition law against abuses of dominance by unnatural monopolies and tender conspiracy or cartels.

**If assistance in implementation is the need, what kind of assistance would be most valuable?
Establishing procedures, training staff, other?**

Establishing procedures and guidelines, training staff, regular advisory, information/data base management system, are the most valuable assistance for KPPU.

5. Please provide any other information or comments you wish to contribute.

Institutional development is one of our concerns in the near future. KPPU has an obligation to confirm its contribution in Indonesia economic recovery. Supports from foreign competition agencies are surely required.

KENYA

1. It would be useful if you could provide as much as reasonably possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issues raised below.

See Attached table.

2. Based on your experiences:

What topics have been most and least useful, and why?

The most useful topics have been topics on the structure of competition agencies , merger control and investigations into cartel activities whereas the least useful have been competition theory.

What kinds of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

Assistance in the form of internship and seminars have proved to be most useful because they provided opportunities for the transfer of practical skills in the handling of competition cases and sharing of experiences with peers respectively.

What are the advantages and disadvantages of single-country and regional events? Does the answer depend on the topic being covered? Please explain.

The advantages and disadvantages of single country and regional events depend on the topic being covered. For instance, an event for the creation of a national legal framework and institutions will be more advantageous if country specific whereas events dealing with merger control and price fixing cartels may be more advantageous if organised on a regional basis.

Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?

Experience working in a competition authority?

Experience in providing assistance to transition or developing economies?

Knowledge of competition law and policy systems in different parts of the world?

Detailed knowledge of your actual legal, institutional, and economic systems?

Besides knowledge of competition law and policy, the following skills and experiences are important for an assistance provider.

- Culture and traditions of the people.
- Political and economic systems of the country.
- Level of Development and income distribution(poverty levels). The following ranking is recommended:
 - ✓ Detailed knowledge of the actual legal institutional and economic systems.
 - ✓ Experience in providing assistance to economies in transition and developing economies.

- ✓ Experience working in a Competition Authority.
- ✓ Knowledge of Competition Law and Policy systems in different parts of the world.

What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

The advantages and disadvantages of receiving assistance from current competition officials and Private consultants including (consulting firms, law firms, professors, etc) will be dependent on the objective of the assistance and the tasks to be addressed by the assistance. Unless such assistance is domesticated and owned by the people, it is more likely to be short-lived and of little benefit to the community.

Approximately what share of the assistance you receive consists of multiyear programmes, and what share consists of one-off events?

Kenya has not up to date received any multiyear programme assistance in the field of competition Law and Policy. In 2001, UNCTAD provided technical and financial assistance for a five-days' regional seminar and OECD provided assistance to the head of competition agency to attend the First Competition Forum in Paris, France.

Approximately what share of the assistance you receive takes place in your economy, and what share is abroad?

Eighty percent domestic and twenty percent foreign events.

Approximately what share of your assistance are seminars and conferences, and what share are resident advisors or internships in other economies?

Almost one hundred percent assistance has been seminars and conferences.

3. Have there been instances when an apparent lack of co-ordination among providers has been a problem for you? Please explain. Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?

As Kenya has received negligible foreign assistance in the development of CLP in the recent past, it is not possible to evaluate the benefits of co-ordination by assistance providers. Indeed, we can only say that the assistance provided by UNCTAD has been extremely beneficial in capacity building.

4. What do you currently consider your economy's greatest need in terms of competition law and policy assistance?

**Drafting a competition law? Drafting secondary legislation/regulations?
Implementing a competition law?**

**Against abuses of dominance by natural monopolies?
Against abuses of dominance by "unnatural" monopolies?
Against cartels?
Against anti-competitive mergers?**

Kenya's greatest need in terms of CLP assistance would be/

- Capacity building
 - Drafting a Competition Law.
 - Advocacy and drafting secondary regulations and guidelines
 - Implementing competition law-
- Against cartels
 - Against abuses of dominance by natural monopolies
 - Against abuses of dominance by unnatural monopolies
 - Against anti-competitive mergers

If assistance in implementation is the need, what kind of assistance of assistance would be most valuable? Establishing procedures, training staff, other?

The most valuable assistance will be in the training of staff and provision of office equipment.

5. Please provide any other information or comments you wish to contribute.

Advocacy programmes to sensitise Government Ministries/departments, business and consumers on the contribution of Competition Law and Policy to economic development and consumer welfare will go a long way in enhancing acceptability of a competition culture and compliance with the law.

LITHUANIA

Most answers to the questionnaire can be found in the “General overview”, which is provided separately. Short answers to the specific questions are also provided below.

1. It would be useful if you could provide as much as reasonably possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issues raised below.

See the general overview and the attached table.

2. Based on your experiences:

What topics have been most and least useful, and why?

All topics described in the general overview were very useful.

What kinds of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

It is impossible to distinguish one or another seminar, conference or some other event. All events were well organised and provided by highly experienced experts.

What are the advantages and disadvantages of single-country and regional events? Does the answer depend on the topic being covered? Please explain.

As regards single-country and regional events, they both are very useful and important. The single-country events allow participants to concentrate more on the country's specific topic and satisfy its internal need. Usually such kind of events helps the competition authority to get relevant answers and to solve existing problems. Topics of the regional events are usually more of general character, but these events are also very important. They allow to get more information about competition policy and its implementation in neighbouring countries, to share experience and to establish and keep contacts with relevant officials from other competition institutions. Thus, both kinds of these events are highly needed.

Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?

1. Experience working in a competition authority.
2. Detailed knowledge of your actual legal, institutional, and economic systems.
3. Experience in providing assistance to transition or developing economies?
4. Knowledge of competition law and policy systems in different parts of the world?

What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

Assistance provided by the current competition officials is the most effective and valuable. In addition to their working experience within the relevant competition authority, currently working competition officials usually possess much more updated information and knowledge of the competition law and policy developments both in their country and different parts of the world. The only one disadvantage in receiving assistance from current competition officials is that they usually experience difficulties in getting the necessary leave from their home administration and very often are not able to provide more extensive assistance.

As regards private consultants, the effectiveness of their assistance very much depends on the topic being covered. Private consultants, especially professors, usually are much better in dealing with the topics either of a very general or of a very specific character. The topics that need practical experience (e.g. investigation procedures in cartel cases) should be presented by current competition officials.

Approximately what share of the assistance you receive consists of multiyear programs, and what share consists of one-off events?

Multiyear programmes - 70 %, one-off events - 30%.

Approximately what share of the assistance you receive takes place in your economy, and what share is abroad?

In Lithuania – 40 %, abroad – 60 %.

Approximately what share of your assistance are seminars and conferences, and what share are resident advisors or internships in other economies?

Seminars and conferences - 50 %, resident advisors - 40 %, internships in other economies - 10%.

3. Have there been instances when an apparent lack of co-ordination among providers has been a problem for you? Please explain. Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?

In Lithuania the overall co-ordination of technical assistance programs has been ensured by the Ministry of Foreign Affairs, and practically the lack of co-ordination has not been a problem. The main advantage of greater international co-ordination is that the co-ordination allows to avoid the overlapping of technical assistance among different providers. The main disadvantage is that it slows down the project implementation.

4. What do you currently consider your economy's greatest need in terms of competition law and policy assistance?

**Drafting a competition law? Drafting secondary legislation/regulations?
Implementing a competition law?**

**Against abuses of dominance by natural monopolies?
Against abuses of dominance by "unnatural" monopolies?
Against cartels?
Against anti-competitive mergers?**

The greatest needs in terms of competition law and policy assistance are related to the implementation of a competition law, especially against cartels and anti-competitive mergers. Most valuable assistance would include all kinds of staff training, in particular ensuring that investigation, enforcement and reporting methodologies are based on the best world-wide practice and are in compliance with the EC rules.

The assistance for implementation of the awareness-raising campaign, including wider public sector and judiciary would also be very valuable.

Some technical assistance is also needed for drafting of secondary legislation/regulations and explanations, especially in the field of block exemptions.

5. Please provide any other information or comments you wish to contribute.

ROMANIA

1. It would be useful if you could provide as much as reasonably possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issues raised below.

2. Based on your experiences:

What topics have been most and least useful, and why?

The most useful topic have been: investigation techniques and notification of the economic concentration.

What kinds of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

Any kind of assistance is useful for our authority but the most useful is the assistance for training the personnel (internship, workshops, seminars) or through study visits at authorities with experience in enforcing competition rules.

What are the advantages and disadvantages of single-country and regional events? Does the answer depend on the topic being covered? Please explain

The advantage of the regional event is that it is possible to exchange opinions with other authorities and in the case of single –country event the target of the assistance is focused only on the problems of one authority that makes it very efficient.

The disadvantage of the regional event is that it is not possible to make an in-depth analysis of the topics discussed within the event.

Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?

2. Experience working in a competition authority?
1. Experience in providing assistance to transition or developing economies?
4. Knowledge of competition law and policy systems in different parts of the world?
3. Detailed knowledge of your actual legal, institutional, and economic systems?

What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

Approximately what share of the assistance you receive consists of multiyear programmes, and what share consists of one-off events?

- 80% - multiyear programmes
- 20% - one-off events

Approximately what share of the assistance you receive takes place in your economy, and what share is abroad?

70% - in the country

30% - abroad

Approximately what share of your assistance are seminars and conferences, and what share are resident advisors or internships in other economies?

50%- seminar and conferences

50%- resident advisors and internships

3. Have there been instances when an apparent lack of co-ordination among providers has been a problem for you? Please explain. Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?

No.

4. What do you currently consider your economy's greatest need in terms of competition law and policy assistance?

Drafting a competition law? Drafting secondary legislation/regulations?

Implementing a competition law?

Against abuses of dominance by natural monopolies?

Against abuses of dominance by "unnatural" monopolies?

Against cartels?

Against anti-competitive mergers?

- Complete the legislative framework in both state aid and anti-trust field.
- Strengthen the administrative capacity.
- Ensure proper enforcement of the rules in anti-trust and state aid including the alignment of incompatible aid schemes with the state aid principles.

If assistance in implementation is the need, what kind of assistance of assistance would be most valuable? Establishing procedures, training staff, other?

Intensity the training of the personnel of the Competition Council and of the judiciary in the competition and state aid field.

5. Please provide any other information or comments you wish to contribute.

THAILAND

1. It would be useful if you could provide as much as reasonable possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issue raised below.

We received technical assistance from the World Bank in 1999 to draft guidelines of the Competition Act. However, the drafted guidelines did not conform to the business culture of Thailand, thus it had to be adjusted. To perform this task based on the drafted one, the Department of Internal Trade (DIT) has been consulting with professors from academic communities concern.

In year 2000-001, we did not receive any assistance from any other source. With our limited resources, the DIT adopted several projects related to the competition issues, for example, advisors, the study of anti-competitive practices of other countries in order to adopt guidelines of unfair trade practices (Article 29) of the Competition Act, and the survey of business practices in industries which are suspected to have anti-competitive practices.

For year 2002, we have a project to acquaint our staffs most aspects of the competition by a professional in this field.

2. Based on your experiences:

What topic have been most and least useful, and why?

Every topic is very interesting and useful for us because we are only now starting to learn about competition issues. In particular, the concerted acts to fix prices of goods and services by transnational enterprises, especially the hard core cartels that damage the consumer interests in many countries. It is a topic that is always being raised in the negotiation forums of the WTO. We have therefore prepared ourselves in respect of these issues for the new round of the negotiations.

What kind of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

The internship is the most useful and important assistance for us now because we can practice and learn how to solve problems that may occur in reality when dealing with the anti-competitive practices. The second important assistance is the conferences/seminars and advisors.

What are the advantages and disadvantages of single-country or regional events? Does this answer depend on the topic being covered? Please explain.

Single-country events are advantageous because they will enable us to have a detailed discussion about the problems that incurred in implementing the competition law and how to solve those problems. However, regional events will be the advantageous in the respect that we can learn and share experiences with countries in a similar position in the same region. However, it also depends on the topic to be covered in the events and the contributions that are made by all the participants.

Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?

Experience working in a competition authority?

Experience in providing assistance to transition or developing economies?

Knowledge of competition law and policy system in different parts of the world?

Detailed knowledge of your actual legal, institutional, and economic systems?

The following is the ranking of skills and experiences that are required by an assistance provider.

- 1) Experience working in a competition authority is required by an assistance provider. With the said experience, the provider will be able to deal with a particular anti-competitive practice, if it occurs, and be able to solve any related problems that may arise when put into the practice.
- 2) Detailed knowledge of our actual legal, institutional, and economic systems is needed by the assistance provider to enable them to adapt their knowledge and experience to correspond with the situation in our country.
- 3) Experience in providing assistance to transition or developing economies will be beneficial in that the assistance provider will clearly see the problems that the country faces and be able to adopt a particular means which is suitable for that country to solve those problems.
- 4) Knowledge of competition law and policy system in different parts of the world will also be useful since we are not alone in this world and as it is the liberalization era, we have to deal with trade and investment of many countries. Knowing about the competition law and policy systems in those countries will be helpful.

What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

The topic which is the most advantageous to us is the methodology to investigate on identify the violation cases such as tie-in sales, price discrimination, predatory pricing etc.

3. Have there been instances when an apparent lack of co-ordination among providers has been a problem for you? Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?

We received technical assistance from the World Bank a few years ago to draft guidelines for implementing our Competition Act . The problem that we faced was the difference in business culture, ways of life, concept of the Act, etc. that caused the misunderstanding when drafting the guidelines. It needs to be adjusted to correspond with the situation in Thailand. Furthermore, the consultants always have their own scope of work and they will not provide any other assistance beyond their own scope. This is one of the limitations of the assistance.

4. What do you currently consider your economy's greatest need in terms of competition law and policy assistance?

Drafting a competition law? Drafting secondary legislation/regulations?

Implementing a competition law?

Against abuse of dominance by natural monopolies?

Against abuses of dominance by "unnatural" monopolies?

Against cartels?

Against anti-competitive mergers?

We need the assistance in implementing a competition law under all of the above topics.

**If assistance in implementation is the need, what kind of assistance would be most valuable?
Establishing procedures, training staff, other?**

Internship is the most valuable for us because we can learn by practising..

5. Please provide any other information or comments you wish to contribute.

Thailand is a developing country and it has just enacted the Competition Act. What we need is assistance from other countries in any form, either technical assistance or financial assistance for developing and carrying out the task of implementing the competition Act. We believed, that with the said assistance, the enforcement of the Competition Act will be more efficient.

TUNISIA

1. It would be useful if you could provide as much as reasonably possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issues raised below.

2. Based on your experiences:

What topics have been most and least useful, and why?

Developpement et promotion de la culture de la concurrence. (Le pourquoi : Période de transition à une économie libérale.)

Moins utiles : Assistance pour la préparation des textes sur la concurrence.

What kinds of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

Plus utiles : Conférences
Séminaires
Stages

Le pourquoi : Promouvoir la culture de la concurrence et tirer Profit de l'expérience des autres autorités de la concurrence.

Moins utiles : Conseillers sur place

Le pourquoi : méconnaissance de l'environnement du pays ce qui nécessite une longue période d'adaptation outre les coûts très élevés à supporter.

What are the advantages and disadvantages of single-country and regional events? Does the answer depend on the topic being covered? Please explain.

Coopération à l'échelle d'un seul pays :

Avantages : échange d'expérience

Inconvénients : limitation aux seuls problèmes généraux (pas de réponse pour les cas particuliers du pays).

Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?

Experience working in a competition authority?

Experience in providing assistance to transition or developing economies?

Knowledge of competition law and policy systems in different parts of the world?

Detailed knowledge of your actual legal, institutional, and economic systems?

1. Expérience de l'apport d'une assistance à des économies en transition ou en développement .
2. Expérience du travail dans des services officiels de la concurrence.
3. Connaissance du droit et de la politique de la concurrence des différentes parties du monde.
4. Connaissance précise du régime juridique du pays prestataire d'assistance.

What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

Inconvénients : pas d'expériences pratique des consultants privés (défaut d'études de cas etc.)

Avantage de l'assistance d'autorité de concurrence : Outre l'expérience pratique, l'entretien d'une coopération continue qui permet l'échange d'idées et facilite la demande de renseignements.

Approximately what share of the assistance you receive consists of multiyear programmes, and what share consists of one-off events?

Pourcentage d'assistance : 100 %
Programmes pluriannuels : 100 %

Approximately what share of the assistance you receive takes place in your economy, and what share is abroad?

Pourcentage d'activités : 80 % à l'étranger
20 % en Tunisie

Approximately what share of your assistance are seminars and conferences, and what share are resident advisors or internships in other economies?

Pourcentage de séminaires et de Stages : 100%
Pourcentage de conseillers résidents : 0%
Stages dans d'autres économies étrangères : 100%

3. Have their been instances when an apparent lack of co-ordination among providers has been a problem for you? Please explain. Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?

Pas de problèmes.

4. What do you currently consider your economy's greatest need in terms of competition law and policy assistance?

**Drafting a competition law? Drafting secondary legislation/regulations?
Implementing a competition law?**

**Against abuses of dominance by natural monopolies?
Against abuses of dominance by "unnatural" monopolies?
Against cartels?**

Against anti-competitive mergers?

- Mise en œuvre de la loi de la concurrence contre les abus de la position dominante des monopoles « non naturels »
- Formation du personnel et promotion de la culture de la concurrence
- Continuation du programme de la coopération avec souhait :
 - de l'étendre à des institutions de concurrence d'autres pays
 - d'être assisté aux actions pour le développement de la culture de la concurrence.

If assistance in implementation is the need, what kind of assistance of assistance would be most valuable? Establishing procedures, training staff, other?

5. Please provide any other information or comments you wish to contribute.

ANNEX B
BENEFICIARIES' 2000-2001 ACTUAL AND 2002 PLANNED TECHNICAL ASSISTANCE IN COMPETITION POLICY

This Annex lists the 9 tables submitted by Brazil, Bulgaria, Chile, Estonia, Kenya, Lithuania, Romania, Russia, and Tunisia on their 2000-2001 actual and 2002 planned technical assistance in competition policy in response to the OECD's questionnaire by 31 January 2002.

BRAZIL

Year/Month		Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
2000	Jun	Mercosur CT-5* Meeting	Buenos Aires		Argentina		Current competition officials		
	Jun	World Trade Organisation Meeting	Geneva		Switzerland	WTC	Current competition officials		WTC
	Sep	3 rd Nordic Seminar on Competition Policy – fighting cartels	Stockholm		Sweden		Current competition officials		

* CT-5 means Technical Committee Number 5.

Year/Month		Activity	Location	Duration	Recipient Countries	Organisers/ Sponsor	Delivery Means	Jointly with	Funded by
2001	Nov	International Seminar on Cartels	Brighton		UK	OECD	Current competition officials		OECD
	Nov	IBRAC International Seminar on Competition Law	Campos do Jordão		Brazil	IBRAC	Current competition officials/ Private contractors		IBRAC
	Dec	International Seminar on Natural Gas Industry Regulation and Competition	Porto Alegre	06-08	Brazil	OECD/SDE	Current competition officials/ Private contractors		SDE
	Feb	Advanced International Cartel Workshop	New York	13-17	USA		Current competition officials		
	Mar	Course on Competition Law	Washington		USA		Current competition officials		
	Apr	Conference on Competition Policy in Infrastructure Sectors	Washington	23-24	USA		Current competition officials		
	Apr	Mercosur CT-5 Meeting	Asuncion	24-28	Paraguay		Current competition officials		
	Mai	International Congress on Economic and Consumer's Defense	Brasília		Brazil	SEAE/SDE	Current competition officials/ Private contractors		OECD/SEAE / SDE

Year/Month		Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
2001	Mai	10 th International Conference on Competition	Berlin	18-25	Germany		Current competition officials		
	Mai	OECD Meeting on Competition Policy	Paris	28/05-01/06	France	OECD	Current competition officials		OECD
	Jun	Mercosur CT-5 Meeting	Asuncion	12-15	Paraguay				
	Sep	XIII Negotiation Group on Competition Policy Meeting	Panama	03-08	Panama		Current competition officials		
	Sep	OECD Committee on Competition Law and Policy and Global Forum on Competition	Paris	13-21	France	OECD	Current competition officials		OECD
	Oct	Mercosur CT-5 Meeting	Montevideo	16-19	Uruguay		Current competition officials		
	Nov	IBRAC International Seminar on Competition Law	Foz do Iguaçu	22-24	Brazil	<i>IBRAC</i>	Current competition officials/ Private contractors		<i>IBRAC</i>

BULGARIA

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
February 2000	Training Seminar	Vienna JVI	15 days	Austria	OECD	Current competition officials	JVI	JVI/OECD
February 2000	Training seminar	Sofia	39 days	Bulgaria	American Bar Association	Private contractor	American Bar Association	American Bar Association
March 2000	Seminar	Istanbul	5 days	Turkey	Turkish Competition Authority	Current competition officials	Turkish Competition Authority	Turkish Competition Authority
March 2000	Seminar	Brussels	4 days	Belgium	EC	Private contractors	EC	EC TAIEX office
April 2000	Workshop	Rome	5 days	Italy	EC	Private contractors	EC	EC TAIEX office
April 2000	Training seminar	Sofia	3 days	Bulgaria	Swedish Competition Authority	Private contractor	Swedish Competition Authority	Swedish Ministry for Foreign Affairs
May 2000	Workshop	Brussels	5 days	Belgium	EC	Private contractors	EC	EC PHARE program
July 2000	Training seminars	Dublin	12 days	Ireland	EC	Private contractors	EC	EC
August 2000	Training	Paris	12 days	France	French Embassy in Sofia	Private contractors	EC	French Government
August 2000	Training visit	Stockholm	8 days	Sweden	Swedish Ministry for Foreign Affairs	Current competition officials	Swedish Competition Authority	Swedish Ministry for Foreign Affairs
September 2000	Training	Brussels	129 days	Belgium	EC	Competition officials	DG Competition	EC
September 2000	Conference	Brussels	4 days	Belgium	EC	Private contractors	DG Competition	EC

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Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
September 2000	Conference	Stockholm	5 days	Sweden	Swedish Ministry for Foreign Affairs	Private contractors	Swedish Competition Authority	Swedish Ministry for Foreign Affairs
September 2000	Conference	Tallinn	5 days	Estonia	EC	Competition officials	EC	EC TAIEX office
October 2000	Conference	Berlin & Bonn	5 days	Germany	EC	Competition officials	Bundeskartellamt	EC PHARE program
October 2000	Seminar	Skopje	4 days	Macedonia	German Foundation for Int'l Legal Cooperation, Stability Pact	Competition officials	Sponsor	Sponsor
December 2000	Seminar	Sofia	4 days	Bulgaria	German Foundation for Int'l Legal Cooperation, Stability Pact	Competition officials	Sponsor	Sponsor
January 2001	Training seminar	Tokyo	30 days	Japan	Japanese International Cooperation Agency	Competition officials, Private contractors	Japan International Cooperation Agency	Japanese International Cooperation Agency
January 2001	Training Seminar	Sofia	1 day	Bulgaria	American Bar Association	Competition officials	American Bar Association	American Bar Association
February 2001	Training Seminar	Vienna JVI	14 days	Austria	OECD	Competition officials	JVI	JVI/OECD
March 2001	Joint session	Brussels	7 days	Belgium	EC	Competition officials	EC	EC TAIEX office
April 2001	Training seminar	Sofia	2 days	Bulgaria	EU Phare Program	Private contractors	IBF Int'l Consulting	EC Phare program
March 2001	Training Seminar	Sofia of Competition	5 days	Bulgaria	American Bar Association	Competition officials	American Bar Association	American Bar Association

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
May 2001	Training	Brussels	94 days	Belgium	EC	Competition officials	DG Competition	EC
May 2001	Conference	Berlin	6 days	Germany	German Foundation for International Legal Cooperation	Competition officials	Bundes-kartellamt	German Foundation for International Legal Cooperation
June 2001	Training seminar	Sofia	19 days	Bulgaria	EC Phare Program	Private contractors	IBF International Consulting	EC Phare program
June 2001	Conference	Ljubljana	4 days	Slovenia	EC	Competition officials	EC	EC TAIEX office
June 2001	Conference	Ljubljana	1 day	Slovenia	OECD/Stability Pact	Competition officials	Stability Pact	OECD/Stability Pact
June 2001	Workshop	Istanbul	5 days	Turkey	Turkish Foundation for Int'l Co-operation	Competition officials	Turkish Competition Authority	Turkish Foundation for Int'l Cooperation
July 2001	Training	Budapest	21 days	Hungary	Central European Summer University	Private contractors	Sponsor	Sponsor
July 2001	Workshop	Brussels	8 days	Belgium	EC	Private contractors	EC	EC
July 2001	Training Seminar	Sofia	5 days	Bulgaria	American Bar Association	Competition officials	American Bar Association	American Bar Association
August 2001	Training seminar	Tokyo	30 days	Japan	Japanese International Cooperation Agency	Competition officials, Private contractors	Sponsor	Sponsor
September 2001	Conference	Bucharest	2 days	Romania	OECD/Stability Pact	Competition officials	Stability Pact	OECD/Stability Pact
September 2001	Training seminar	Sofia	12 days	Bulgaria	EC Phare Program	Private contractors	IBF Int'l Consulting	EC Phare program

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Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
September 2001	Training Seminar	Vienna Joint Vienna Institute	99 days	Austria	Joint Vienna Institute	Private contractors	Joint Vienna Institute	Joint Vienna Institute
October 2001	Global Forum on Competition	Paris	2 days	France	OECD	Competition officials, Private contractors	OECD	OECD
October 2001	Training seminar	Sofia	4 days	Bulgaria	EC Phare Program	Private contractors	IBF Int'l Consulting	EC Phare program
November 2001	Training seminar	Sofia	12 days	Bulgaria	EC Phare Program	Private contractors	IBF Int'l Consulting	EC Phare program
November 2001	Training seminar	Sofia	1 day	Bulgaria	EC Phare Program	Private consultant	IBF Int'l Consulting	EC Phare program
November 2001	Seminar	Budapest	5 days	Hungary	USAID	Competition officials, Private contractors	USAID	USAID
November 2001	Workshop	Riga	3 days	Latvia	EC	Competition officials	EC	EC TAIEX office
November 2001	Workshop	Sofia	2 days	Bulgaria	OECD, Stability pact	Competition officials	OECD Stability pact	OECD/ Stability pact
November 2001	Workshop	Istanbul	8 days	Turkey	Turkish International Cooperation Agency	Competition officials	Turkish Competition Authority	Turkish International Cooperation Agency
December 2001	Training seminar	Sofia	2 days	Bulgaria	EC Phare Program	Private contractors	IBF Int'l Consulting	EC Phare program

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
December 2001	Training seminar	Sofia	5 days	Bulgaria	EC Phare Program	Private contractors	IBF Int'l Consulting	EC Phare program
December 2001	Training Seminar	Sofia	3 days	Bulgaria	American Bar Association	Competition officials	Sponsor	Sponsor
2002	Training Seminar	Vienna JVI	14 days	Austria	JVI/OECD	Competition officials	JVI	JVI/OECD
2002	Joint session	Brussels	7 days	Belgium	EC	Competition officials	EC	EC TAIEX office
2002	Conference		4 days	Lithuania	EC	Competition officials	EC	EC TAIEX office
2002	Training Seminar	Sofia	3 days	Bulgaria	American Bar Association	Competition officials	Spornos	Sponsor
2002	Training	EU Members	30 days	EU-Member States	PHARE	Competition officials	Competition Authorities	EC Phare Program
2002	Seminar & Conference	Regional Countries	13 days	Regional Countries	OECD/Stability Pact	Competition officials	Competition Authorities	OECD/Stability Pact
2002	Global Forum on Competition	Paris	2 days	France	OECD	Competition officials, Private contractors	OECD	OECD
2002	Workshop	Istanbul	8 days	Turkey	Turkish International Cooperation Agency	Competition officials	Turkish Competition Authority	Turkish International Cooperation Agency

CHILE

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
2001/ 11	Conference	Ottawa	3 days	Open seminar, including Chile	Canadian Competition Bureau	Competition officials, professors		N/A
2001/10	Short internship	Santiago	5 days	Costa Rica	F.N.E./Competition Commission of Costa Rica	Competition officials		Costa Rica/ Chile Coop. Agencies
2001/8	Conference	Rio de Janeiro	4 days	Open seminar, including Chile	CADE (Brasil)	Competition officials, private lawyers, professors		CADE
2001/4	Conference	Washington D.C.	5 days	Open seminar, including Chile	BID (IDB)	Competition officials, professors, experts		N/A
2000/12	Conference	Caracas	4 days	Latin American countries, including Chile	OECD/ Procompetencia (Venezuela)	Competition officials, professors, experts		OECD
2000/11	Training seminar	Lima	5 days	Latin American countries, including Chile	INDECOPI (Peru)	Competition officials		N/A

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
2000/9	Short term adviser	San José, San Salvador	6 days	Costa Rica, El Salvador	F.N.E./Competition Commission of Costa Rica; Government of El Salvador	Competition Officials		Chilean Coop. Agency and FNE
2000/9-8	Short term adviser	San José	10 days	Costa Rica	F.N.E./Competition Commission of Costa Rica	Competition officials		Chilean Coop. Agency and FNE
PLANNED ACTIVITIES								
2002/3	Short internship	Santiago	5 days	Panama	FNE/ Competition Commission of Panama	Competition officials		Not confirmed
Not established	Short Intern-Ship	Santiago or San José	5 days	Costa Rica	FNE/Competition Commission of Costa Rica	Competition officials		Not confirmed

ESTONIA¹

Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
20 months	Estonia	PHARE/ General Directorate for Fair Trading, Consumer Affairs and Fraud Control, France	Current competition officials		PHARE
11 months	Estonia	PHARE	Current competition officials		PHARE
12 months	Estonia	Finnish Republic/Finnish Competition Authority	Current competition officials		Finnish Republic/Finnish Competition Authority
12 months (Planned in 2002)	Estonia	PHARE	Current competition officials		PHARE

¹ Apparently, the table on assistance received by Estonia provides information on major programmes providing assistance for Estonia. In contrast, the table submitted by Lithuania provides information on the individual technical assistance events, including multi-country events.

KENYA

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means²	Jointly with	Funded by
2001 February	W/Shop	Cape Town (S.Africa)	Two Days	African Countries	South Africa	Competition Experts	DFID WTO	DFID WTO
2001 March	Seminar	Mombasa (Kenya)	Five days	Regional Agencies Competition	Kenya	Experts	UNCTAD	Kenya and UNCTAD
2001 October	Forum	Paris (France)	Two days	Invited 21 Non-OECD Countries	OECD	Conference	-	OECD
2002 February	Forum	Paris (France)	Two days	Invited non OECD Countries	OECD	Conference	-	OECD

LITHUANIA

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
2000								
02 26 – 03 13	Seminar	Vienna	14		OECD			
06 08 – 09	Conference	Lisbon	2	EU Member-States and EU Candidate Countries	Portugal			
07 13 – 14	Conference	Kiev	2	Countries of Central and Eastern Europe	Antimonopoly Committee of Ukraine, UNCTAD, European Commission			
09 10 - 12	Conference	Stockholm	2	Nordic Countries	Swedish Competition Authority			
09 25 - 27	Seminar	Tallinn	5	EU Candidate Countries	European Commission			
09 18 – 12 18	Training	Brussels	90	Lithuania	European Commission			
11 13 – 17	Congress	Durban	5		Consumers International			
11 21 – 22	Workshop	Brighton	2	EU Member-States and EU Candidate Countries	Fair Trading, England			
2001								
2000 12 06 – 2001 11 30	Long-term adviser (PAA)	Vilnius	230	Lithuania	European Commission	Former Competition Official		PHARE Twinning
2000 12 06 – 2001 11 30	Short-term consultation	Vilnius	223	Lithuania	European Commission	Competition Advisers		PHARE Twinning
02 28 – 03 12	Seminar	Vienna	14		OECD			
03 05 - 09	Seminar	Brussels	5	EU Candidate Countries	European Commission			
03 11 – 17	Seminar	Brussels	5	EU Candidate Countries	European Commission			
04 03	Conference	Seoul	1		Korea Fair Trade Commission			

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
05 20 – 22	Conference	Berlin	3		Bundeskartellamt			
06 15 – 19	Conference	Ljubliana	4	EU Candidate Countries	European Commission			
06 04	Seminar	Paris	1	OECD countries	OECD			
06 25 – 07 07	Training	Potsdam	14	Lithuania	European Commission			
07 28 – 10 21	Training	Bonn	90	Lithuania	European Commission			
08 31 – 11 30	Training	Paris	90	Lithuania	OECD			
09 10 - 21	Training	Potsdam	11	Lithuania	European Commission			
10 16 – 18	Forum	Paris	3	OECD countries	OECD			
10 24 – 26	Seminar	Tallinn	2	Baltic States and Russian Federation	OECD			
10 25 - 26	Study -visit	Lisbon		Lithuania	European Commission			
11 08 – 09	Seminar	Riga	2	EU Candidate Countries	European Commission			
11 11 – 18	Training	Stockholm	5	Lithuania	European Commission			
11 15 - 21	Training	Bonn	5	Lithuania	European Commission			
11 24 – 25	Conference	Ottawa	2		Canada's Competition Bureau			
12 01 - 05	Study-visit	Lisbon	5	EU Candidate Countries	European Commission			
12 01 - 08	Seminar	London	8	EU Candidate Countries	UK Foreign and Commonwealth Office			
2002								
03 04 – 15	Seminar	Vienna	14		OECD			
06 15 - 18	Conference	Vilnius	4	EU Candidate Countries	European Commission			

ROMANIA

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsor	Delivery Means	Jointly with	Funded by
2000	Consultation, Seminars	Competition Council	10 months	Romania	U.S. Federal Trade Commission	resident advisors	Competition Council	USAID
2001	Consultation seminars	Competition Council	6 months	Romania	U.S. FTC	resident advisors	Competition Council	USAID
2001	Training stage	Bruxelles	5 days	Romania	European Commission	Competition officials		TAIEX
2001	Training stage	Bruxelles	5 days	Romania	European Commission	Competition officials		TAIEX
2000	Seminar	Vienne	10 days	Romania	OECD	Competition officials		OECD
2001	Seminar	Vienna	10 days	Romania	OECD	Competition officials		OECD
2001	Seminar	Trier, Germany	2 days	Romania	EU Law Academy	Professors		EU Law Academy
2001	Training stage	Trier, Germany	5 day	Romania	EU Law Academy	Professors		EU Law Academy
2001	Seminar	Bruxelles	5 days	Romania	European Commission	Competition officials		European Commission
2001	Study visit	Rome, Italy	5 days	Romania	Autorità, Italy	Competition officials	Competition Council	Phare Program
2001	Study visit	Trier, Bonn, Luxemburg, Bruxelles	12 days	Romania	Ministry of Finance, Germany	Competition officials	Competition Council	Phare Program
2001-2002	Seminars, study visits, drafting legislation	Competition Council	17 months	Romania	Finance Ministry, Germany, Autorità, Italy	Short- and medium-term advisors	Competition Council	Phare Program

RUSSIA

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsors	Delivery Means	Jointly with	Funded by
2001 February	First Conference on Regulatory Reform	Singapore	2 days	Russian Federation, APEC/OECD members	APEC OECD	Competition Officials, Attorneys, Academics		APEC OECD
2001 February March	Competition Policy Seminar	Vienna Austria	14 days	Russian Federation, Economies in Transition	IMF, Joint Vienna Institute, The World Bank	Competition Officials, Attorneys, Academics	OECD, Economic Development Institute	IMF
2001 March	Competition Policy Seminar	Bangkok Thailand	3 days	Russian Federation, APEC members	APEC Royal Thai Government	Competition Officials, Attorneys, Academics		APEC
2001 March	Consultations on Competition Policy and Reg. Ref. in Telecommunications	Moscow Russian Federation	2 days	Russian Federation	OECD	Competition Officials	MAP Russia	OECD
2001 March	Consultations on draft Law "On State Aid"	Brussels Belgium	2 days	Russian Federation	European Commission	Competition Officials		TACIS
2001 April	Seminar "Abuse of Dominant Position"	Volgograd Russian Federation	3 days	Russian Federation	OECD USAID	Competition Officials	MAP Russia, US FTC, US DOJ	USAID
2001 May	Seminar "Cartel Practices"	Novgorod Russian Federation	3 days	Russian Federation	OECD USAID	Competition Officials	MAP Russia, US FTC, US DOJ	USAID
2001 May	International Conference on Competition Policy Issues	Berlin Germany	2 days	Russian Federation	Bundeskartellamt	Competition Officials, Attorneys, Academics		Bundeskartellamt

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsors	Delivery Means	Jointly with	Funded by
2001 May	Consultations on Comp. Policy and Reg. Ref. in Electricity	Moscow Russian Federation	2 days	Russian Federation	OECD	Competition Officials	MAP Russia	OECD
2001 May	Consultations on draft Law "On State Aid"	Paris France	4 days	Russian Federation	European Commission	Competition Officials		TACIS
2001 June	Seminar "Economic Concentration"	Nizhnij Novgorod Russian Federation	3 days	Russian Federation	OECD, USAID	Competition Officials	MAP Russia, US FTC, US DOJ	USAID
2001 June	XIII Session of Interstate Council on Antimonopoly Policy of CIS countries	Moscow Russian Federation	2 days	Russian Federation, CIS countries	MAP Russia UNCTAD	Competition Officials		UNCTAD
2001 July	International Conference "Competition Policy"	Seoul Korea	4 days	Russian Federation, APEC/OECD members	Korea Fair Trade Commission	Competition Officials, Attorneys, Academics		APEC
2001 September	Training Course "Taxation Reform"	Madrid Spain	5 days	Russian Federation	European Commission	Competition Officials		TACIS
2001 September	Seminar on "Natural Monopolies"	Novorossiysk Russian Federation	2 days	Russian Federation	DGCCRF France	Competition Officials	MAP Russia	DGCCRF France
2001 September	XIV Session of Interstate Council on Antimonopoly Policy of CIS countries	Astana, Republic of Kazakhstan	1 day	Russian Federation, CIS countries	Kazakh Antimonopoly Authority, UNCTAD, MAP Russia	Competition Officials		UNCTAD, Kazakh Antimonopoly Authority
2001 September	International Conference "10 th Anniversary of Kirgiz Antimonopoly Authority"	Bishkek, Republic of Kirgizstan	1 day	Russian Federation, CIS countries	Kirgiz Antimonopoly Authority, MAP Russia, UNCTAD	Competition Officials		Kirgiz Antimonopoly Authority, UNCTAD

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/Sponsors	Delivery Means	Jointly with	Funded by
2001 September	Seminar “Cooperative Initiative on Regulatory Reform”	Beijing China	2 days	Russian Federation, APEC/OECD members	APEC OECD	Competition Officials, Attorneys, Academics		APEC
2001 September	Consultations on Comp. Policy and Reg. Ref. in Gas	Moscow Russian Federation	2 days	Russian Federation	OECD	Competition Officials	MAP Russia	OECD
2001 October	Seminar on Competition Policy	Moscow Russian Federation	3 days	Russian Federation	Autorità, Italy	Competition Officials	MAP Russia	Ministry for Trade and Industry, Italy
2001 October	Competition Conference “Definition of Market Borders”	Helsinki Finland	2 days	Russian Federation, Baltic States	Council of Nordic States	Competition Officials, Attorneys, Academics		Council of Nordic States
2001 October	Seminar on merger control	Tallinn Estonia	3 days	Baltics, Russian Federation	OECD	Competition Officials		OECD
2001 October	Annual Conference Of Fordham Law Institute	New York USA	3 days	Russian Federation, OECD members	Fordham Law Institute	Competition Officials, Attorneys, Academics		Fordham Law Institute
2001 November	Global Forum on Governance	Paris France	4 days	Russian Federation, OECD members	OECD	Competition Officials, Attorneys, Academics		OECD
2001 November	Training course “Organization and practice of State Aid Monitoring in Ferrous Metallurgy”	Paris France	5 days	Russian Federation	European Commission	Competition Officials, Attorneys, Academics		TACIS
2001 November	Training course on WTO issues	Paris France	5 days	Russian Federation	DGCCRF France	Competition Officials, Attorneys, Academics		DGCCRF France

Year/Month	Activity	Location	Duration	Recipient Countries	Organisers/ Sponsors	Delivery Means	Jointly with	Funded by
2001 November	Global Forum on International Investment	Mexico city Mexico	2 days	Russian Federation, OECD members	OECD, Government of Mexico	Competition Officials, Attorneys, Academics		OECD
2001 December	Training course on competition policy	Rome Italy	5 days	Russian Federation	Autorità, Italy	Competition Officials	Ministry for Trade and Industry of Italy	Ministry for Trade and Industry of Italy
2001 December	Short-term consultations on competition policy issues with the participation of arbitration judges	Moscow Russian Federation	5 days	Russian Federation	OECD	Competition Officials	MAP Russia	OECD

2002 Planned Technical Assistance in Competition Policy

OECD Co-operation in accordance with the Program of Co-operation between the Russian Federation and OECD for 2002
 -competition policy
 -regulatory reform

TACIS TACIS project “Antimonopoly Policy and State Aid”

USAID Bilateral arrangements

APEC Co-operation in accordance with the Working Plan of APEC

TUNISIA

Year/month	Activity	Location	Duration	Recipient Countries	Organisers/ Sponsors	Delivery Means	Jointly with	Funded by
14-3-01	Workshop, training course	Paris	6 days	Tunisia	DGCCRF	DGCCRF		ADETEF
2-5-01	Workshop	Paris	1 days	Tunisia	DGCCRF	DGCCRF		Ministry of Commerce (Tunisia)
1-10 -01	Workshop, training course	Paris	6 days	Tunisia	DGCCRF	DGCCRF		ADETEF

2002: A co-operation programme with France is being negotiated.

Unclassified

CCNM/GF/COMP(2002)4



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

31-Jan-2002

English - Or. English

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP(2002)4
Unclassified

OECD Global Forum on Competition

EXPERIENCES OF OECD OUTREACH AND MEMBERS' TECHNICAL ASSISTANCE ACTIVITIES IN 1999-2000

-- Session II --

This document contains excerpts from the Secretariat note that was initially discussed at the Working Party No. 3 held on 13 February 2001. It is submitted AS BACKGROUND for discussion under Session II of the second meeting of the Global Forum on Competition to be held on 14-15 February 2002.

JT00120192

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English - Or. English

EXPERIENCES OF OECD OUTREACH AND MEMBERS' TECHNICAL ASSISTANCE ACTIVITIES IN 1999-2000

II. Definition of Terms and Summary of Responses

7. This note and its annexes refer to technical assistance as being provided in the following forms, each of which has been used by one or more Members:

- Conferences are usually short large scale meetings for an exchange of views, typically among high-level experts, policy-makers, etc. They can be efficient for establishing contacts and for policy dialogue that raises awareness of issues and mutual understanding; in fact, they seldom provide technical assistance.
- Seminars and workshops are usually smaller scale events intended to increase the capacity of their participants. OECD outreach consists primarily of such events, often using a case-study format.
- Long-term resident advisors spend at least one month working in the competition authority of a beneficiary country. Longer stays are even more beneficial, because the advisor grows to understand the country's legal and economic situation. In the view of the US, "this can be the most effective form of assistance."¹ (In the early to mid-1990s, US authorities sent teams of advisors for periods of 6-9 months to Central European countries, particularly Poland. EU "twinning" programs under the PHARE program involve funding for competition experts from EU Member Countries as long-term resident advisors to Central and East European competition authorities.) Longer stays increase the opportunity cost of the competition authority providing an advisor, however.
- Short term consultations – visits of a few days to one month – are a common form of assistance and can be very effective at dealing with specific issues.
- Internships are long-term, at least one-month stays of competition experts from beneficiaries at an experienced competition enforcement authority. They need considerable preparation by the host to be effective, and are generally costly. Sometimes, costs are shared by the host and the beneficiary. For instance, the response by Mexico mentions that "[t]echnical assistance provided by the [Mexican competition authority] is funded either by the [authority] itself, when it comes to seminars, or by recipient countries, as in the case of most internships."²
- Study visits are short visit of competition officials from beneficiary countries to experienced competition enforcement authorities. Study visits are a less expensive way of establishing professional contacts and exchanging views with beneficiaries, especially where costs are shared between the host and the beneficiary. For the purposes of establishing contacts and exchanging views, they need limited preparation and they can be carried out on an ad hoc basis to a wide range of beneficiaries. However, in order to have a training effect, study visits need considerable preparation by the host. Australia's experience shows that "smaller delegations, rather than large ones, are the best forums for interactive learning."³

8. Another model for technical assistance – creation of an institute that would provide extended courses to government officials from transition and developing countries – has been proposed, but the Secretariat is not aware of any operational programs that use this model.

III. Need for and attributes of effective technical assistance

16. This section analyses the information received with respect to the need for and attributes of technical assistance.

The need for increased technical assistance

17. As noted above, calls for significantly increased technical assistance to developing countries have been made at the June 1999 OECD Trade and Competition Conference, meetings of UNCTAD and the WTO Working Group, and various other fora. Questionnaire responses that address the issue agree that more technical assistance is needed. Based on its direct experience, the Italian competition authority "shares the view, recently echoed in international fora such as the WTO and UNCTAD,⁴ about the emergence in recent years of a rising demand for [technical assistance]."⁵ Similarly, Japan stresses that more technical assistance activities are necessary both in the policy and the training field.⁶ The Mexican competition authority also "agrees that increase is needed in both training and policy technical assistance activities."⁷ Canada⁸ and the European Commission⁹ also support increased technical assistance.

18. As also noted above, questionnaire responses contained little if any discussion of whether or how the resources that would be needed to increase technical assistance might be found. Providers of funding for such work must of course assess the relative priority of competition policy and other important goals. It appears from informal discussions with World Bank officials that the Bank's current balancing of competing objectives has resulted in such a focus on direct poverty reduction projects that funding available for competition policy work is or may be reduced.

19. Although the balancing that goes on within governments and other funding bodies extends beyond the competence of competition authorities, the apparent imbalance between need and supply makes it important to consider whether competition authorities and others interested in this field can and should do more to educate policy-makers in their governments or other bodies about the importance of such assistance. In this connection, the CLP Division has been in contact with the Secretariat serving the OECD Development Assistance Committee, and that important group appears interested in placing greater emphasis on competition policy. It would be useful to know more about delegates' views on how the funding agencies in their governments assess the relative importance of competition policy and the prospects for increased funding. Comments from the World Bank and other international organisations are also invited.

Attributes of effective technical assistance

20. Regardless of the prospects for increased funding, it is important that every reasonable effort be made to hold down the costs and maximise the benefits of technical assistance. One major purpose of the questionnaire was to learn to what extent past work in delivering assistance provides information concerning the effectiveness of different forms of assistance. Major points made in the responses are discussed below, but differences in specificity and terminology prevent much in the way of conclusions in this area. After the discussion in February, the CLP Division's Outreach Secretariat intends to pursue this issue further by engaging in further follow up via e-mail and telephone with knowledgeable officials in Members' capitals and the staff of international organisations.

21. The responses discuss the effectiveness of technical assistance depending on the level of development of recipients' competition regime, the effectiveness of country-specific and regional assistance, and considerations governing the provision of assistance to individuals who are not competition officials.

The recipients' competition regime

22. In order to be effective, technical assistance needs to be adapted to the needs and circumstances of beneficiaries. Like Japan¹⁰ and Canada,¹¹ Australia has found "that the effectiveness of co-operation activities varies in line with the stage of development of the country's competition regime."¹² Japan's response states that "[i]n general, providing basic legal knowledge is necessary for the countries without competition laws, while providing practical experience appears to be more useful for the countries with their own competition laws."¹³ The EC makes the related point that the nature of requests varies with the sophistication of the requesting country:

Some countries request assistance with drafting the envisaged competition law or amending an existing one to broaden its scope or improve its enforcement. Other, more experienced countries, request assistance to deal with particular cases including at the level of micro-economic analysis or investigation techniques adapted to the type and sector of the case. A broader category of requests refer to the participation of experienced attorneys or economists to seminars or workshops dealing with specialised antitrust or regulatory reform issues.¹⁴

23. Implicit in the three types of assistance Italy considers most effective are differences in the level of development of the requesting country's competition regime: (i) "support to the design of competition laws and implementing regulations"¹⁵; (ii) "the training of officials directly involved in enforcement";¹⁶ and (iii) "activities aimed at enhancing the awareness of government officials of administrations other than the competition authorities vis-à-vis pro-competitive regulatory reforms."¹⁷

24. Australia's response contains the most specific discussion of the best forms of assistance for countries at different levels. For "countries ... in the exploratory stage of competition policy development, Australia has found it most effective to bring officials to Australia to examine legislative and regulatory structures first-hand."¹⁸ On the other hand, "[c]ountries with a more developed competition policy and institutional framework appear to benefit most from in-house staff exchanges and consultancies."¹⁹ In fact, the response by Australia found that "[i]n-country training ... appears to be most effective once competition legislation is in place. [...] These arrangements are effective in providing practical, skills-based training and go well beyond theoretical issues."²⁰

25. Australia also offers its views on the level of understanding of competition issues among developing countries:

[W]e are now starting to see a move to a second generation of technical assistance activities, particularly in the field of competition law and policy in the Asia-Pacific region. The first phase has involved discussion of the theory, rationale and models for competition law and policy. The ACCC is of the opinion that most developing countries are now in the position where they need assistance in moving beyond this theoretical level, to seeking assistance in how to actually implement a competition law, how to conduct investigations, how to define markets, how to institute compliance mechanisms, how to set priorities, how to achieve and best utilise an effective media strategy etc.²¹

26. Using somewhat different terminology, Canada notes that most of the requests it receives seek assistance in implementing new competition laws, but

there is a significant number of countries who have yet to be persuaded of the benefits of a competition policy while others need advice on how to draft and implement a competition law. As a result, there is a real need for technical assistance focused on building a culture of competition, drafting of competition laws, consultative processes, the establishment of a competition authority, and domestic public information/education processes.²²

27. The response by Mexico finds that "Latin American countries mostly demand assistance to (i) devise competition laws and institutions; (ii) understand the economic rationality of competition rules; (iii) apply the economic aspects of competition law and policy; and (iv) learn of competition aspects of sector-specific regulation."²³

Country-specific and regional assistance

28. To some extent, beneficiaries' level of competition law and policy development is also a factor in determining the relative effectiveness of country-specific and regional events. Australia stresses that the more practical assistance needed by beneficiaries with more developed competition regimes can be better provided on a country-specific basis:

Australia has found that, in the exploratory stage, programs grouping delegates from different countries are the most effective to facilitate the exchange of information and experiences. However, once countries have legislation in place and specific technical assistance is required, an in-country, and country specific, approach has proved to be the most effective.²⁴

29. Canada agrees:

Regional seminars may provide a useful overview of competition policies and laws for some countries. However, they are not as effective as other means when there is a need for assistance in how to implement or enforce competition laws in the field.²⁵

30. On the other hand, the EC states that a regional approach can be both less expensive and more effective, and its response does not appear to be excluding events intended to improve the investigation and other skills of law enforcers. It explains that:

[a] more efficient use of resources could ... be achieved through the use of technical assistance such as training activities aimed at more than one country or a particular region with similar/comparable needs, rather than merely one country at a time. This would also carry with it the added value of providing competition officials from such countries valuable exposure to their counterparts from other countries.²⁶

31. Like the EC, the OECD Secretariat has also found multi-country events very effective means of working on implementation and enforcement issues. For example, its annual two-week seminar in Vienna for enforcement officials from all transition countries draws relatively high level officials and focuses almost entirely on actual cases from those countries. All CIS countries with a competition law are invited to send at least one official to its annual law enforcement seminar in Russia, and its Baltic Programme events include officials from the three Baltic states, the contiguous Russian territories, and the Russian MAP.

32. The Secretariat believes that there is no real conflict in these apparently differing views. Whether a country-specific or multi-country event is preferable depends, we believe, upon more than whether the participants are still considering or developing a competition law or are seeking to learn more practical enforcement techniques. Although a country-specific event is probably the most efficient way to provide law enforcement training if the participants are investigators who are truly prepared to accept that training,

the question is not merely how much knowledge will be absorbed by the participants, but how much benefit that increased knowledge will have. Second, at least some participants often characterise some lessons as developed country theory that is inapplicable to their situation, and to reach such participants it can be useful to have participants from other developing countries that are somewhat further along the learning curve. Also, case discussions are not only useful for teaching investigation techniques, they are concrete ways of illustrating the impact of good and bad enforcement policies. For such policy discussions, it is very useful to have representatives from different countries (and different parts of large countries).

33. Japan's response adds another consideration when it notes that the example and development of one country can have a "spillover" effect among its regional peers: "Thailand in the APEC program is immensely important, particularly in setting a role model for the countries in the region and hosting the meeting."²⁷ Depending on the circumstances, taking advantage of a recipient's influence on other countries could call for holding country-specific events to make it a better a role model or holding regional events at which the country can be a role model.

Inclusion of participants other than competition officials

34. In the broadest sense, it seems clear that competition policy assistance should include a wider audience than just competition officials. Australia notes that it is "highly useful to involve members of the judiciary, academia, business and consumer organisations, as examples, in order to develop an entire 'culture of competition' that is understood and accepted across the entire community."²⁸ Canada seems to agree.²⁹ Usually, UNCTAD's technical assistance activities are also "open to others [i.e., not competition authorities and officials, such as] other Ministries, university and business circles, consumer associations, private sector representatives."³⁰ Most World Bank conferences are also open to a wide range of participants.

35. Some activities that include participants other than competition officials are clearly technical assistance as that term is (broadly) defined in this note. For example, Finland mentions the importance of providing technical assistance to the judiciary,³¹ and the OECD has worked with the Supreme Arbitrazh Court in Russia. Some of the other activities, however, represent a kind of generalised "competition advocacy" that constitutes policy dialogue or political support rather than technical assistance. While not implying anything about the relative value of these two different kinds of assistance, this distinction is useful when discussing, for example, the effectiveness of different ways of delivering assistance. The distinction is also useful in discussing what kinds of events particular donors tend to organise.

Qualifications of technical assistance providers

36. In addition to law enforcement experience, which is so important that it is discussed separately below, the Secretariat has previously suggested that it is important that at least one member of any technical assistance team have significant experience in providing such assistance to a country whose economy, culture, and legal system is very different from his own. In the Secretariat's experience, competition experts without outreach experience frequently give logical but incorrect interpretations to the laws, cases, statements, and questions they encounter. On relatively long-term missions, such communications failures have time to get worked out, but for missions or seminars of a week or less they can be extremely costly. Someone with outreach experience can often serve as a sort of second level interpreter for those panellists who do not know, for example, that seminar participants use "dumping" to refer to predatory pricing, that entry barriers may exist in markets we are used to thinking of as easy to enter, or that issues (such as corruption or misleading advertising) that we do not consider a competition problem (since they are covered by laws enforced by other agencies) are in fact competition problems in countries where they are not effectively handled by any agency.³²

37. Members' responses show that they also regard knowledge about both the specific beneficiary and the general experience of transition and developing economies to be crucial. Drawing a long list of the necessary characteristics of those providing technical assistance in the field of competition law and policy, Canada also emphasises such qualities:

- familiarity and preferably experience in dealing with issues and unique requirements of emerging and developing economies;
- capacity to communicate knowledge that is sensitive to the needs, level and expectations of the recipients;
- = experience in dealing with national and international government and non-government institutions; and
- = experience in a multicultural environment.³³

38. Further, like Mexico,³⁴ Australia agrees that

[c]onsultants and competition policy experts also need to be strongly aware of, and have an appreciation of any cultural, political and social differences that exist. These factors have an enormous impact on how business is done in other countries. What may be considered the traditional or 'text book' approach to addressing competition issues in Australia (or other such developed countries) may simply not work in developing economies. Consultants therefore need to adopt broader, more flexible and more creative strategies and approaches to competition policy than might otherwise be the case.³⁵

39. In addition to the above qualities, Mexico stresses that "[e]xperience on the trade and industrial difficulties that face small open economies are also of great help."³⁶

IV. The role of competition authorities and private contractors

40. As pointed out in its note to the CLP in October 1999,³⁷ the Secretariat believes that competition officials' experience in dealing with enforcement, institutional, and procedural issues makes them uniquely qualified to provide technical assistance. Members' responses indicate that they basically share the Secretariat's views on this point. Moreover, it is clear that most of the technical assistance provided by major OECD donor countries (and the World Bank) is designed by officials without a competition policy background and delivered by private contractors, some but not all of which include former competition officials on their team. The obvious issue is whether there are any practical means by competition authorities, working in their capitals or through the CLP, could improve the quality of technical assistance – and thus the quality of non-Members' competition enforcement and regulatory analysis – by delivering more of the assistance or playing a greater role in designing assistance projects and selecting the private contractors.

41. The main advantage cited by Members for using private contractors is simply to overcome the resource constraints faced by competition authorities. Canada responded that, in general, "[p]roviding technical assistance can be facilitated through private contractors in light of constraints within government relating to core mandate and legal, regulatory and/or financial impediments that can prevent or inhibit the delivery of assistance and the recovery of costs."³⁸ Japan³⁹ and Australia offered similar comments, with the latter noting that "[t]he main advantages [of private contractors] relate to issues such as resource constraints, and the ability to tap into the skills and expertise of consultants in other fields, such as those in regulatory, academic, or legal fields."⁴⁰ As mentioned by Finland, lectures by private contractors can be useful to provide "a good idea of how the private sector faces competitive concerns,"⁴¹ but this benefit results from using private sector participants, not from contracting out technical assistance in general.

42. The disadvantages to using private contractors that Members described are essentially the same as those previously mentioned by the Secretariat. For instance, Canada warns of the limited capacity of private contractors to provide technical assistance that is most relevant for beneficiaries, especially the ones grappling with complex enforcement issues:

[O]ne of the main disadvantages is that much of the technical assistance being requested relates to capacity building and the running of a competition authority about which the Bureau is better placed to provide advice. Moreover, not all private contractors providing technical assistance in respect of competition policy may be able to provide the kind of practical, "real-life" experience that newly established or establishing competition authorities are looking for.⁴²

43. Similar comments were offered by other Members, such as Finland,⁴³ Italy,⁴⁴ the US,⁴⁵ and the EC.⁴⁶ Australia added another potentially important disadvantage to the use of private contractors:

[T]he ACCC does not always receive feedback on the effectiveness or achievements of technical assistance activities that have been outsourced. Similarly, any useful contacts that are made by the consultant are not automatically made available to the ACCC.⁴⁷

44. It appears that, in general, specialised government funding agencies have limited co-operation with their national competition authority. For instance,

[t]he ACCC generally does not play a large role in activities which are otherwise contracted out by the Australian Government to other parties. The ACCC is occasionally approached by AusAID to discuss the framework of a technical assistance activity, or be asked to make suggestions or recommendations on appropriate consultants for an activity, or to provide briefing to the consultant prior to the commencement of an activity.

45. The situation of the Canadian Competition Bureau is similar.⁴⁸ As regards the United States, "[t]he U.S. Agency for International Development ('USAID') has financed technical assistance through private contractors or academics, but this has been done without input or participation of DOJ and FTC."⁴⁹

46. Consequently, like Canada,⁵⁰ Australia promotes more co-operation between competition authorities and funding agencies: "it is vital to continue to forge closer links between the ACCC and AusAID so that each agency is fully informed of the technical assistance activities being provided by the other in the field of competition law and policy and the greatest benefit possible is able to be achieved by these activities."⁵¹

47. In light of the above, the Secretariat believes that it would be useful for delegates to discuss the following possible ways to give competition authorities a greater role in the provision of technical assistance without straining their limited resources:

- legislators could assign more financial resources for the provision of technical assistance by competition authorities, including resources to cover the costs of having employees dealing specifically with technical assistance;
- contracts from government funding agencies could cover the agencies' total costs of providing technical assistance;
- competition authorities could be given a much larger share of available funding, with discretion to provide assistance through its staff or to use their expertise to shape technical assistance projects and select qualified private subcontractors; and

- competition authorities could advise funding agencies on the design of their technical assistance projects and on the selection of qualified private contractors.⁵²

V. The international co-ordination of technical assistance

Current types and levels of international co-ordination

48. In general, Members do not actively co-ordinate their technical assistance with each other or with international organisations. For instance, Canada stated that "[i]n the absence of an effective mechanism to do so, [Canada's] technical assistance is generally not co-ordinated with other OECD Members or international organisations."⁵³ However, some co-ordination results from Members' co-sponsoring or sending representatives to OECD and other seminars that use international panels. Korea and the US, for example, have both co-sponsored events with the OECD.

49. Competition authorities are generally receptive to requests for co-operation if funding is not an issue, but co-operation becomes problematic or even impossible if the requested country provides all or most assistance through private contractors. For OECD case study seminars, we are generally unwilling to use private contractors because of conflicts of interest (and usually lack of relevant expertise). For less sensitive events, we have found private contractors unwilling to co-operate, and only once has a funding agency been sufficiently "hands on" to direct a contractor to co-operate. A particular problem arises in the case of the EU, which has considerable funding for assistance but is unable, we understand, to fund DG Competition participation in assistance organised by others.

- 50. At the regional level, EU Member States provide some assistance on behalf of the EU. Some other countries, such as Japan engage in some kind of regional co-operation in the provision of technical assistance.⁵⁴

51. There appears to be little co-ordination between global organisations that provide technical assistance (OECD, UNCTAD, World Bank, WTO) and regional organisations, though some APEC/OECD co-ordination exists (largely between APEC countries that are OECD Members and the OECD Secretariat).

52. Based on both recently collected information and the Secretariat's experience, there is significantly more co-ordination among OECD, UNCTAD, World Bank, and WTO. As noted above, the organisations generally avoid duplication both through informal contacts and from differences in the organisations' criteria for and means of providing assistance. We believe that the three programs complement each other, and active co-operation is increasing. Before turning to Members' views on possible ways to increase international co-ordination, it may be useful to expand on the past and present co-ordination of the activity of these four international programmes.

Current co-ordination among international organisations

53. As noted above, the OECD and some of its Members have provided major technical assistance to competition authorities in Central and East Europe and the former Soviet Union. In general, UNCTAD has not been very active in this area, and has focused its work on less developed countries. The World Bank appears to have worked quite extensively in this area on issues that relate to the functioning of a market economy, but not to have provided much specific technical assistance to competition authorities in these “transition” countries. The area has not been a focus of WTO activity, either.

54. The most recent international assistance initiative in this geographic area is the Investment Compact for Southeast Europe that has been signed by the G7 countries and the EC. The OECD is the official “lead agency” with respect to competition law and policy work done as part of the Compact, and in this capacity it did co-operate with USAID in assessing the competition policy regime in Croatia. One of the Compact’s “regional flagship initiative” relates to “buy, operate, and transfer” programmes and other innovative ways of encouraging private investment in infrastructure. This project was organised by the United Nations Economic Commission for Europe (UNECE), which approached the OECD to provide assistance on the competition policy issues that should be considered in designing and operating such programs. We agreed to do so, and UNECE in turn has agreed to participate in the competition law and policy initiative the Secretariat is developing.

55. As interest in competition policy has spread globally, there have been greater opportunities for both co-ordination and for conflict and duplication. These opportunities were probably the greatest in Southeast Asia shortly after the 1997 economic crisis, and there has certainly been increased co-ordination in that area. For example, the IMF and World Bank were very involved in Indonesia and Thailand, and their involvement included work on competition law and policy. The OECD Secretariat therefore maintained contact with those countries through participation in regional events organised by the JFTC and with the KFTC, but it did not join in commenting on the draft laws of Indonesia and Thailand. Rather, the OECD Secretariat worked more to encourage interest in competition law in Malaysia and the Philippines. Co-ordination has also manifested itself in OECD and UNCTAD Secretariat members serving as panellists on each other’s events. And the OECD has co-operated with the World Bank in sponsoring two events – a high level conference in Bangkok in 1999 and a one-week intensive course on competition law in Singapore in 2000 – and OECD Secretariat participated in a back-to-back World Bank conference in Jakarta.

56. In Asia as elsewhere there has continued to be some natural division of labour based on the special relationship that UNCTAD and the World Bank have with less developed countries. Moreover, the WTO began providing technical assistance relatively recently, and through large regional events. Until recently, all of the OECD Secretariat’s work in Africa has been as speaker in programs organised by UNCTAD or others. In South America, the OECD began its work in 1995 and 1996 through joint ventures with the World Bank, and since then informal discussions – both with recipients and with other prospective donors – have contributed to the conflict avoidance that results from the four organisations’ somewhat different approaches to delivering assistance.

57. Those different approaches may generally be described as follows. UNCTAD does hold some training seminars, but it focuses more on shorter, higher-level policy dialogue involving a very broad range of countries. The World Bank also holds some training seminars, but by far the main focus of its work – especially in recent years – has been the provision of in-depth, long-term assistance to a small number of countries. The WTO has held a number of large conferences. OECD outreach consists almost entirely of training seminars that take advantage of its Members’ enforcement experience, and is directed to a range of countries that is narrower than UNCTAD’s or the WTO’s and broader than that of the World Bank.

Potential benefits from co-operating in the delivery of technical assistance

58. Members' responses with respect to the potential benefits of increased co-ordination are discussed below at some length. Before turning to that topic, however, it is important to note a related but separate point – that in one context or another, a number of responses discussed the benefits that would flow from having more “joint venture” events with panellists from a number of different countries. All events held by international organisations have such panels as a matter of course, but this is apparently not the case for other events. Australia notes that joint ventures among donors could help increase the “opportunity [for] recipient countries to receive advice from different sources, allowing for comparison of alternative methods and approaches.”⁵⁵ Similarly, Mexico stresses that “greater international co-ordination of technical assistance programs would reflect better the international experience.”⁵⁶ UNCTAD share this view, emphasising that co-ordination can be done best “through co-operation between [technical assistance] providers.”⁵⁷

Potential benefits and costs of increased co-ordination

59. All Members addressing the issue agreed that in general, greater co-ordination of technical assistance would or could have some benefits. (*See, e.g.*, Australia,⁵⁸ Canada,⁵⁹ the Czech Republic,⁶⁰ Denmark,⁶¹ Italy,⁶² Japan,⁶³ and Norway.⁶⁴) The identified benefits reflect differing types and levels of co-ordination. In general, there were four different co-ordination/benefit “pairs,” one of which involves the sharing of resource materials, two of which involve different levels of sharing information on future plans, and another of which combines a high level of sharing future plans with some degree of centralised planning.

- First, the goal of reducing organisation costs could be promoted by creating some sort of virtual “library.” This will be referred to as “the library concept.”
- Second, the goal of minimising unwarranted overlap and duplication could be promoted by more and earlier sharing of information on planned events. This will be referred to as “co-ordination to reduce overlap.”
- Third, the goal of providing better assistance through voluntary joint ventures involving international panels could be promoted through even greater and earlier sharing of could lead to deeper forms of voluntary co-operation and thereby produce resource savings in other ways. This will be referred to as “the joint venture concept.”
- Fourth, the goal of rationalising technical assistance could be promoted by combining extensive information sharing with the creation of a central body that provides advice on how donors might best meet recipients' needs. This will be referred to as “the central co-ordination concept.”

60. Each of these forms of co-ordination is discussed separately below. Members' responses do not include much information relating to the benefits or costs of these activities. In fact, the benefits are generally discussed only in theoretical terms, without consideration of current problems or how useful particular forms of co-ordination might actually be in practice. For example, minimising overlap and duplication is described as a benefit without any assessment of how much unwarranted overlap exists. And it is assumed that more co-ordination increase the use of international panels without analysis of the reasons that some donors do not currently use such panels. Moreover, there is no analysis of whether or to what extent any of these forms of co-ordination could be used for technical assistance that is provided by private contractors.

61. The responses do contain some warnings about the costs and obstacles to co-ordination, which are of a technical and a policy nature. Although the nature and extent of these costs and obstacles would of course depend on how extensive co-ordination is contemplated, a few generalisations are possible.

62. On the technical side, Members point out that co-ordination could be very costly. All of these forms of co-ordination would impose costs in terms of both human and financial resources. Thus, the Czech Republic recognises that "the establishment of ... international co-ordination will be very demanding and time-consuming, will require considerable financial support and human resources."⁶⁵ The Canadian response sees "funding issues (i.e. raising and allocating funding)"⁶⁶ as one of the most significant obstacles to the enhanced co-ordination of technical assistance.

63. Some responses also express concern that co-ordination would impose about the costs because of delays resulting from the co-ordination itself. Denmark believes that "[t]he greatest obstacle to [co-ordination] could be the time constraint."⁶⁷ The longer periods necessary for enhanced co-ordination could, in the opinion of Canada, also result in "a slower reaction time to requests."⁶⁸ UNCTAD notes that the co-ordination process could harm the effectiveness of technical assistance by leading to "last-minute decisions often due to uncertain funding."⁶⁹ It should be noted, however, that implementing the library concept or the information sharing necessary to minimise unwarranted overlap should not result in any delays. Delay would apparently be a cost only from co-ordination involving the joint venture concept or the central co-ordination concept; neither the library nor the calendar would cause any delay in decision-making.

64. Australia points another cost-related issue that would arise from any proposal relying on one central co-ordinator:

Identification of one central authority or organisation to perform this co-ordination role may also be an issue – there is no one clear organisation that this responsibility would flow to. Does this mean that a new organisation would need to be established? This in turn has obvious cost implications.⁷⁰

65. In addition, the co-ordination of technical assistance could raise significant policy issues, again depending on whether and how it was intended to promote co-operation in delivering assistance. First of all, "[t]here may be concern raised that the central co-ordination of technical assistance activities may result in a relinquishing of control of a country's technical assistance and international aid programs."⁷¹ In particular, as regards funding, Australia points out that "most countries, like Australia, would want to retain control over where its aid money goes."⁷²

66. Second, agreement on the ways to provide more integrated technical assistance could also be rather difficult. As Canada points out,

some obstacles to greater international co-ordination would be deciding on the fora; securing committed and ongoing funding; establishing common goals among the participating countries; and taking into account the different approaches to competition policy, [...] conflict over prioritising the various projects if funds are limited; debate about how to actually provide the assistance (i.e. design of project since each member may have different views on competition policy); issues of jurisdiction (i.e. what country should be providing the assistance).⁷³

Creating a library of resource materials

67. Canada points out that the sharing of knowledge/expertise could avoid “reinventing the wheel” each time a technical assistance project is undertaken, resulting in a more efficient use of resources (time, personnel and money).⁷⁴ Canada goes on to suggest:

Since much of the technical assistance provided to date is from OECD Members, the OECD could build a resource of information on technical assistance for competition policy which could be useful for future projects. This could include items such as discussions of Member’s past experiences with technical assistance projects; a database of past, current or future projects; a list of experts in the field who have worked on past projects; and any other tools that may be helpful for a government when they are designing or implementing a technical assistance program.⁷⁵

68. Other responses did not focus so directly on the creation of such a library, though the collection of at least some aspects of this information is implicit in the joint venture and the central co-ordination concepts. In the Secretariat’s view, one of the most valuable “other tools” that such a library might contain would be resource materials that had been used for technical assistance events.

69. The costs, the potential benefits, and the likely cost/benefit ratio of the library concept would depend in large measure on the types of information it was supposed to include, as well as whether and to what extent the “librarian” was expected to “manage” the information by, for example, actively pursuing providers to obtain materials and/or organise/synthesise the submissions. Costs could be minimised to the extent that Members put this information on their websites, and the central library consisted essentially of links to those sites. In addition, information such as the documentation for past events could presumably be kept on a central site without great expense because it should not require “management.” The costs and benefits of collecting and maintaining information such as a complete data base on past, current, and future events would be significantly higher and are discussed in general terms below.

Minimising unwarranted overlap

70. Australia notes that “[a] lack of co-ordination imposes serious risks of overlap, duplication and therefore wasted resources.”⁷⁶ Overlap that wastes resources is by definition unwarranted, but this note refers to minimising unwarranted overlap to emphasise that overlap is not necessarily wasteful. In the first place, two competition policy events held in the same place in consecutive months may not really overlap because one may be an international conference aimed at high level officials and the other may be a training seminar for investigators. It might be more efficient from the perspective of countries that supply panellists for the two events to be held back-to-back, but this is not necessarily the case, and other efficiency considerations must also be considered. Even if the two events are both training for investigators, the overlap is not necessarily unwarranted.

71. In principle, the only form of co-ordination needed to prevent unwarranted overlap should be early notice of events that providers are considering. The initial notice would be different from whatever information might be required to make a public calendar of planned events, because donors would at least sometimes want the information to be kept confidential until plans became more fully developed. The Secretariat is looking into what would be possible in terms of a limited access “bulletin board” on which Members could directly post their plans before they became definite enough to go on a public calendar.

72. Maintaining a public calendar of planned events could also help reduce the risk of undue overlap. Finland raises the idea of the OECD website being used for the purposes of co-ordinating technical assistance. It argues that

[s]ince help is coming to non-members from several countries, the OECD could perhaps provide its own homepage for technical assistance to which each country could report its technical assistance activities: the target countries, description of contents and the relevant dates.⁷⁷

73. At present, UNCTAD's website probably has the most complete calendar, but the OECD calendar is being developed. With respect to a calendar, the costs would appear to depend in large part on how important Members would consider it that the calendar be complete. Maintaining a calendar would not be very expensive if consisted only of information submitted by Members and others, but the costs would rise quickly if the co-ordinator were expected actively to seek out such information.

Facilitating joint ventures

74. The joint venture concept reflects an intermediate level of co-ordination. For a clearinghouse to be useful in assisting donors to locate other donors that might be interested in joint venturing on an event on a particular topic or in a particular area, a large number of donors would need to submit a considerable amount of data about past activities and current interests. It would be useful, but not necessary, for the clearinghouse also to contain information from countries and regions that are seeking assistance. In addition to facilitating joint ventures in delivering technical assistance, such a clearinghouse could also be useful for individual donors in creating projects tailored for recipients' needs.⁷⁸ The Czech Republic specifies various types of information that could be collected and shared:

- a survey of technical assistance already provided or in the process of being provided;
- a survey of requirements of individual countries concerning needed technical assistance; and
- a list of experts able to provide expert technical assistance.⁷⁹

75. Such a clearinghouse would be expensive to create and maintain, however, and it is not clear how much of a benefit it would be as a practical matter.

Promoting central co-ordination

76. The Canadian response explicitly advocates establishing a new technical assistance co-ordinating body composed of representatives of technical assistance providers.⁸⁰ As described,

[t]he co-ordinating body itself would not be providing technical assistance, [i]ts core tasks would include:

maintaining an up to date overview of recipients' needs and stages of development;
keeping an eye on the various and potentially duplicative technical assistance projects;
encouraging the development, among interested parties whether recipients or donors, of a strategically planned, more focused and integrated approach to the delivery of international technical assistance for competition policy; and,
ideally, assessing periodically the progress that is being made through the delivery of technical assistance in ensuring the development of sound competition laws, policies and institutions in developing economies.⁸¹

77. Furthermore, the co-ordinating body

could keep track of and inform the international competition community about the various initiatives under way. This body could also receive requests for technical assistance and then direct them appropriately. This would not preclude requests going to individual countries, who would in turn advise the body of such activities.⁸²

[...]

The co-ordinating body could keep track of projects, field requests and liaise with other organisations in order to provide strategically oriented technical assistance to recipient countries with a view to reduce overlap and duplication. A co-ordinating body would also be better positioned to develop a longer term plan for the provision of technical assistance. Such a plan could take into consideration the different stages of development of the recipients countries to ensure that the design of technical assistance projects fits the differing needs.⁸³

78. In filings with the WTO Working Group on the Interaction between Trade and Competition Policy, the European Community and its Members States also argue for a system involving co-ordination by a central body, in this case a future WTO Competition Policy Committee:

An enhanced and more co-ordinated approach to technical assistance should ... be developed in parallel to negotiations on a WTO framework agreement. This should be based on closer co-operation among competent international organisations - including UNCTAD and the World Bank - and full partnership with developing countries. Once such a framework agreement has been established, a WTO Competition Policy Committee should play an important role in promoting and monitoring integrated technical assistance programmes. [Such a framework agreement] would also ensure that the assistance provided would be based on commonly agreed objectives adjusted to the specific needs of the country in question.⁸⁴

79. Under such a system,

a more co-ordinated and targeted approach to technical assistance and capacity-building would also be achieved through the design and formulation of a more comprehensive program for such assistance for a given country. One or more countries or organisations could then assume responsibility for specific elements of the program ranging from studies, over drafting or amendment of legislation, to training officials, rather than addressing the needs of a given country on a piece-meal basis as is currently the prevailing picture.⁸⁵

80. Any central co-ordination system would presumably be quite costly to create and maintain, and it would be interesting to learn whether either Canada or the EU has made a cost estimate for its approach. In addition, while a centralised system could achieve significant efficiencies, the negotiation of integrated approaches would itself be costly and would face the problem that countries generally prefer to allocate funding to assist particular countries, not the countries that it could most efficiently serve in the eyes of an international group. Such negotiation would be necessary because, as noted by UNCTAD, "it does not seem possible to decide that one particular organisation can decide what [technical assistance] activities others may undertake."⁸⁶

Attributes of an international co-ordinator of technical assistance

81. The necessary attributes of an international co-ordinator of technical assistance would depend on the type and level of co-ordination. Implementation of the library concept would require some expertise if the librarian was to manage the information, but a useful library could be created without the need to include sensitive information. A modest programme to reduce unwarranted overlap would not require any special competition-related expertise. Finland mentioned the OECD website as a possible calendar, and both the Czech Republic⁸⁷ and Denmark⁸⁸ mention a possible role for the OECD.

82. On the other hand, if international co-ordination is to include managing the kind of information that might be involved in the joint venture concept or would be involved in serving as a proactive central

co-ordinator, more sensitive and complex considerations arise. Australia points out that "[t]he organisation would also need to be aware of any sensitivities and priorities for individual countries' aid programs."⁸⁹ A corollary is that donors would need to feel that they could share sensitive information on budgets and priorities with the co-ordinator's secretariat. This consideration might point towards the OECD, but others would not. If the system contemplated that developing countries would make requests to or through the co-ordinator, the criterion noted by UNCTAD – the “widest possible experience of the widest possible types of recipient countries”⁹⁰ – would point toward UNCTAD. If the co-ordinator were supposed to study proposals, assess needs, and play a real co-ordination role, the secretariat would need to have both (a) experience in competition enforcement and assistance, and (b) the trust of both donors and recipients.

83. Canada would require the following characteristics for a central co-ordinator of the sort it recommends:

- International recognition, respect and support;
- Commitment by member countries to internationally co-ordinated technical assistance; ...
- Long-term focus (so it can provide on-going support);
- Associated with a pool of skilled personnel/experts (with experience in areas as listed previously - economics, law, development); and
- Solid commitment for long term funding.⁹¹

Conclusions

Co-operation in delivering assistance

84. Quite apart from any efficiencies that may be realisable through any co-ordination system, the Secretariat agrees with those responses which argue that more “joint ventures” with more international panels would tend to improve technical assistance. As noted above, the Secretariat has co-sponsored events with Members, non-Members, and international organisations, and each of these joint ventures have created efficiencies. Moreover, all OECD events have international panels, which we believe makes the assistance more credible and more valuable. The benefits of such co-operation were highlighted at the UNCTAD meetings last September:

For countries without a competition law or with a law but little experience, international organisations could help greatly through their programs of technical assistance. Each international organisation active in the competition field had different constituencies and missions. However, they were not alternatives, but were rather complimentary. In this regard, OECD welcomed the fact that the Secretary General of UNCTAD had acknowledged the co-operation between UNCTAD and OECD in the field of technical assistance. OECD believed that this co-operation should progress further, insofar as resources and other factors permitted.⁹²

Co-ordination of technical assistance

85. The Secretariat is convinced that there is more need and room for the co-ordination of technical assistance. At the same time, the obstacles of co-ordination should not be underestimated. As Members point out, enhanced co-ordination would involve significant financial and human resources and considerable time.

86. Moreover, notwithstanding Members' general support for greater co-ordination, economic,⁹³ historic, cultural, political and geographic links⁹⁴ remain decisive factors in Members' decisions about the type and intensity of technical assistance and the actual beneficiaries. In fact, many Members provide

technical assistance largely or exclusively on the basis of bilateral⁹⁵ or multilateral agreements.⁹⁶ For instance, Canada's Competition Bureau

primarily supports relationships under current free trade agreements and co-operation agreements. Otherwise, technical assistance is generally provided on an ad-hoc basis. The Bureau responds to requests depending on available resources and nature of request.⁹⁷

87. Moreover, before launching any costly new system there should be more cost/benefit analysis than is possible on the basis of the information we have collected to date. We believe that it would be cost-effective to implement modest co-ordination to reduce unwarranted overlaps, which would in fact also promote joint ventures. Based on currently available information, we think it is an open question whether and which of the other possible forms of co-ordination would be cost-effective. In this respect, one of the issues delegates might want to discuss is whether, how, and with what costs and benefits would any co-ordination system seek to deal with the very large amount of technical assistance that is funded by governments but provided through private contractors. The same questions should also be asked with respect to the smaller but significant amount of assistance that is funded through foundations and other private parties.

88. In order to be cost-effective, co-ordination to minimise unwarranted overlaps should be provided through one or more clearinghouses that are "virtual" and as automated as possible. A clearinghouse should probably consist of some sort of non-public bulletin board for events in the planning stage and a public calendar. Donors should commit to the prompt submission of information, because there could be substantial costs associated with assigning the co-ordinator to engage in the active "outreach" and follow-up needed to maintain a single, central, complete, and up-to-date clearinghouse.

89. Finally, the Secretariat questions whether a single clearinghouse to reduce unwarranted overlaps and promote joint ventures would be preferable to several such clearinghouses, which could of course be connected by links. A single source would be better for users if they could be reasonably sure of its accuracy and completeness, but as noted above it could be costly to assign any single institution the task of actively seeking out information. If a several existing organisations – perhaps APEC, UNCTAD, and the OECD – all maintained linked clearinghouses, the combination might provide more accurate and up-to-date information with lower operating costs and only slightly higher search costs for users.

VI. Questions for discussion

90. The Secretariat is proposes the following issues for possible discussion at the forthcoming meeting:

1. Is the supply of, and demand for, technical assistance currently in balance? If the need for assistance exceeds the supply, what steps might be taken to make donors more aware of this need?
2. What are the advantages and disadvantages of providing technical assistance through competition authorities as opposed to private contractors?
3. Is it desirable and possible to give competition authorities a greater role in the provision of technical assistance without straining their limited resources? If so, what are delegates' reactions to the following possibilities?

- legislators could allocate significant financial resources to competition authorities for the provision of technical assistance, including resources to cover the costs of having employees dealing specifically with technical assistance;
 - contracts from government funding agencies could cover the agencies' total costs of providing technical assistance;
 - competition authorities could be given a much larger share of available funding, with discretion to provide assistance through its staff or to use their expertise to shape technical assistance projects and select qualified private subcontractors; and
 - competition authorities could advise funding agencies on the design of their technical assistance projects and on the selection of qualified private contractors.
4. What are the likely costs and benefits of the following forms of co-ordination?
- reducing the cost of organising technical assistance events and providing advice by creating some sort of virtual "library."
 - minimising unwarranted overlap and duplication by more and earlier sharing of information on planned events.
 - promoting better assistance through voluntary joint ventures involving international panels by even greater and earlier sharing of information on geographic and substantive areas of individual donor's interest and perhaps information on the assistance requested by particular potential beneficiaries;
 - rationalising technical assistance by combining extensive information sharing with the creation of a central body to advise on how donors might best meet recipients' needs.

ANNEX A

THE SUMMARY OF RESPONSES TO THE QUESTIONNAIRE

The following is a summary of responses to the Questionnaire on Members' Technical Assistance Activities [DAFFE/CLP/WP3(2000)8] by Members and other major providers of technical assistance, namely Australia, Canada, the Czech Republic, Denmark, Finland, Italy, Japan, Mexico, The Netherlands, Norway, Poland, Switzerland, Turkey, United States, the European Commission, UNCTAD, the World Bank and the World Trade Organisation.

Australia

Australian technical assistance has been mostly provided by the ACCC, largely with funding support by AusAID – the Australian Government Agency for International Development. The ACCC's staff dealing with international activities have also been co-ordinating the ACCC's technical assistance. The ACCC's technical assistance activities include the organisation and hosting of conferences and workshops in Australia and other countries; organising and receiving delegation visits to Australia; participating in workshops, conferences and specific training programs internationally; organising international staff exchange programs; and responding to requests for assistance from our international counterparts. Many ACCC Commissioners and staff become involved in the actual implementation and delivery of the ACCC's technical assistance work.⁹⁸

The geographical focus of the Australian Government's Overseas Aid Program is the Asia Pacific region with Papua New Guinea, Pacific Island countries and the poorest regions of East Asia being the areas of highest priority. The program also responds selectively to development needs in South Asia, Africa and the Middle East.

The promotion and development of effective competition regimes is recognised by the Australian Government as an integral component in achieving effective governance. Approximately 15 per cent of Australia's total aid budget of A\$1.5 billion in 1999/2000 is directed towards projects aimed at improving effective governance in developing countries.

Canada

The Canadian Competition Bureau is the primary government agency providing technical assistance in the field of competition law and policy. The Bureau primarily supports relationships under current free trade agreements and co-operation agreements. Otherwise, technical assistance is generally provided on an ad hoc basis. The Bureau responds to requests depending on available resources and the nature of the request.

The Bureau does not have any funding in its regular budget which is earmarked for technical assistance. Therefore, it is quite limited in its ability to finance responses to requests for assistance directly. A few officers in the Bureau's Economics and International Affairs Branch allocate a limited part of their time to co-ordinating responses to technical assistance requests. Other officers within the Bureau, with relevant expertise in requested areas, are called upon on an ad hoc basis to provide technical assistance.

Bureau representatives have met on a number of occasions with representatives from other competition agencies to discuss various issues. The Bureau's technical assistance activities are usually held in Canada, but there have been limited instances where Bureau representatives have travelled to the recipient country. Such activities are generally one-off, short-term events and are designed for one country at a time. The Bureau has offered technical assistance both to competition officials and to other groups, however, requests to the Bureau most often come from competition authorities.

In addition to the Bureau, there are other government departments and agencies involved in the organisation and co-ordination of visits, missions and training programs which may include a competition policy component.

The projects handled outside of the Bureau are generally more long-term with greater funding. For example, the Thailand or Indonesian projects involve large amounts of funding from the Canadian International Development Agency (CIDA) over a long period of time. Within these projects, only a portion of the funding is allocated to competition policy. This is very different from the short-term projects the Bureau provides, which do not have significant, if any, funding attached to them.

The Czech Republic

Founded in 1991, the Czech Office for the Protection of Competition has relied extensively on technical assistance provided by OECD Member countries and international organisations, such as the OECD and the World Bank. In the framework of co-operation with the European Commission and preparation for EU accession, the Office has also gained considerable knowledge of EU competition policy. The Office would be very keen to share its experience and knowledge with other, newly established competition authorities. However, it has very limited human resources for technical assistance. As a result, so far technical assistance has been offered on an *ad hoc* basis.

On the basis of co-operation agreements with East European competition authorities, the Office received officials of the Russian and Romanian competition authorities for short periods. Croatian and Estonian competition officials also visited the Office. In 1999, the Office organised the Forum on New Competition Laws and their Implications for Business in Central and Eastern Europe in co-operation with the UN Economic Commission for Europe and the Czech Ministry of Industry and Trade. On the basis of the acceptance of the Office's proposal by several EU Member State competition authorities, bilateral visits of competition officials should be initiated in 2001.

Denmark

With the Danish competition authority as the sole provider of technical assistance in the field of competition law and policy, overall technical assistance in the field of competition law and policy by Denmark has been limited. Most Danish assistance has been provided to the Faroe Islands, Greenland and Central and Eastern Europe and mostly in the form of receiving foreign competition officials for short (one-day) study visits.

The competition authority provided all technical assistance from its regular budget and without having human resources specifically devoted to technical assistance.

Finland

The Finnish competition authority has focused its technical assistance activities on geographically close areas: Estonia and nearby Russian regions. It has concluded bilateral agreements with its counterparts in both Estonia and Russia and provided technical assistance in the framework of such agreements.

The Finnish competition authority organised several seminars, internships and other training programs for Estonia, including competition officials and judges. Technical assistance to Russia has involved high-level visits and internships. One-part time person has co-ordinated all technical assistance by the competition authority. The actual provision of technical assistance was carried out by case-handling officials of the competition authority.

Germany

The Bundeskartellamt has provided technical assistance primarily for beneficiaries in Africa, Asia and Central and East Europe. The Bundeskartellamt's technical assistance activities have involved the organisation of short study visits and some seminars, as well as sending current and former staff to events organised by other assistance providers. The Bundeskartellamt does not have resources earmarked for technical assistance and its technical assistance activities are co-ordinated by its international affairs personnel.

It is noteworthy that a number of German institutions, both public and private ones, deal with providing technical assistance, including in the field of competition law and policy. Those activities are mainly funded by Federal Ministries and are carried out in co-operation with the Bundeskartellamt.

Italy

Until now, all Italian technical assistance in the field of competition law and policy has been provided exclusively by the Italian competition authority. Within the competition authority no human resources are specifically allocated to perform technical assistance activities: these are carried out on a rotation basis. Since the competition authority's financial resources for technical assistance are also rather limited, it submitted applications for external funding, for instance to the EC for sending a long-term resident advisor to the Romanian competition authority.

As far as the geographic coverage of technical assistance is concerned, the competition authority does not have explicit priorities, such activities usually being demand-driven. Nevertheless, due to the geographic proximity, the competition authority often receives requests for technical assistance from countries located in the Mediterranean or in Central and East Europe.

The Italian competition authority provided technical assistance in various ways: internships, seminars, submission of written comments on draft laws, etc. The most common forms of technical assistance have been internships of foreign officials and the participation of the competition authority's officials in training seminars. All technical assistance activities have been short-term.

Japan

The JFTC has a very extensive technical assistance program focusing on Asia but also covering many other countries of the world, such as African, Baltic, Central Asian and Latin American countries. The JFTC has 3 full time officials responsible for co-ordinating technical assistance. Experts at the events are recruited from inside and outside the JFTC according to need. The Japanese government contracts private experts for providing technical assistance only in special cases.

The JFTC has been providing technical assistance primarily by way of co-operation with, and with the financial support of, various other agencies and parts of the Japanese government. The JFTC has been involved in short few-day conferences and workshops, longer-term training seminars (up to 1 month) and in receiving visiting advisors for periods between 1 week and 6 months.

The JFTC has not provided technical assistance together with other OECD countries and/or international organisations, although the Japanese government has a program under APEC to which OECD countries and the Secretariat contribute on a regular basis. Within the APEC Program, the JFTC regards “supporting Thailand ... [as] immensely important, particularly in setting a role model for the countries in the region and hosting the meeting.”⁹⁹ The JFTC has also participated in UNCTAD training seminars in Costa Rica and India, co-operated with the WTO in a workshop, and participated in OECD outreach events in China (twice) and Seoul.

Korea

The major technical assistance event of the KFTC has been the annual International Workshop on Competition Policy held in co-operation with the OECD since 1996. Participants in those workshops included APEC Member economies closely linked to Korea in economic and geographical terms as well as some transition economies from other regions, such as Romania. The workshops provided an excellent opportunity for the KFTC to share its experiences on the introduction and enforcement of competition law. Usually, the workshops have been used for training KFTC staff and other Korean Government agencies, as well.

The KFTC's technical assistance activities have been funded entirely from the KFTC's budget. Full-time technical assistance personnel in KFTC's International Affairs Division has been co-ordinating assistance.

Mexico

Virtually all Mexican technical assistance in competition issues is provided by the Federal Competition Commission (CFC). Technical assistance activities are co-ordinated by the International Affairs Division of the CFC. It contacts foreign competition agencies and co-ordinates the provisions of technical assistance internally. Case handling personnel provide technical assistance during internships and seminars when necessary. The CFC has provided the following types of technical assistance: sending panellists to seminars and conferences organised and sponsored by others and receiving interns from beneficiaries.

During 1999 and 2000 most Mexican technical assistance was directed to Latin American and Caribbean countries by means of the participation of Mexican officials in seminars and through internships. Seminars included case study seminars and seminars dealing with competition issues arising in specific sectors. Internships were provided to competition officials from Costa Rica, Panama and Peru.

Technical assistance provided by the CFC is funded either by the CFC itself, when it comes to seminars, or by recipient countries, as in the case of most internships. One of the internships was jointly funded by the government of Costa Rica and the government of Mexico under a general technical co-operation agreement, the resources of which are independent from the Commission's regular budget. No other separate supplementary funding from agencies is available for technical assistance activities.

The CFC has contributed extensively to technical assistance activities organised by international organisations and other OECD Members. Mexican officials served as panellists in two seminars and a workshop sponsored by OECD and Latin American competition authorities (Brazil, Peru and shortly Venezuela) to study cases and to discuss competition policy in specific sectors. The Mexican experience was also presented in two UNCTAD seminars, one dealing with the role of competition in globalizing world markets attended by UN countries, and the other held in Costa Rica focused on the Latin American and Caribbean experiences with competition policy. The CFC participated in a training seminar co-organised by the South Korean competition authority and the OECD as well as in the APEC/PFP competition policy seminar.

The Netherlands

The Netherlands competition authority was established on January 1, 1998, and has so far given a relatively low priority to providing technical assistance. The competition authority has hosted officials of the USFTC and of the CTFTC (Chinese Taipei) for exchanges of experience.

Norway

Pursuant to an agreement entered into in 2000, the Norwegian competition authority provided technical assistance to the Competition Commission of South Africa and promoted competition in the Southern African Development Community (SADC) through training of personnel. In the framework of that agreement, the Norwegian competition authority sent short term consultants to South Africa to train the staff of the Competition Commission and officials from SADC countries as well as long-term advisors to the Competition Commission. The technical assistance programme with South Africa was funded by the Norwegian Agency for Development Co-operation.

The Norwegian competition authority also sent a panellist to the competition conference organised in the framework of the OECD's Baltic Regional Program. Travel and expenses for the panellist at the Baltic Conference was funded by NCA.

Notwithstanding the above technical assistance, the response by Norway mentions that it "do[es] not proactively seek opportunities to provide technical assistance"¹⁰⁰ and "will always have limited resources and the resources will normally be allocated on an [ad hoc] basis."¹⁰¹

Poland

Poland concluded bilateral co-operation agreements with Russia, Lithuania and Ukraine, which have also served as a framework of providing technical assistance.¹⁰² Most technical assistance activities have been provided for Russia. Following a visit by the President of the Polish competition authority to Russia to sign a co-operation program with the Russian Ministry of Anti-monopoly Policy and the Promotion of Entrepreneurship for 2000-2001, several Russian competition experts have paid study visits to the Polish competition authority and Polish experts have visited the Russian competition ministry.

Furthermore, the Polish competition authority sent a panellist to the OECD conference held in the framework of the OECD Baltic Regional Program in October 2000.

Switzerland

In December 1999, the Swiss competition authority sent a panellist to an OECD seminar dealing with competition in the Russian market of bank services. Although, in the absence of a special budget allocated to technical assistance, the Swiss competition authority has not had any other technical assistance activities, Switzerland is engaged in preparatory works assessing the possibilities of providing technical assistance.

Turkey

Pursuant to a co-operation agreement signed with the Economic, Cultural, Training and Technical Co-operation Presidency of Premiership (EKETIB) on February 14, 2000, the Turkish competition authority organised international conferences with the participation of senior competition officials of the beneficiaries and held a training seminar with theoretical lectures on competition policy by Turkish academicians and case studies presented by Turkish competition officials. The countries covered by the agreement with EKETIB are Central Asian republics and South East European countries. Technical assistance activities carried out under the agreement are funded by the competition authority and EKETIB.

United States

The US Federal Trade Commission and the Antitrust Division of the US Department of Justice have a very extensive technical assistance program, which operates on a bilateral, multilateral and regional basis. Bilateral technical assistance involves long- and short-term visits by experts of the two authorities at foreign competition authorities. Study visits by foreign competition authority officials are also sponsored. Multilateral and regional technical assistance is offered by means of agency staff participation in events sponsored by or organised in co-operation with various international organisations, such as the OECD, the World Bank and UNCTAD.¹⁰³

Advisors for short- and long-term missions involve an approximately equal number of lawyers and economists. Short-term missions were provided to the Member States of MERCOSUR and the Caribbean Community (CARICOM), Balkan countries, Ukraine and Russia. During Fiscal Years 1999 and 2000 long-term resident advisors served in Romania, Argentina and South Africa. Study visits by foreign competition officials have lasted for periods between several days and six weeks. Such visits have been offered to officials from Croatia, Israel, Panama, Romania and Venezuela.

There is one full-time professional official at USFTC assigned to the co-ordination of USFTC technical assistance. Technical assistance by the USDOJ is co-ordinated by the Executive Office, Economic Analysis Group, and Foreign Commerce Section of the Antitrust Division. The technical assistance programs involving the US antitrust authorities have been primarily funded by the US Agency for International Development (USAID).

The US antitrust authorities have participated in several OECD technical assistance activities, such as conferences and case study seminars. The USFTC has financed a case study seminar series in Ukraine jointly with the OECD. "The US agencies believe these activities are well-conceived and

organised, and ably conducted. [They] favour the continuation of OECD case analysis seminars. [They] also favour continuation of U.S. assistance to nations requesting assistance through these seminars.”¹⁰⁴

European Commission

The European Commission provides its technical assistance to three regions: (i) Central and East European countries (CEECs); (ii) CIS and Central Asian countries (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan); and (iii) 77 African Caribbean and Pacific (ACP) countries. All three regions benefit from technical assistance under specific and complex aid regimes. The EU's PHARE Program funds technical assistance for CEECs, while its TACIS program helps CIS and Central Asian countries. Further, a new Partnership Agreement signed with ACP countries in June 2000 addresses ACP countries' needs for technical assistance.

Under the PHARE Program Euro 4.2 billion was allocated for the period between 1990 and 1994 and Euro 6.693 billion for the period between 1995-1999. TACIS had a budget of Euro 4.226 billion between 1991 and 1999 and Euro 3.138 billion has been committed for the period 2000-2006. Technical assistance to ACP countries is financed by the 9th European Development Fund (EDF). EDF resources are channelled through two instruments - one envelope for providing grants and one for providing risk capital and loans to the private sector. The 9th European Development Fund is worth Euro 13.5 billion. With European Investment bank loans worth an additional Euro 1.5 billion, the total comes to Euro 15.2 billion.

Competition law and policy is part of the above technical assistance programs. With CEECs, most of which have applied for EC membership, enhanced pre-accession strategies serve as a framework for assistance with each country. Such strategies focus on accession partnerships and increased pre-accession aid. The accession partnerships, which are revised regularly, bring together in one document the priority areas in which each candidate country for accession needs to make progress. Legislative alignment, enforcement, institution building and transparency in the field of antitrust and state aid are among the most important priorities identified by the European Commission in the various accession partnerships.

Specific actions under the PHARE Program include 'twinning' arrangements. Under such arrangements, EU Member State experts provide long-term in-country assistance to CEEC competition authorities. The Commission has also held annual high-level conferences for candidate country competition officials. The European Commission's Technical Assistance and Information Exchange Office has organised study visits and workshops for CEEC competition officials. DG Competition has been contributing to such visits and workshops.

UNCTAD

UNCTAD has focused its technical assistance on the following types of activities: “Country-specific seminars, training workshops, regional and subregional seminars, advisory missions on the drafting of anti-trust law and comments on draft legislation.”¹⁰⁵ Usually, it provides both national and regional assistance, in the form of events usually held in the recipient country for 2-5 days. UNCTAD has been providing technical assistance on the basis of “extra-budgetary funding, in addition to regular staff time allocated to such [assistance] activities.”¹⁰⁶ Staff resources include full-time regular staff and additional administrative support when necessary.

WORLD BANK

The World Bank has funded major technical assistance projects addressed primarily to individual countries.

In some cases, for instance for Croatia, the project covered a wide area of private sector development, of which capacity building in the field of competition policy was one component. In some other cases, the entire assistance project focused on competition policy, such as the assistance project for Guatemala.

Either as a component of a larger assistance project or as an assistance project in itself, assistance in the field of competition has usually involved funding for a wide array of activities. In the case of the assistance project for Croatia, the competition component covered the following types of assistance for the Croatian competition authority:

- preparation of substantive and procedural primary and secondary legislation (law amendments, implementing decrees and regulations, administrative guidelines and policy and law interpretation documents);
- development of a training program and linkages with foreign competition authorities and international organisations;
- building of institutional expertise capacity (long-term resident advisor);
- implementation of a public information and dissemination strategy aimed at creating a culture of competition and compliance with the law; and
- definition of organisational and personnel profile.

Technical assistance to Guatemala involved *inter alia* the following types of activities with regard to the Guatemalan competition authority:

- development of information resources, library;
- internal (long-term resident advisor) and external training (internship);
- sector studies, preparation of investigative and procedural manual;
- university and research development; and
- preparation of a corporate compliance program.

WORLD TRADE ORGANISATION

The World Trade Organisation has been dealing with issues of competition policy, including assistance to countries with limited competition law and policy experience, primarily through its Working Group on the Interaction between Trade and Competition Policy established by the Singapore Ministerial Conference in December 1996. The Working Group has organised several conferences with the participation of beneficiaries. These conferences provided excellent opportunities for fruitful policy dialogue. Since the conferences focused less on providing technical assistance as defined by this note, the tables in Annex B to D do not include those conferences.

ANNEX B

RESPONDENTS' PLANS FOR TECHNICAL ASSISTANCE IN 2001

Based on the responses to the questionnaire, providers technical assistance activities for 2001 do not show considerable changes in the general policy directions as regards technical assistance are discussed below. Several competition authorities, such as the Czech,¹⁰⁷ the Danish,¹⁰⁸ the Finnish,¹⁰⁹ Mexican,¹¹⁰ and the Norwegian¹¹¹ competition authorities, plan no considerable changes in their future technical assistance activities either as regards the type of activity or as regards the beneficiaries.

Changes in the European Commission's technical assistance activities will follow the development of its international trade agreements. Continuing its current level of technical assistance to its current beneficiaries, in accordance with the new Partnership Agreement signed with ACP countries in June 2000 in Cotonou, Benin, the European Commission will reinforce its assistance to ACP countries.¹¹² Furthermore, in accordance with its already existing or planned trade agreements with Mercosur, Chile and the Andean Community, the European Commission plans to extend its technical assistance to Latin American beneficiaries.¹¹³

In order to respond to the increasing demand for technical assistance, the Italian competition authority started to seek external funding for the provisions of additional technical assistance, in particular funding for technical assistance to competition authorities in candidate countries for EU accession. Recently, the competition authority submitted a request for European Union funding for a long-term resident advisor program to be implemented jointly with the German competition authority in Romania in 2001.

Responding to calls for increased technical assistance, Switzerland is engaged in preparatory works assessing the possibilities of providing technical assistance in the field of competition law and policy.¹¹⁴

The United States mentions that

[t]he agencies' plans for FY2001, beyond those programs already funded, are awaiting approval of relevant agency appropriations for FY2001, which remain unenacted by Congress as of the date of this submission. Programs that are now funded for implementation in FY2001 include an expansion of our activities in MERCOSUR, and a regional program for the Balkan states. In addition, our activities in South Africa, including resident and short-term advisors, will continue.¹¹⁵

With respect to its plans for 2001, UNCTAD points out that

[t]he general orientation of the UNCTAD work in the field of competition law and policy is set by the UN Review Conference on the Set of Principles and Rules for the Control of RBPs, the IGE on competition law and policy and the Working party on medium terms. It has been divided in the following four main areas, as stipulated in the Resolution of 4th UN Review Conference and specified by UNCTAD X in its Plan of Action in Bangkok:

- A. Institutional capacity-building, including drafting competition law;
- B. Competition advocacy and educating the public;
- C. Studies on competition, competitiveness and development;

D. Inputs to possible international agreements on competition.¹¹⁶

Providers' technical assistance activities planned for 2001 are summarised in a table attached to this note as Annex E.

ANNEX C

**INVENTORY OF THE TECHNICAL ASSISTANCE ACTIVITIES OF MEMBERS, OTHER PROVIDERS AND OECD OUTREACH
IN 1999-2000 BY PROVIDERS AND TYPE OF ACTIVITY**

(Assistance sponsored and/or organised by the provider are in bold, participation in assistance organised and sponsored by others is not highlighted.
The numbers in brackets following the individual beneficiaries indicate the number of activities in the 1999-2000 period.)

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
PROVIDERS↓							
Australia	<ul style="list-style-type: none"> • 18 Asian and Oceanic economies • Bangladesh • India • South Africa • ASEAN • South and South-East Asia 	<ul style="list-style-type: none"> • South Africa • ASEAN • APEC (6) • South Africa (2) • Asia-Pacific countries (2) • Indonesia • People's Republic of China (OECD) 	<ul style="list-style-type: none"> • Chinese Taipei (2) • Fiji • Hong Kong • Malaysia • Papua New Guinea • South Africa 	<ul style="list-style-type: none"> • South Africa (3) • Thailand • Indonesia (3) • Thailand 	<ul style="list-style-type: none"> • Chinese Taipei (2) • Samoa 	<ul style="list-style-type: none"> • South Africa (3) • People's Republic of China (2) • Papua New Guinea (2) • Barbados • Chinese Taipei • Fiji • Kenya • Malaysia • Zimbabwe • People's Republic of China (16) • Vietnam (5) • Fiji (3) • Chinese Taipei (2) • Indonesia (2) • Malaysia (2) • Philippines (2) • Singapore (2) • South Africa (2) • Egypt • Hong Kong • Pakistan • Bangladesh • Cambodia • Papua New Guinea • Thailand 	

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
PROVIDERS↓							
Canada		<ul style="list-style-type: none"> • Brazil (2) • APEC Countries (OECD) • Vietnam • Asia-Pacific countries 		<ul style="list-style-type: none"> • Dominican Republic • Nicaragua 		<ul style="list-style-type: none"> • People's Republic of China (2) • Chinese Taipei • Jamaica • Morocco • South Africa • Thailand • Vietnam 	<ul style="list-style-type: none"> • Indonesia (2 short visits in preparation of a long-term program)
Czech Republic	<ul style="list-style-type: none"> • Central and East European countries 					<ul style="list-style-type: none"> • Croatia • Estonia • Romania • Russia 	
Denmark		<ul style="list-style-type: none"> • Slovenia • Russia 	<ul style="list-style-type: none"> • Greenland 			<ul style="list-style-type: none"> • Slovenia (2) • Bulgaria • Lithuania • Malaysia 	

TYPE OF ACTIVITY→ PROVIDERS↓	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
European Commission		<ul style="list-style-type: none"> • Russia (several) • Slovenia (training on EC competition policy carried out by Austrian private contractor) • CIS, CEEC, South-East European countries 	<ul style="list-style-type: none"> • Latvia (partly on state aids) • Lithuania • Romania (carried out by Germany and Italy) • Slovenia (on state aids carried out by France and Austria) 	<ul style="list-style-type: none"> • Estonia (carried out by the Swedish Competition Authority to advise amendments to merger rules) 	<ul style="list-style-type: none"> • Estonia (to OFT on merger control) • Russia (several) 		<ul style="list-style-type: none"> • Russia (assistance in legal drafting, studies, steel sector project with competition and state aid components) • Bulgaria (institution-building project related to competition and state aids, including training and information activities) • Estonia (translation of EC merger rules) • Slovenia (training assistance on EC-conform legislation carried out by German private contractor)
Finland	• Russia	<ul style="list-style-type: none"> • Estonia (6) • Russia (OECD) 			• Estonia	<ul style="list-style-type: none"> • Estonia (5) • Russia (3) 	

TYPE OF ACTIVITY→ PROVIDERS↓	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
Italy	<ul style="list-style-type: none"> • North African countries 	<ul style="list-style-type: none"> • Bulgaria • Estonia, Slovenia • Lithuania • People's Republic of China (OECD) • Central and East European countries 			<ul style="list-style-type: none"> • Kenya • Mozambique 		<ul style="list-style-type: none"> • Romania (preparatory meetings for sending a long-term resident advisor under the EC twinning program) • Russia (preparatory work)
Japan	<ul style="list-style-type: none"> • Indonesia • People's Republic of China 	<ul style="list-style-type: none"> • People's Republic of China (2) • APEC (2) • Azerbaijan, Estonia, Indonesia, Kenya, Laos, Malaysia, Morocco, Sri Lanka, Thailand, Zambia (training at the JFTC) • Chile, Honduras, India, Kazakhstan, Kenya, Peru, Sri Lanka, Tanzania, Uzbekistan (training at the JFTC) • Russia • Asia • Chinese Taipei (2) • Costa Rica • India • People's Republic of China (OECD) 	<ul style="list-style-type: none"> • Malaysia (2) • Thailand (2) • Latvia 	<ul style="list-style-type: none"> • Vietnam • Chinese Taipei 			

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
PROVIDERS↓							
Korea	<ul style="list-style-type: none"> • APEC (World Bank) • APEC 	<ul style="list-style-type: none"> • APEC, Romania (2) (OECD) 					
Mexico	<ul style="list-style-type: none"> • Costa Rica 	<ul style="list-style-type: none"> • Costa Rica • Argentina, Brazil, Chile, Jamaica, Mexico, Panama, Peru, South Africa • Argentina, Brazil, Chile, Ecuador, Jamaica, Panama, Peru, Uruguay, Venezuela • APEC 			<ul style="list-style-type: none"> • Nicaragua • Panama • Peru 		
Norway		<ul style="list-style-type: none"> • South Africa • Estonia, Latvia, Lithuania, Russia (OECD) 	<ul style="list-style-type: none"> • South Africa 				
Poland		<ul style="list-style-type: none"> • Estonia, Latvia, Lithuania, Russia (OECD) 		<ul style="list-style-type: none"> • Russia 	<ul style="list-style-type: none"> • Russia 	<ul style="list-style-type: none"> • Russia 	
Switzerland		<ul style="list-style-type: none"> • Russia 					
Turkey	<ul style="list-style-type: none"> • Central Asia, South-East Europe (Albania, Azerbaijan, Bosnia Herzegovina, Cyprus, Georgia, Kazakhstan, Kyrgyzstan, FYROM, Moldavia, Mongolia, Turkmenistan, Uzbekistan) • various countries (2) 	<ul style="list-style-type: none"> • Central Asia, South-East Europe (Albania, Azerbaijan, Bosnia Herzegovina, Cyprus, Georgia, Kazakhstan, Kyrgyzstan, FYR of Macedonia, Moldavia, Mongolia, Turkmenistan, Uzbekistan) 					

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
PROVIDERS↓							
United States	<ul style="list-style-type: none"> • India (several) • Bosnia Herzegovina, Croatia, FYR of Macedonia, Russia, Slovenia • Bulgaria, Romania • Russia • South Africa • Ukraine • CARICOM • Central and East European countries, CIS 	<ul style="list-style-type: none"> • Ukraine (2) (JV with the OECD) • CIS (3) • Central and East European countries, CIS, South-East European countries (2) • Argentina, Brazil, Chile, Jamaica, Panama, Peru (OECD) • APEC • CARICOM 	<ul style="list-style-type: none"> • Romania • South Africa 	<ul style="list-style-type: none"> • India (several) • South Africa (6) • Romania (5) • Brazil • Argentina • Lithuania 	<ul style="list-style-type: none"> • Romania 		
UNCTAD	<ul style="list-style-type: none"> • CIS • CIS, CEEC • CIS (2) • CIS, Bulgaria, Mongolia, FYR of Macedonia, India 	<ul style="list-style-type: none"> • Zambia (2) • South Asia (2) • Burkina Faso • South Asia • Madagascar • Mali • Thailand • Vietnam • CARICOM • COMESA • COMESA, SADC • Latin America, Caribbean • Northern Africa • Guadeloupe • APEC 		<ul style="list-style-type: none"> • Botswana • Thailand 			

TYPE OF ACTIVITY→ PROVIDERS↓	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
WORLD BANK	<ul style="list-style-type: none"> • South and South-East Asia (2) (JV with OECD) 						assistance programs: <ul style="list-style-type: none"> • Croatia • Colombia • Guatemala • Indonesia • Nicaragua • Panama • El Salvador • Thailand
OECD	<ul style="list-style-type: none"> • Baltics (2) • 50 countries from Europe, North and South America, Asia and Oceania (Trade & Competition) • Brazil, Chinese Taipei, India, Indonesia, Malaysia, People's Republic of China, Russia (JV with World Bank) • Chinese Taipei • Chinese Taipei, various • Russia • South Africa • Ukraine • North Africa (UNCTAD) • South-East Asia • India, Indonesia, Malaysia, Pakistan, Singapore, Thailand (JV with World Bank) 	<ul style="list-style-type: none"> • Russia (4) • Ukraine (3) (with USFTC) • APEC (3) (with KFTC) • Baltics, Russia (2) • CIS (2) • CIS, CEEC, South-East Europe (2) • South-East Asia (2) (with CTFTC) • Brazil • Argentina, Brazil, Jamaica, Panama, Peru, South America • Latin America • People's Republic of China • APEC (2) • Thailand • South Africa, SADC • South-East Asia 		<ul style="list-style-type: none"> • South Africa • Vietnam • Croatia (writing study on competition law developments) • Brazil (fact -finding mission) 			<ul style="list-style-type: none"> • Baltics (2 annual reports on each Baltic country's competition policy developments)

ANNEX D

**INVENTORY OF THE TECHNICAL ASSISTANCE ACTIVITIES OF MEMBERS, OTHER MAJOR PROVIDERS AND OECD OUTREACH
IN 1999-2000 BY BENEFICIARY AND TYPE OF ACTIVITY**

(Assistance shared with other beneficiaries are in italics. Assistance sponsored and/or organised by the provider is highlighted in bold.
The numbers in brackets following the individual providers indicate the number of activities in the 1999-2000 period.)

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
BENEFICIARIES↓							
Albania	▪ <i>Turkey</i>	▪ <i>Turkey</i>					
Argentina		▪ <i>OECD</i> ▪ <i>Mexico (2)</i> ▪ <i>United States</i>		▪ United States			
Azerbaijan	▪ <i>Turkey</i>	▪ <i>Japan</i> ▪ <i>Turkey</i>					
Bangladesh	▪ Australia	▪ UNCTAD				▪ Australia	
Barbados						▪ Australia	
Bosnia Herzegovina	▪ <i>Turkey</i> ▪ <i>United States</i>	▪ <i>Turkey</i>					
Botswana				▪ UNCTAD			
Brazil		▪ OECD ▪ <i>OECD (2)</i> ▪ <i>Canada (2)</i> ▪ <i>Mexico (2)</i> ▪ <i>United States</i>		▪ United States ▪ OECD (fact-finding mission)			
Bulgaria	▪ <i>United States</i> ▪ <i>UNCTAD</i>	▪ <i>Italy</i>				▪ Denmark	▪ European Commission (institution-building project related to competition and state aids, including training and information activities)

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
BENEFICIARIES↓							
Burkina Faso		▪ UNCTAD					
Cambodia						▪ Australia	
Chile		▪ <i>Japan</i> ▪ <i>Mexico (2)</i> ▪ <i>United States</i>					
Chinese Taipei	▪ <i>OECD</i> ▪ <i>OECD</i> ▪ <i>OECD</i>	▪ <i>Japan (2)</i> ▪ <i>Canada</i>	▪ <i>Australia (2)</i>	▪ <i>Japan</i>	▪ <i>Australia (2)</i>	▪ <i>Australia</i> ▪ <i>Canada</i> ▪ <i>Australia (2)</i>	
Costa Rica	▪ <i>Mexico</i>	▪ <i>Mexico</i> ▪ <i>Japan</i>					
Colombia							▪ <i>World Bank (assistance program)</i>
Croatia	▪ <i>United States</i>			▪ <i>OECD (writing study on competition law developments)</i>		▪ <i>Czech Republic</i>	▪ <i>World Bank (assistance program)</i>
Cyprus	▪ <i>Turkey</i>	▪ <i>Turkey</i>					
Dominican Republic				▪ <i>Canada</i>			
Ecuador		▪ <i>Mexico</i>					
Egypt						▪ <i>Australia</i>	
Estonia		▪ <i>Finland (6)</i> ▪ <i>OECD (2)</i> ▪ <i>Japan</i> ▪ <i>Norway</i> ▪ <i>Poland</i>	▪ <i>Italy</i>	▪ <i>European Commission (carried out by the Swedish competition authority to advise amendments to merger rules)</i>	▪ <i>Finland (5)</i> ▪ <i>European Commission (to OFT on merger control)</i>	▪ <i>Finland (5)</i> ▪ <i>Czech Republic</i>	▪ <i>European Commission (translation of EC merger rules)</i>
Fiji			▪ <i>Australia</i>			▪ <i>Australia</i> ▪ <i>Australia (3)</i>	
Georgia	▪ <i>Turkey</i>	▪ <i>Turkey</i>					
Greenland			▪ <i>Denmark</i>				
Guadeloupe		▪ UNCTAD					

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
BENEFICIARIES↓							
Guatemala							▪ World Bank (assistance program)
Honduras		▪ <i>Japan</i>					
Hong Kong		▪ <i>UNCTAD</i>	▪ Australia			▪ Australia	
India	▪ United States (several) ▪ World Bank ▪ Australia ▪ <i>OECD</i> ▪ <i>UNCTAD</i>	▪ <i>Japan</i> ▪ <i>UNCTAD (2)</i> ▪ Japan		▪ United States (several)			
Indonesia	▪ Japan ▪ World Bank ▪ <i>OECD</i>	▪ OECD ▪ <i>Japan</i> ▪ Australia		▪ Australia (3)		▪ Australia(2)	▪ World Bank (assistance program) ▪ Canada (2 short visits in preparation of a long-term program)
Jamaica		▪ <i>OECD</i> ▪ <i>Mexico (2)</i> ▪ <i>United States</i>				▪ Canada	
Kazakhstan	▪ <i>Turkey</i>	▪ <i>Japan</i> ▪ <i>Turkey</i>					
Kenya		▪ <i>Japan (2)</i>			▪ Italy	▪ Australia	
Kyrgyzstan	▪ <i>Turkey</i>	▪ <i>Turkey</i>					
Laos		▪ <i>Japan</i>					
Latvia		▪ <i>OECD (2)</i> ▪ <i>Norway (OECD)</i> ▪ <i>Poland (OECD)</i>	▪ European Commission (twinning partly on state aids) ▪ Japan				

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
BENEFICIARIES↓							
Lithuania		<ul style="list-style-type: none"> ▪ <i>OECD (2)</i> ▪ <i>Norway (OECD)</i> ▪ <i>Poland (OECD)</i> 	<ul style="list-style-type: none"> ▪ European Commission (twinning, including assistance on legislation, administrative and judicial enforcement, advocacy, information and documentation technology) ▪ <i>Italy</i> 	<ul style="list-style-type: none"> ▪ United States 		<ul style="list-style-type: none"> ▪ Denmark 	
FYR of Macedonia	<ul style="list-style-type: none"> ▪ <i>Turkey</i> ▪ <i>United States</i> ▪ <i>UNCTAD</i> 	<ul style="list-style-type: none"> ▪ <i>Turkey</i> 					
Madagascar		<ul style="list-style-type: none"> ▪ UNCTAD 					
Malaysia	<ul style="list-style-type: none"> ▪ <i>OECD</i> 	<ul style="list-style-type: none"> ▪ <i>OECD</i> ▪ <i>JAPAN</i> ▪ <i>Canada</i> 	<ul style="list-style-type: none"> ▪ Japan (2) ▪ Australia 			<ul style="list-style-type: none"> ▪ Australia ▪ Denmark ▪ <i>Australia (2)</i> 	
Mali		<ul style="list-style-type: none"> ▪ UNCTAD 					
Moldavia	<ul style="list-style-type: none"> ▪ <i>Turkey</i> 	<ul style="list-style-type: none"> ▪ <i>Turkey</i> 					
Mongolia	<ul style="list-style-type: none"> ▪ <i>Turkey</i> ▪ <i>UNCTAD</i> 	<ul style="list-style-type: none"> ▪ <i>Turkey</i> 					
Morocco	<ul style="list-style-type: none"> ▪ <i>UNCTAD</i> ▪ <i>France</i> ▪ <i>Germany</i> ▪ <i>Italy</i> ▪ <i>OECD</i> 	<ul style="list-style-type: none"> ▪ <i>Japan</i> 				<ul style="list-style-type: none"> ▪ Canada 	
Mozambique					<ul style="list-style-type: none"> ▪ Italy 		
Nepal		<ul style="list-style-type: none"> ▪ <i>UNCTAD (2)</i> 					

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
BENEFICIARIES↓							
Nicaragua				▪ Canada	▪ Mexico		▪ World Bank (assistance program)
Pakistan		▪ UNCTAD (2) ▪ Canada				▪ Australia	
Panama		▪ OECD ▪ Mexico (2) ▪ United States			▪ Mexico		▪ World Bank (assistance program)
Papua New Guinea		▪ OECD (with KFTC) ▪ Canada (OECD)	▪ Australia			▪ Australia (2) ▪ Australia	
People's Republic of China	▪ Japan ▪ OECD ▪ Australia	▪ Japan (2) ▪ OECD ▪ UNCTAD ▪ Canada				▪ Australia (2) ▪ Canada (2) ▪ Australia (16)	
Peru		▪ OECD ▪ Japan ▪ Mexico (2) ▪ United States			▪ Mexico		
Philippines		▪ OECD (with KFTC) ▪ Canada (OECD)				▪ Australia (2)	
Romania	▪ United States	▪ Canada	▪ European Commission (twinning carried out by Germany and Italy) ▪ United States	▪ United States (5)	▪ United States	▪ Czech Republic	▪ Italy (preparatory meetings for sending a long-term resident advisor jointly with Germany under the EC twinning program)

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
BENEFICIARIES↓							
Russia	<ul style="list-style-type: none"> ▪ Finland ▪ OECD ▪ United States ▪ OECD ▪ United States 	<ul style="list-style-type: none"> ▪ European Commission (several) ▪ OECD (4) ▪ Japan ▪ OECD (2) ▪ Denmark ▪ Finland ▪ Switzerland ▪ Canada ▪ Norway ▪ Poland 		<ul style="list-style-type: none"> ▪ Poland 	<ul style="list-style-type: none"> ▪ European Commission (several) ▪ Poland 	<ul style="list-style-type: none"> ▪ Finland (3) ▪ Czech Republic ▪ Poland 	<ul style="list-style-type: none"> ▪ European Commission (assistance in legal drafting, studies, steel sector project with competition and state aid components) ▪ Italy (preparatory work for future program)
El Salvador							<ul style="list-style-type: none"> ▪ World Bank (assistance program)
Samoa					<ul style="list-style-type: none"> ▪ Australia 		
Singapore		<ul style="list-style-type: none"> ▪ OECD ▪ Canada (OECD) 				<ul style="list-style-type: none"> ▪ Australia (2) 	
Slovenia	<ul style="list-style-type: none"> ▪ United States 	<ul style="list-style-type: none"> ▪ Denmark ▪ European Commission (training on EC competition law carried out by Austrian private contractor) 	<ul style="list-style-type: none"> ▪ European Commission (twinning on state aids carried out by France and Austria) ▪ Italy 			<ul style="list-style-type: none"> ▪ Denmark (2) 	<ul style="list-style-type: none"> ▪ European Commission (training assistance on EC-conform legislation carried out by German private contractor)
South Africa	<ul style="list-style-type: none"> ▪ Australia ▪ United States ▪ OECD 	<ul style="list-style-type: none"> ▪ Australia ▪ Norway ▪ Australia (2) ▪ Mexico ▪ OECD 	<ul style="list-style-type: none"> ▪ Australia ▪ Norway ▪ United States 	<ul style="list-style-type: none"> ▪ United States (6) ▪ Australia (3) ▪ OECD 		<ul style="list-style-type: none"> ▪ Australia (3) ▪ Canada ▪ Australia (2) 	

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
BENEFICIARIES↓							
Sri Lanka		<ul style="list-style-type: none"> ▪ <i>Japan (2)</i> ▪ <i>UNCTAD (2)</i> ▪ <i>Canada</i> 					
Tanzania		<ul style="list-style-type: none"> ▪ <i>Japan</i> 					
Thailand		<ul style="list-style-type: none"> ▪ UNCTAD ▪ <i>Japan</i> ▪ <i>OECD</i> ▪ <i>OECD</i> ▪ <i>Canada</i> 	<ul style="list-style-type: none"> ▪ Japan (2) 	<ul style="list-style-type: none"> ▪ Australia ▪ <i>Australia</i> ▪ <i>UNCTAD</i> 		<ul style="list-style-type: none"> ▪ Canada ▪ <i>Australia</i> 	<ul style="list-style-type: none"> ▪ World Bank (assistance program)
Turkmenistan	<ul style="list-style-type: none"> ▪ <i>Turkey</i> 	<ul style="list-style-type: none"> ▪ <i>Turkey</i> 					
Ukraine	<ul style="list-style-type: none"> ▪ <i>United States</i> ▪ <i>OECD</i> 	<ul style="list-style-type: none"> ▪ OECD (3) ▪ United States (2) 					
Uruguay		<ul style="list-style-type: none"> ▪ <i>Mexico</i> 					
Uzbekistan	<ul style="list-style-type: none"> ▪ <i>Turkey</i> 	<ul style="list-style-type: none"> ▪ <i>Japan</i> ▪ <i>Turkey</i> 					
Venezuela		<ul style="list-style-type: none"> ▪ <i>Mexico</i> 					
Vietnam		<ul style="list-style-type: none"> ▪ UNCTAD ▪ <i>Canada</i> ▪ <i>Canada</i> 		<ul style="list-style-type: none"> ▪ Japan ▪ OECD 		<ul style="list-style-type: none"> ▪ Australia ▪ <i>Canada</i> 	
Zambia		<ul style="list-style-type: none"> ▪ UNCTAD (2) ▪ <i>Japan</i> 					
Zimbabwe						<ul style="list-style-type: none"> ▪ Australia 	
APEC	<ul style="list-style-type: none"> • Korea (World Bank) • Korea 	<ul style="list-style-type: none"> ▪ OECD (3) • Korea (2) (OECD) ▪ Japan (2) ▪ <i>Australia (6)</i> ▪ <i>OECD (2)</i> ▪ <i>Mexico</i> ▪ <i>United States</i> ▪ UNCTAD 					
ASEAN	<ul style="list-style-type: none"> ▪ <i>Australia</i> 	<ul style="list-style-type: none"> ▪ Australia 					
Asia		<ul style="list-style-type: none"> ▪ Japan 					

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
BENEFICIARIES↓							
Asia-Pacific		<ul style="list-style-type: none"> ▪ Australia (2) ▪ Canada 					
Baltics	<ul style="list-style-type: none"> ▪ <i>OECD (2)</i> 	<ul style="list-style-type: none"> ▪ <i>OECD (2)</i> 					<ul style="list-style-type: none"> ▪ OECD (2 annual reports on each country's competition policy developments)
Caribbean		<ul style="list-style-type: none"> ▪ <i>UNCTAD</i> 					
CARICOM (Caribbean Community)	<ul style="list-style-type: none"> ▪ United States 	<ul style="list-style-type: none"> ▪ UNCTAD ▪ United States 					
Central and East Europe	<ul style="list-style-type: none"> ▪ Czech Republic ▪ <i>UNCTAD</i> ▪ <i>United States</i> 	<ul style="list-style-type: none"> ▪ <i>OECD (2)</i> ▪ <i>United States (2)</i> 	<ul style="list-style-type: none"> ▪ Italy 				
COMESA (Common Market for Eastern and Southern Africa)		<ul style="list-style-type: none"> ▪ UNCTAD ▪ <i>UNCTAD</i> 					
Commonwealth of Independent States	<ul style="list-style-type: none"> ▪ UNCTAD ▪ <i>UNCTAD</i> ▪ UNCTAD (2) ▪ <i>United States</i> ▪ <i>UNCTAD</i> 	<ul style="list-style-type: none"> ▪ OECD (2) ▪ <i>OECD (2)</i> ▪ United States (3) ▪ <i>United States (2)</i> 					
Latin America	<ul style="list-style-type: none"> ▪ OECD 	<ul style="list-style-type: none"> ▪ <i>UNCTAD</i> 					
North Africa	<ul style="list-style-type: none"> ▪ Italy ▪ OECD 	<ul style="list-style-type: none"> ▪ UNCTAD 					
South America		<ul style="list-style-type: none"> ▪ <i>OECD</i> 					
South and South-East Asia	<ul style="list-style-type: none"> ▪ Australia ▪ OECD 	<ul style="list-style-type: none"> ▪ OECD (2) ▪ OECD 					

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
BENEFICIARIES↓							
South Asian Association for Regional Co-operation (SAARC)		▪ <i>UNCTAD</i>					
South-East Europe		▪ <i>OECD (2)</i> ▪ <i>United States (2)</i>					
Southern African Development Community (SADC)		▪ <i>UNCTAD</i> ▪ <i>OECD</i>					
50 countries from Europe, North America, Asia and Oceania (Trade and Competition)	▪ <i>OECD</i>						
18 Asian and Oceanic economies	▪ <i>Australia</i>						
Various countries	▪ <i>Turkey</i> ▪ <i>OECD</i>						

ANNEX E

**PLANNED TECHNICAL ASSISTANCE ACTIVITIES OF MEMBERS, OTHER PROVIDERS AND OECD OUTREACH
IN 2001 BY PROVIDERS AND TYPE OF ACTIVITY**

(Assistance sponsored and/or organised by the provider are in bold, participation in assistance organised and sponsored by others is not highlighted.
The numbers in brackets following the individual beneficiaries indicate the number of activities in 2001.)

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
PROVIDERS↓							
Australia		<ul style="list-style-type: none"> • Egypt (several) • Indonesia (several) • Thailand (several) • APEC (2) 	<ul style="list-style-type: none"> • Chinese Taipei • Papua New Guinea 	<ul style="list-style-type: none"> • Egypt (several) • Indonesia (several) • Thailand (several) 	<ul style="list-style-type: none"> • Chinese Taipei • Papua New Guinea 	<ul style="list-style-type: none"> • Hong Kong 	<ul style="list-style-type: none"> • Southern & Central Africa (scoping study and needs analysis)
Czech Republic			<ul style="list-style-type: none"> • CEEC 		<ul style="list-style-type: none"> • CEEC 		
Denmark			<ul style="list-style-type: none"> • Greenland 				
European Commission							<ul style="list-style-type: none"> • Ukraine ("Application of Foreign Trade Regime" project with a third dedicated to competition policy) • <i>Ukraine (steel related with elements of competition policy)</i>
Finland							<ul style="list-style-type: none"> • Estonia (continuing assistance) • Russia (continuing assistance)
Italy			<ul style="list-style-type: none"> • Romania 				<ul style="list-style-type: none"> • <i>Russia (assistance project)</i>
Korea		<ul style="list-style-type: none"> • APEC (OECD) 					
Netherlands						<ul style="list-style-type: none"> • Estonia 	

TYPE OF ACTIVITY→	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
PROVIDERS↓							
Norway					• South Africa		
United States			• South Africa (several)	• South Africa (several)			• MERCOSUR (non-specified activities) • South-East Europe
OECD	• People's Republic of China	<ul style="list-style-type: none"> • Russia (8) • Brazil • South-East Asia with (with CTFTC) • Asia (with KFTC) • Baltics • CIS, Central and East Europe and South East Europe (2 weeks) • <i>People's Republic of China</i> • APEC • South-East Europe (3) • <i>South Africa (4)</i> 		<ul style="list-style-type: none"> • Baltics • Russia 		• People's Republic of China	<ul style="list-style-type: none"> • Global Forum on Competition (beneficiaries to be defined by CLP) • People's Republic of China (study on the domestic implications of trade and investment liberalisation) • preparatory missions and conference to launch a Regional Flagship Initiative on competition law and policy for South-East European countries

TYPE OF ACTIVITY→ PROVIDERS↓	Conference	Seminar	Long-term resident advisor	Short-term consultation	Internship	Study visit	Miscellaneous
UNCTAD		<ul style="list-style-type: none"> • Azerbaijan • Burkina Faso, Mali • Cuba • African countries • CEMAC • CIS • COMESA • APEC 					
WORLD BANK							<i>initial dialogue possibly leading to formal assistance:</i> <ul style="list-style-type: none"> • Dominican Republic • Ecuador • Vietnam • UEMOA (Economic Community of West African Countries) • COMESA

Notes

- ¹ Response by the United States [DAFFE/CLP/WP3/WD(2001)9], at p. 2.
- ² Response by Mexico [DAFFE/CLP/WP3/WD(2001)7], at p. 2.
- ³ Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at p. 4.
- ⁴ The UNCTAD stresses its support for increased technical assistance “as was agreed at UNCTAD X and 4th Review Conference.” Response by UNCTAD [DAFFE/CLP/WP3/WD(2001)13], at p. 3.
- ⁵ Response by Italy [DAFFE/CLP/WP3/WD(2001)5], at p. 1.
- ⁶ See Response by Japan [DAFFE/CLP/WP3/WD(2001)6], at p. 1.
- ⁷ Response by Mexico [DAFFE/CLP/WP3/WD(2001)7], at p. 2.
- ⁸ Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 2.
- ⁹ Response by the European Commission [DAFFE/CLP/WP3/WD(2001)12], at pp. 3-4. [emphasis added].
- ¹⁰ See Response by Japan [DAFFE/CLP/WP3/WD(2001)6], at p. 1.
- ¹¹ See Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 4.
- ¹² Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at p. 4.
- ¹³ Response by Japan [DAFFE/CLP/WP3/WD(2001)6], at p. 1.
- ¹⁴ Response by the European Commission [DAFFE/CLP/WP3/WD(2001)12], at p. 5.
- ¹⁵ Response by Italy [DAFFE/CLP/WP3/WD(2001)5], at p. 2.
- ¹⁶ Ibid., at p. 2.
- ¹⁷ Ibid., at p. 2.
- ¹⁸ Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at p. 4.
- ¹⁹ Ibid., at p. 4.
- ²⁰ Ibid., at p. 4.
- ²¹ Ibid., at p. 7.
- ²² Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 4.

- 23 Response by Mexico [DAFFE/CLP/WP3/WD(2001)7], at p. 2.
- 24 Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at p. 4.
- 25 Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 4.
- 26 Communication from the European Community and Its Member States to the WTO Working Group on the Interaction between Trade and Competition Policy [WT/WGTCP/W/140], 8 June 2000, at p. 11.
- 27 Response by Japan [DAFFE/CLP/WP3/WD(2001)6], at p. 1.
- 28 Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at p. 5.
- 29 See Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 5.
- 30 Response by UNCTAD [DAFFE/CLP/WP3/WD(2001)13], at p. 4.
- 31 Response by Finland [DAFFE/CLP/WP3/WD(2001)10], at p. 3.
- 32 See Competition Policy Outreach Activities: Stocktaking, Challenges and Future Directions [DAFFE/CLP(99)30], para. 31. at pp. 8-9.
- 33 Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 5.
- 34 See Response by Mexico [DAFFE/CLP/WP3/WD(2001)7], at p. 3.
- 35 Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at p. 5.
- 36 Response by Mexico [DAFFE/CLP/WP3/WD(2001)7], at p. 3.
- 37 See Competition Policy Outreach Activities: Stocktaking, Challenges and Future Directions [DAFFE/CLP(99)30], para. 28 at p. 8.
- 38 Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 6.
- 39 See Response by Japan [DAFFE/CLP/WP3/WD(2001)6], at p. 1.
- 40 Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at pp. 5-6.
- 41 Response by Finland [DAFFE/CLP/WP3/WD(2001)10], at p. 4.
- 42 Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 6.
- 43 See Response by Finland [DAFFE/CLP/WP3/WD(2001)10], at p. 3.
- 44 See Response by Italy [DAFFE/CLP/WP3/WD(2001)5], at p. 2.
- 45 See Response by the United States [DAFFE/CLP/WP3/WD(2001)9], at p. 2.
- 46 See Response by the European Commission [DAFFE/CLP/WP3/WD(2001)12], at p. 7.

- 47 Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at pp. 5-6.
- 48 See Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 6.
- 49 Response by the United States [DAFFE/CLP/WP3/WD(2001)9], at p. 1.
- 50 See Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 2.
- 51 Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at pp. 5-6.
- 52 See Response by the European Commission [DAFFE/CLP/WP3/WD(2001)12], at p. 7.
- 53 Canada tries to enhance the efficiency of technical assistance with greater nationwide coordination of technical assistance providers. Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 8.
- 54 "GOJ has not provided technical assistance together with other OECD countries and/or international organizations. GOJ has a program under the APEC, which is a regional group of countries." Response by Japan [DAFFE/CLP/WP3/WD(2001)6], at p. 1.
- 55 Response by Italy [DAFFE/CLP/WP3/WD(2001)5], at pp. 2-3.
- 56 Response by Mexico [DAFFE/CLP/WP3/WD(2001)7], at p. 4.
- 57 Response by UNCTAD [DAFFE/CLP/WP3/WD(2001)13], at p. 6.
- 58 See Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at pp. 6-7.
- 59 See Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 8.
- 60 See Response by the Czech Republic [DAFFE/CLP/WP3/WD(2001)3], at pp. 2-3.
- 61 See Response by Denmark [DAFFE/CLP/WP3/WD(2001)4], at p. 1.
- 62 See Response by Italy [DAFFE/CLP/WP3/WD(2001)5], at pp. 2-3.
- 63 See Response by Japan [DAFFE/CLP/WP3/WD(2001)6], at p. 1.
- 64 See Response by Norway [DAFFE/CLP/WP3/WD(2001)14], at p. 2.
- 65 Response by the Czech Republic [DAFFE/CLP/WP3/WD(2001)3], at pp. 2-3.
- 66 Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at pp. 7-8.
- 67 Response by Denmark [DAFFE/CLP/WP3/WD(2001)4], at p. 1.
- 68 Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at pp. 7-8.
- 69 Response by UNCTAD [DAFFE/CLP/WP3/WD(2001)13], at p. 6.
- 70 Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at pp. 6-7.

- 71 Ibid., at pp. 6-7.
- 72 Ibid., at pp. 6-7.
- 73 Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at pp. 7-8.
- 74 Ibid., at pp. 7-8.
- 75 Ibid., at p. 3.
- 76 Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at pp. 6-7.
- 77 Response by Finland [DAFFE/CLP/WP3/WD(2001)10], at p. 6.
- 78 Response by the Czech Republic [DAFFE/CLP/WP3/WD(2001)3], at pp. 2-3.
- 79 Ibid., at pp. 2-3.
- 80 See Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 3.
- 81 Ibid., at pp. 8-9.
- 82 Ibid., at p. 3.
- 83 Ibid., at pp. 8-9.
- 84 Communication from the European Community and Its Member States to the WTO Working Group on the Interaction between Trade and Competition Policy [WT/WGTCP/W/140], 8 June 2000, at p. 11.
- 85 Ibid., at pp. 11-12.
- 86 Response by UNCTAD [DAFFE/CLP/WP3/WD(2001)13], at p. 6.
- 87 Response by the Czech Republic [DAFFE/CLP/WP3/WD(2001)3], at pp. 2-3.
- 88 Response by Denmark [DAFFE/CLP/WP3/WD(2001)4], at p. 1.
- 89 Response by Australia [DAFFE/CLP/WP3/WD(2001)1], at pp. 6-7.
- 90 Response by UNCTAD [DAFFE/CLP/WP3/WD(2001)13], at p. 6.
- 91 Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 9.
- 92 Draft Report of the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Agenda Item 6, TD/RBP/CONF.5/L.1/Add.2, at p. 2.
- 93 "Mexico is providing training to competition officials of some Latin American countries; specifically to our main commercial partners in the Central America area." Response by Mexico [DAFFE/CLP/WP3/WD(2001)7], at p. 2.

94 "During 1999 and 2000 most (eight out of 17) of the technical assistance activities undertaken by Mexico were directed to Latin American and Caribbean countries, by means of the participation of Mexican officials as experts in seminars and through the provision of internships. Seminars included case study seminars and those dealing with competition issues arising in specific sectors. Internships were provided to competition officials from Costa Rica, Panama and Peru." Response by Mexico [DAFFE/CLP/WP3/WD(2001)7], at p. 1. See also response by Italy [DAFFE/CLP/WP3/WD(2001)5] and Response by Finland [DAFFE/CLP/WP3/WD(2001)10], at p. 4.

95 See Response by the Czech Republic [DAFFE/CLP/WP3/WD(2001)3], at p. 1., Response by Finland [[DAFFE/CLP/WP3/WD(2001)10], and Response by Poland, e-mail by Ewa Soliwoda of January 19, 2001.

96 See Response by Turkey [DAFFE/CLP/WP3/WD(2001)15].

97 Response by Canada [DAFFE/CLP/WP3/WD(2001)2], at p. 1.

98 Beyond the extensive technical assistance activities of ACCC in the field of competition law and policy, AusAID also funds a broader program of technical cooperation and policy dialogue with developing countries aimed at strengthening their capacity to participate in global and regional trading arrangements and take advantage of new trade opportunities. Trade-related development assistance projects (including projects relating to competition law and policy development) worth around A\$100 million are currently underway, with about A\$20 million estimated to have been spent in 1999-2000.

99 Response by Japan, p. 1.

100 Response by Norway [DAFFE/CLP/WP3/WD(2001)14], at p. 1.

101 Ibid., at p. 2.

102 See Response by Poland, e-mail by Ewa Soliwoda of January 19, 2001.

103 See International Competition Policy Advisory Committee (ICPAC) Final Report to the Attorney General and Assistant Attorney General for Antitrust, 2000 (www.usdoj.gov/atr/icpac/finalreport.htm), Annex 6-A.

104 Response by the United States, p. 2.

105 Response by UNCTAD [DAFFE/CLP/WP3/WD(2001)13], at p. 3.

106 Ibid., at p. 4.

107 Response by the Czech Republic [DAFFE/CLP/WP3/WD(2001)3], at p. 2.

108 Denmark explicitly states that "there are no likely change of policy or priorities for the year 2001." Response by Denmark [DAFFE/CLP/WP3/WD(2001)4], at p. 1.

109 Response by Finland [DAFFE/CLP/WP3/WD(2001)10], at p.3.

110 Response by Mexico [DAFFE/CLP/WP3/WD(2001)7], at p. 1.

- ¹¹¹ Response by Norway [DAFFE/CLP/WP3/WD(2001)14], at p. 1.
- ¹¹² See Response by the European Commission [DAFFE/CLP/WP3/WD(2001)12], at p. 3.
- ¹¹³ See *ibid.*, at p. 3.
- ¹¹⁴ Response by Switzerland [DAFFE/CLP/WP3/WD(2001)11], at p. 1.
- ¹¹⁵ Response by the United States [DAFFE/CLP/WP3/WD(2001)9], at p. 1.
- ¹¹⁶ Response by the UNCTAD [DAFFE/CLP/WP3/WD(2001)13], at p. 3.

Unclassified

CCNM/GF/COMP/WD(2002)20



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

06-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP/WD(2002)20
Unclassified

OECD Global Forum on Competition

**THE UNITED STATES EXPERIENCE IN COMPETITION LAW TECHNICAL ASSISTANCE:
A TEN YEAR PERSPECTIVE**

**-- Note by the US Federal Trade Commission and the US Department
of Justice, Antitrust Division, Session II--**

This note is submitted by the US Delegation FOR DISCUSSION during Session II of the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120423

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English text only

**THE UNITED STATES EXPERIENCE IN COMPETITION LAW TECHNICAL ASSISTANCE:
A TEN YEAR PERSPECTIVE**

**U. S. Federal Trade Commission
U.S. Department of Justice, Antitrust Division**

Introduction and Summary

1. For the past ten years the U.S. antitrust agencies have conducted a program of international technical assistance, funded principally by the U.S. Agency for International Development (USAID) for the benefit of developing competition agencies. The program has reached developing nations or nations in transition in Central and Eastern Europe, the former Soviet Union, South America and the Caribbean, and South Africa. There have been four main features of the program: resident advisors, short-term missions (one-two weeks), regional conferences, and internships in the United States for foreign personnel. Depending on the state of development of competition law in individual countries, the program has assisted in the development of framework laws, advised in the creation of enforcement agencies, promoted the education of supporting institutions (other government agencies, academia, business groups, consumer associations and the press) both in and outside government, and provided training of personnel in the substantive legal principles, analytical framework, and investigative techniques needed for the success of a competition law enforcement regime.

2. Over time and with the accumulation of experience, the U.S. agencies have learned a great deal about how to operate an effective technical assistance program at relatively low cost. Several conclusions flow from that learning:

1. The comparative advantage of a program operated by the U.S. government agencies is that it can draw on its own long-term expertise in the investigation, prosecution, and, in some cases, adjudication of competition matters. The career legal and economic experts of the agencies are expert in the practical and analytic skills that are most likely to be lacking in newly formed competition agencies. The strength of the U.S. program is its ability to provide human resources to strengthen the ability of new competition agencies to investigate and resolve competition cases in a way that supports the development of functioning market economies.
2. The most effective form of assistance is to place long-term resident advisors (*i.e.*, those who spend over one month) in foreign postings to directly advise competition agency staffs over a period of time. Over the course of time, resident advisors earn the respect, trust, and confidence of foreign agency staff, who are then more likely to solicit, listen to, and implement their advice. By contrast, an expert who spends only a few weeks does not gain a close understanding of the country, the culture, the institution, the law, and the problems of the host country. Instead, our resident advisors remain in place long enough to follow and advise on actual host-country investigations. They can then advise based on a thorough understanding of the facts and can guide the gathering of additional facts. By contrast, short-

term advisors can only advise based on the situation presented to them that can be, given a natural reluctance to present a less than optimal picture to strangers, somewhat distorted. Resident missions are best positioned to understand the true assistance needs of a new competition authority and through the development of personal and professional relationships, to offer advice that is at once candid and useful. Finally, and most significantly, it places the advisor in the right place and the right time when the “teachable moment” arises -- that point when foreign agency staff realises that it has a complex problem and can benefit from the experience of others as it tries to solve that problem.

3. The second most effective form of assistance is to formulate short-term missions that either teach investigative skills in an interactive hypothetical case exercise, or address particular targeted technical issues. This can either be done for an individual country, or for several countries in a region, in a seminar or workshop format. Short-term missions can also bring specialised expertise to bear in support of a long-term advisor. Ideally, long-term and short-term missions can be combined, so that the short-term mission work complements deeper first hand experience and serves to broaden and deepen the kind of assistance being offered.
4. We encourage regional programs when that is feasible because they facilitate transparency between similarly situated neighbouring countries and encourage the application of the same analytic principles to similar conduct. Regional programs can also spawn regional networking and, eventually, co-operation. To facilitate these goals, we have begun a program of mentoring at regional conferences, where more advanced nations that have already benefited from U.S. assistance co-host events with the U.S. and offer approaches that are indigenous to conditions within a region.
5. The U.S. agencies are discriminating in their participation in most conferences or seminars addressed to general themes, partly because of scarce resources, but also because of the limited utility we see in a straight lecture format. One kind of conference, however, that is well suited for U.S. participation is represented by OECD case analysis seminars, where actual foreign cases are dissected and analysed in an international setting.
6. The agencies have also developed considerable expertise in legislative drafting, particularly with respect to formulations on competitive effects or injury, agency structure and powers, and remedies, and in advising on the technicalities of creation of antitrust agencies, where the U.S. affords two differing models of successful operations. While there are numerous sources of expertise available to help with the drafting of substantive provisions of law, competition agencies have practical experience in how the law is applied which may not be readily available elsewhere. Moreover, the U.S. agency experience has resulted in a cumulative knowledge of comparative law that serves over time to enhance the quality of the advice being offered.
7. Least effective in our experience, although not in concept, have been internships by foreign personnel in Washington. U.S. confidentiality laws prohibit foreign access to ongoing investigative files, so that effective U.S. activities are limited to lectures and discussions that take, at most, a week or two.
8. The comparatively long experience of the U.S. agencies has given them the ability to effectively manage a competition assistance program for three reasons. First, a body of internal expertise and experience in international work has resulted from repeated contact with foreign counterparts. Second, program management at both agencies has been steady over time, so that administration of programs and interagency co-ordination is optimal.

Third, high quality control has been achieved through ongoing routine review of program activities.

3. This paper addresses the United States' experience in providing technical assistance in competition law enforcement. We do not attempt to address the question from the point of view of the literature, which has included several thoughtful and useful discussions of international technical assistance¹. Our own experience, however, has generally been consistent with the findings of those papers.²

Characteristics of the U.S. technical assistance program.

4. Both the Federal Trade Commission and the Justice Department's Antitrust Division use their scarce resources primarily for domestic law enforcement, and do not generally make extensive use of appropriated funds for technical assistance programs³. The agencies rely principally on USAID funds to organise programs and pay travel expenses and salary compensation for the time spent on foreign missions. Therefore, the U.S. agency costs of international technical assistance in terms of personnel are chiefly opportunity costs – whatever domestic enforcement responsibilities are foregone for the time needed to plan and execute a foreign assignment. Strenuous efforts are made to reduce even these costs by employing personnel who have just completed assignments or who are otherwise not at the moment engaged in time sensitive work.

5. The U.S. program is managed and directed from outside the domestic law enforcement staff organisational structure. When the U.S. program began in 1992, its administration was lodged in the budget and financial management branches of the agencies, although substantive program design and personnel assignments were the responsibility of the larger enforcement staff structure. In the Federal Trade Commission, activities are directed by the Office of the General Counsel with the assistance of the international staffs of the FTC Bureaus of Competition and Consumer Protection. In the Antitrust Division, program direction is centered in the Foreign Commerce Section.

6. The U.S. program supports U.S. foreign policy goals, particularly the expansion of world trade and lowering of barriers to investment. Because USAID is an agency of the U.S. government, its priorities and funding have tracked the most significant developments in our foreign policy in recent years. Historically, USAID has focused on underdeveloped nations, but the concept of underdevelopment has acquired new meaning with the collapse of Communism and the failures of centralised economic systems around the world. Competition law is but one branch of a larger body of commercial law with which states characterised by central economic planning lack familiarity, much less experience. In securing funding for our activities, we have emphasised the need for an operating competition law system within a larger structure of reformed commercial law. In developing this theme, however, we have had to recognise that

1 *E.g., Assessing Aid: What Works, What Doesn't and Why*, World Bank Policy Research Report; Cohn, Stuart R., *Teaching in a Developing Country: Mistakes Made and Lesson Learned in Uganda*, 48 J. LEGAL EDUC. 101, 107-108 (1998).

2 *See id.* (noting almost universal agreement among those who have been part of short-term and long-term technical assistance missions as to the need to study the country and culture, receive feedback on local concerns and conditions, use local events and issues to flesh out theories, and know the local law).

3 Limited exceptions have occurred in cases where the competition agencies have a direct interest in the success of foreign competition agencies.

in many developing or transitional economies there exists no “culture of competition,” and that, therefore, our general approach has been first to point out that competition is an engine of economic growth and development, spawning entrepreneurship. Competition law and policy needs to be seen as facilitating business and not impeding it.

7. While the U.S. effort is mainly directed at developing investigative skills, we attempt to integrate our efforts, to the extent possible, with larger goals, because competition policy is almost always an aspect of a larger picture of economic development and expanded trade. Illustrative of this approach in our work in South America was the joint declaration of eleven nations at the First Competition Summit of the Americas in Panama City in October 1998. In the conference communiqué the signatories committed to: 1) the promotion of an authentic competition culture among market participants; 2) affirmation of a commitment to effective enforcement of sound competition laws, particularly in combating illegal price-fixing, bid-rigging, and market allocation; 3) co-operation with each other, consistent with their respective laws, to maximise the efficacy and efficiency of the enforcement of each country’s competition laws, and to help disseminate the best practices for the implementation of competition policies, with emphasis on institutional transparency; 4) encouragement of efforts by those small economies in the region that do not yet have solid competition regimes to complete the development of their legal frameworks; and 5) seeking the advancement of these principles in the Negotiating Group on Competition Policy of the Free Trade Area of the Americas. Taken together, these principles are a blueprint for the USAID technical assistance program for South America.

8. Our program focuses on the development of sound competition policy principles and institutions, taking account of distinctive national conditions. We recognise that no single model of substantive commands and institutions is suitable for all circumstances, and we give considerable attention to establishing the institutional capacity that supports effective enforcement in established antitrust systems. Many countries use civil law systems, which may require greater specificity than is characteristic of most U.S. antitrust laws. For example, the FTC Act makes it unlawful to engage in “unfair methods of competition in or affecting commerce,” leaving to the agency and the courts the delineation of such “methods.” A civil law country requires more specificity, and we adjust our advice accordingly. Likewise, we encourage other nations to benefit from the views of others, particularly the European nations that aspire to membership in the EU.

9. Although our program adapts flexibly to the different legal environments in different countries, it does focus on the three types of conduct that characterise most competition laws worldwide: anticompetitive agreements, especially cartels; single-firm conduct, referred to as monopolisation in the U.S. and abuse of dominance in many other countries; and anticompetitive mergers and acquisitions. We do not purport to be policy planners in terms of suggesting which industries or factual situations should be investigated. We do not profess specific knowledge of conditions in foreign nations, and we have no preconceived notions of what enforcement priorities should be set. Nonetheless, our experience informs us in important ways that may have value to our foreign counterparts.

- For example, we frequently suggest that countries consider cartels the most important component of the law. Cartels result in unambiguous harm, and do not require detailed economic analysis. An enforcement agency might benefit from choosing a factual situation involving a consumer product with a suspiciously high price that is uniform among competitors within defined geographic regions. An antitrust case by a new authority in a developing country that results in lower prices to everyday consumers can demonstrate the value of competition and competition law enforcement to the public and to the other institutions, inside and outside the government, that are interested parties in the results of the reform process.

- In the abuse of dominance area, we tend to suggest that a focus on increased prices that are not cost-justified by a so-called dominant firm may be of less competitive significance than whether barriers to entry into the market exist, and whether incumbent firm behavior helps maintain those barriers. We have often suggested that abuse of dominance theories could usefully be used to attack barriers to entry and have counseled against selection of enforcement targets based on dominance or pricing criteria alone.⁴
- At the other end of the spectrum, mergers and acquisitions are the most complex and the least likely to be an enforcement priority in a developing country. Such investigations are very time consuming. Nonetheless, most new competition agencies do review mergers, so in those cases we tend to suggest sensitivity to whether competition rather than political and social concerns inform the analysis. All too often, a proposed acquisition is seen as a threat to incumbent firms or employment, rather than something that might enhance efficiency and expand output in the long run. Concerns about employment or the closing of antiquated facilities may be a political reality, but we counsel the conduct of a sound competitive analysis in all merger proposals being examined.

10. Finally, we are mindful of the simple fact that government and laws often insulate markets from competition. Here we would look to the authority of the agency to examine such realities, either as an enforcement matter or, more likely, as an advocate of procompetitive policies. The idea of promoting competition advocacy also readily lends itself to larger issues, such as privatisation policy and whether, and how, to reform policies towards regulated industry sectors of the economy.

11. The experience and know-how that U.S. agencies have accumulated over a century of enforcement are uniquely helpful for building effective and creative investigative techniques. It is this experience that we seek to impart to foreign counterparts. We have seen there is a true hunger for practical, operational criteria by which general substantive commands (e.g., “don’t fix prices”) are translated into enforcement initiatives. We provide that know-how in great detail.

The Evolution of a Competition Technical Assistance Program.

12. A competition law and policy technical assistance program such as that operated by the U.S. agencies has a clear evolutionary pattern. It began in our case when the Communist state controlled economic and political systems of Central and Eastern Europe began to give way, circa 1989, to market based economic systems. Nations in the region began to implement measures to “westernise” their economic systems and commercial dealings. Competition law is only one building block of a functioning market economy, and as such can only be accomplished as part of a more complex reform process.⁵ In the

4 Particularly troublesome have been cases based on legislation that declares excessive pricing to be an abuse of dominance. Some agencies have been tempted to use this as a vehicle to impose “back-door” price regulation in response to rising consumer prices.

5 USAID’s Europe and Eurasia Bureau, as part of its Commercial Law and Associated Institutional Reform (C-LIR) project, has produced since 1999 a series of Diagnostic Assessment Reports for various formerly Communist countries. These reports show relative progress in seven areas of commercial law, including competition law, in terms of the development of framework laws, implementing institutions, supporting institutions, and the creation of functioning “markets” for each commercial law.

initial transition period, competition law took a back seat to more immediate reforms, such as macroeconomic reform, banking, and privatisation. The need for competition law reform was predicated on a functioning free market economy, which was lacking at the outset in most cases. Host countries and the U.S. agencies did not begin to address competition issues until over a year after reform efforts began. At that point, we were asked to advise on the drafting of competition laws themselves. It serves an understanding of the U.S. experience to outline a few of the competition-related issues that needed to be addressed, how some of these were suited to our expertise, and how some were not.

A. *Assessment of the political and economic environment*

13. Our first effort in any country is to assess the political and economic environment. In the first years of our program, this began with a high-level visit to the host country. Indeed, the FTC Chairman and the Assistant Attorney General or one of his deputies participated in the early assessment missions. The importance of competition law and policy may be unfamiliar to governments where the challenges of competition among enterprises is a new experience. Visits by top U.S. officials helped focus high-level attention on the need for effective competition laws and policies, both in the host countries and in the U.S. foreign assistance establishment. As the development of competition laws proceeded in Central and Eastern Europe and understanding of its purposes and importance became more widespread, it was no longer necessary to send top officials on these missions.

14. During an initial assessment, we seek to learn more about, among other things, the national political and economic historical experience, the principal bilateral and multilateral political and economic relationships, the construction of the political system and how it is held accountable, the extent to which private property is recognised and protected, the state of privatisation of public ownership, the degree to which the legal system supports civil society goals and the rule of law, and the main requirements for economic growth and development and expanded trade. Recognising the need for competition law to fit within a larger structure of commercial laws, we also assess the extent of compliance with internationally recognised standards of laws governing contract, corporate governance, securities, bankruptcy, collateral rights, foreign investment, and trade, as well as competition.

15. Some components underpinning a competition law regime were outside of our experience. The U.S. antitrust agencies brought to the table little expertise in the assessment of Communist or statist systems and how to dismantle and reconstruct them. In particular, the process of developing standards of corporate governance or advising on privatisation was outside our direct experience. In such situations, we limited our efforts to our own areas of expertise, and sought out means of co-ordination with others to provide assistance in related areas where appropriate. To this end, useful liaisons were established with, for example, the American Bar Association's Central and East European Law Initiative program in some countries.

16. In more concrete terms, assessment missions also allow us to learn what the agency's needs are and can help target our long-term assistance accordingly. For example, if an agency is well-staffed with qualified economists but has few trained lawyers, we might decide to staff a long-term mission with a lawyer. In two cases, assessment missions told us that the agency spent a good deal of its resources on what we consider to be consumer protection matters, and responded by including attorneys with consumer protection experience on the long-term team.

B. Drafting Framework Laws

17. We have found that our domestic law enforcement experience, coupled with our growing experience in observing what works and what doesn't in transition economies, gives us a unique perspective that we can bring to bear in helping to draft competition laws. The U.S. agencies have familiarity with the workings of the U.S. statutes and an understanding of the parallel provisions of EU law. While the day-to-day work of at least some U.S. agency personnel also involves consideration of new legislation and amendments to existing law, it would be fair to say that in the beginning the idea of helping to draft competition laws for possible adoption by foreign entities was a novel exercise, as it was to a host of other entities that were recruited in the worldwide drafting effort. Over time, however, our internal expertise grew as we accumulated experience in working with new countries based on previous work. We came to see that in a few areas the U.S. agencies brought to bear a keen eye on several discrete areas of legal drafting: forging definitions of the conduct being addressed, helping formulate the legal requirements for competitive injury, fashioning remedies, and helping design the enforcement infrastructure.

18. While countries planning to draft competition legislation often find no shortage of competent assistance in drafting the substantive provisions, we have found that legislation drafted without input from competition enforcement agencies often overlooks some important practical issues. Examples of such oversights abound:

- Competition laws typically provide that the competition agency may compel production of necessary documents by businesses. They do not always provide clear guidance as to what the agency may do when its request for documents is rebuffed.
- While many laws provide for fines of a determinate amount as a sanction in such cases, as a practical matter companies may choose to simply pay the fine as a cost of doing business. Enforcement agency staff familiar with the problem can help discuss providing for more effective remedies.
- Some competition laws provide that the terms of all members of a multi-member body expire at the same time. This can lead to a loss of institutional continuity if all members are replaced simultaneously.
- Agencies' relationship with the judiciary is sometimes poorly considered. In some cases, the judiciary is given a role in all cases but lacks adequate training and experience or lacks the capacity to decide cases based on likely future market effects as opposed to past conduct. In other cases, the agency is empowered to decide cases but lacks effective power to impose remedies and sanctions. It can be difficult to strike an appropriate balance between bringing agency expertise to bear, imposing effective remedies, and ensuring fairness through independent review.
- Some laws can be interpreted to mean that the agency is required to address every complaint, no matter how ill-founded. This can lead agencies to waste time on cases that should never have been opened or, worse, to be used by weak competitors who wish to use the competition agency as a club against more efficient competitors.
- Some laws contain deadlines for action that may not be realistic in actual experience. If a competition agency is forced to reach a decision before it can conduct an adequate investigation, the result may be ill-informed; conversely, overgenerous deadlines may result in unneeded delay to business.

- Institutional demands created by legislative command may not be adequately appreciated. A merger notification program with unreasonably low reporting thresholds may result in a new competition agency being overwhelmed with notifications and having no time to analyze them, let alone address the potentially more serious cartels or abuses of dominance.

19. Problems such as these can be avoided if we can provide pragmatic assistance during the drafting process. We do not recommend particular legislative outcomes. Instead, we advise the drafters on what our experience has shown to be the implications of choosing one course of action over another. We provide options and identify the possible benefits and consequences of the choices under consideration. We have found that being involved at an early stage is particularly useful: it may be too late, as a practical matter, to point out drafting problems during the implementation stage, as it is often difficult to get lawmakers to revisit these issues.

20. In the past ten years, our agencies have examined and advised on the drafting or redrafting of around 50 laws.

C. *Creating implementing institutions*

21. In a similar vein, we have been able to provide valuable assistance to officials responsible for setting up a competition agency. Typically this is done through short-term missions before the agency is created, but it is also done on an ongoing basis by long-term advisors, especially those who are present during the early days of an agency's life.

22. Internal operating procedures, agency structure, and internal guidelines can have a significant impact on the quality of an agency's work. Institutional issues include matters such as who holds the power to initiate investigations and to make decisions. Who within the agency will have the power to compel testimony and require documents? What form will staff recommendations take, and will they be subject to any sort of critical internal review before being presented to the decision-maker? What means will be used to assure the independence of decision-making? What will be the agency's advocacy and public education functions, and what measures will be in place to ensure that its voice is heard? What will be the organisational and procedural rules, and how transparent will they be? What is appropriate staff skills mix, agency size, budget, and technical support systems? What should be staff educational requirements and how can appropriate training be implemented? Bureaucratic inertia being what it is, it can be difficult to persuade agency officials to change these kinds of procedures once they are in place.

23. The U.S. has the advantage of two successful models of government antitrust law enforcement, as well as the ability to refer to a number of specialised regulatory agency models (such as the Federal Energy Regulatory Commission) where competition considerations are at least part of the regulatory policy analysis. While we do not suggest that the U.S. dual agency system should be emulated, that model (an executive department and an independent agency) possesses a pedigree that traces to 1890 and 1914, respectively. Consequently, years of experience – of trial and error – informs our message. In addition to the agency model, the U.S. has the advantage of a strong and independent judiciary, both at the trial and appellate level, which further strengthens and enriches the U.S. point of view.

D. *Educating supporting institutions*

24. A competition agency cannot function in a vacuum. For it to do its job, there must be other institutions in place that understand the role of competition in a market economy.

- At the most fundamental level, this includes the legislative branch that must pass on any law that is enacted. The U.S. agencies are accustomed to explaining their positions to Congress, and we have been able to offer useful advice as to how agencies can formulate their message to their legislators.
- Agencies that regulate natural monopolies, real or imagined, must understand the role of competition and not merely compare input costs with final prices.
- At some level, the work of competition agencies intersect with the courts, whether for adjudication of cases, for judicial review, or for enforcement of orders. Judges may not have any training in competition law, and without adequate training may be unwilling to uphold even the soundest decision of a competition agency.
- The linkages between competition and consumer protection are well understood in the United States, and if the competition agency does not itself handle this function (as the FTC does in the U.S.), a competition agency should have a healthy relationship with the consumer protection agency and should be able to help it understand that consumer protection should complement, not replace, competition in a market economy.

25. Our working experience in building and maintaining these kinds relationships with related institutions in the U.S. as well as with our counterpart institutions at the state and local level, helps us to counsel the need for such relationships elsewhere and to convey the techniques for building them.

26. Support for competition policy also needs to come from non-governmental institutions. This can be done, for example, by encouraging appropriate economics and law course development. In the U.S., the antitrust agencies have found it useful to maintain healthy dialogues with bar and consumer associations and business groups. Finally, we view public education through the media as a critical role. We have worked to encourage competition agencies to develop these relationships and educate these institutions, and have on occasion assisted in those efforts directly.

E. Putting the Pieces Together: Creating a Working Mechanism for Effective Competition Law Enforcement

27. These groundwork steps lead up to the final and most significant stage of our assistance efforts: creating an effective functioning competition agency. Once a law is drafted and an enforcement entity created, the most difficult work is to assist inexperienced foreign personnel learn to apply the law: to conduct investigations, to select appropriate enforcement targets, to shape prosecutions, and to craft remedies. Success in accomplishing this work is the sine qua non of judging the success of a competition regime, and is one of the most difficult undertakings by our domestic agency staffs. Our inherent strength as competition agencies is in assisting staff to develop the skills necessary to identify cases where competition agency intervention might benefit the development of a market economy and to develop the skills necessary to investigate those cases, analyse the results, and develop appropriate remedies. This is a long process. At the FTC and DOJ, experienced antitrust lawyers and economists rarely begin with skills fully developed. They acquire skills, techniques, and judgement from more experienced attorneys and economists over many years. It should not be surprising that staff at new competition agencies need the same thing, and experienced competition enforcement staff from other agencies can help fill that gap.

28. Many skills need to be imparted. How do staff members identify promising potential cases, and perhaps as important, how do they identify those that should be quickly closed? What elements must be proved to establish a case? What information is needed to satisfy those elements, and what might suggest

that the case should be closed? Where can that information be found, and how can it be obtained? What are the evidentiary standards required by the decision maker, and how may it be ensured that the information gathered will satisfy those standards? What remedies are appropriate, and what will be their impact on the marketplace? How should the results of the investigation and recommendations be presented to the decision maker? How can investigations be effectively supervised and reviewed to ensure that the right issues are identified, investigated, and discussed and time not wasted on superfluous issues? The list goes on. Given the high turnover in agency personnel, our biggest challenge is as much the teaching of skills to individual staff members as the creation of a knowledge base that will survive turnover.

29. We have learned that different legal and political environments produce special problems. The idea of reaching out to other government entities to suggest that there might be a better way is often a foreign concept in countries where minding one's own business and asking no unnecessary questions have long been the norm. The need to explain the rationale for government action may not be obvious in countries that used to rely on state coercion to implement government policies. Finally, the idea that the bottom line matters can be as difficult to inculcate abroad as it sometimes is at home. It is easy to believe that success can be measured by the number of cases brought or the amount of fines levied. Perhaps the most critical skill we try to impart is the skill of judging success by the degree that competition improves the lot of a country's consumers.

30. Our advantage in skilled professional human resources was thus brought to bear in a program that stresses long-term resident mission advisors and targeted short-term work including regional conferences. We turn next to a discussion of those two basic components of our program as well as of other techniques we have tried and assessed.

Long-Term Advisors

31. In our experience, placing advisors in competition agencies on a long-term basis is the most effective way to effectuate the goals of technical assistance⁶. No amount of lecturing, simulation exercises or retrospective case analysis can better train staff while promoting development of a competition culture than having advisors present to work with agency staff on their own investigations utilising the actual mechanisms and procedures of their own laws and agencies. Only by being there over a sustained period is it possible to learn what the agency's true needs are. Agency officials may be unwilling, or indeed unable, to identify their needs and shortcomings to those they do not know well and trust. There is no substitute for engaging staff at that point in an investigation when its energies and attention are intensely focused on a given issue and they are most motivated to learn, what some have called "the teachable moment." Having an advisor on the scene at those times is ideal, from the point of view of pedagogy and learning. Advisors who have become familiar with a country's competition law and institutions and market developments can also give much more focused counselling. Moreover, a long-term presence helps develop personal relationships, respect and rapport, which are essential to the development of trust⁷. Only when a relationship of mutual trust develops will advice, no matter how well informed, be absorbed and

6 See also, William E. Kovacic, *Antitrust and Competition Policy in Transition Economies: A Preliminary Assessment*, in ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 537 (Barry Hawk ed., 2000, Ch. 23) ("The best assistance programs are anchored by the presence of long-term advisors who reside in-country and work directly with the host country's policy officials").

7 See also DevTech Systems, Inc., Final Evaluation of the Federal Trade Commission and Department of Justice Component of the Project on Competition Policy, Laws and Regulations 7-9 (Jan. 24, 1996).

applied. These relationships have fruitful by-products in the form of relationships that continue long after the advisor leaves a country. These are especially strong among fellow law enforcers, and lead to informal consulting among peers.

A. *General Description of Long-term Programs*

32. The U.S. began sending its personnel on long-term missions in 1991, soon after the former Warsaw Pact countries set out to form free-market economies. With the exception of Argentina and South Africa, most of our long-term missions have been to former socialist countries. The missions have run from three months to three and a half years. Our first advisors were to Poland (3.5 years) and Czechoslovakia -- later the Czech and Slovak Republics (2.5 years), followed by Hungary (4 months) and Bulgaria (10 months). Subsequent long-term missions were sent to the Baltic nations of Lithuania, Latvia, and Estonia (14 months), Russia (7 months), Ukraine (1 year), Romania (3.5 years), Argentina (3 months), and South Africa (2.5 years). Typically, an individual advisor's residency overseas lasts between six months and a year. Rotating teams of advisors account for the length of some missions.

33. We staff these missions with one or two experienced agency staff members. When the U.S. agencies can fund a team of two, we strive to have a lawyer and an economist, one from each agency. They live in-country and work on a daily basis within the offices of the institution responsible for implementing competition policy, supported by a capable interpreter⁸. We have on occasion extended our resources by having advisors travel on a regular basis from a home base in one country to a nearby country. After Czechoslovakia divided, our advisor in Slovakia also worked in the Czech Republic. Long-term advisors in Lithuania, for example, commuted to Latvia and, for a while, to Estonia. More recently, an advisor in Romania commuted regularly to Bulgaria.

34. Advisors review and comment on both the substance of matters under investigation and the investigative tools that are being used. In some agencies they have also counselled the decision-making body or agency head. In so doing, they help develop decision makers' capacity to identify the outcome determinative facts and issues. While U.S. agency personnel perform an active advisory role, they do not actually conduct investigations or argue the merits of cases, nor do they counsel particular outcomes. Instead, they help identify options and the strength, weaknesses, and likely consequences of the various choices under consideration.

B. *Assistance to Investigating Staff*

35. Some of long-term advisors' most important work is imparting experience to the investigating staff. These staff are very short on experience both in practical skills such as investigational skills and, in many cases, the relevant substantive areas of law and economics. When the long-term advisor programs began in the early 1990's, few of the staff at the agencies we worked with had any training in competition law or industrial economics.

36. Long-term advice on the practical application of these new concepts helps build on and coalesce some of the fragmented knowledge that agency staff picks up from other sources. The guidance of

8 The importance of the interpreter's role cannot be overstated. In most countries we hire an interpreter who usually remains with the program throughout, and who becomes a full-fledged member of the team, not just translating, but helping us understand the basis and context of a concern or question. The interpreter, as a fellow national, often becomes a conduit for news and identifies issues needing our help about which we might not have been approached directly.

seasoned lawyers and economists is needed to understand what they mean in the real world and to apply them correctly. For example, it is one thing to know that there is such an idea as a small but significant non-transitory price increase resulting from a lessening of competition, but it is quite another to learn how to ascertain whether it might result from a particular transaction.

37. Often a long-term advisor can help extend his or her own reach by calling on the U.S. resources of the FTC or DOJ when confronted with a specialised problem outside of his or her own experience. Specialists at FTC and DOJ are easily consulted by telephone or e-mail, and can send written materials as needed. In addition, as discussed below, long-term advisors can identify and co-ordinate short-term missions by industry experts from Washington.

C. Assistance to Decision Makers

38. When cases reach the decision-making level, long-term advisors in many cases review staff's memoranda and recommendations. They meet with the agency head or council members to discuss the matter and make suggestions. In some countries advisors prepared confidential written analyses for decision makers, some of which eventually evolved into final agency decisions. In some countries staff attended council meetings and were even asked to contribute to the discussion of the case.

39. Participation in an agency's proceedings at this decision-making stage helps to insure that the decision has a solid basis in the findings of fact, that the order and remedy, if any, is effective, and the agency's written decision is well reasoned, useful, and enlightening. Because he or she comes from an enforcement agency with a long experience, a long-term advisor can give the agency the confidence to make the difficult but necessary decision. For example, an agency head may be reluctant to reject a staff recommendation and close an investigation after a lengthy investigation has proven nothing without some reassurance that a conclusion that the law has not been violated is itself a successful outcome. Through experience garnered over time, advisors can see problems with remedies that are effective in the short-run, but anticompetitive in the long-run. They can point out problems with remedies that limit price increases or prevent labour cutting and other cost-cutting measures that can initially be very tempting. The advisor can, for example, provide useful assistance to agency decision makers who face political pressure to keep prices down or to prevent multi-national corporations from absorbing hallmark national industries. The role of an antitrust agency in these social issues should be limited to an analysis of the competitive consequence. The long-term advisor is strictly neutral with respect to issues that fall outside the scope of the law or economics of competition. The very fact that the advisor has nothing to gain or lose by the decision makes his or her own advice all the more valuable.

Short-Term missions

40. While we have found that the use of long-term advisors is the best way to provide technical assistance to new competition agencies, there are occasions when the use of short-term advisors is an effective tool. We have found that short-term advisors are effective in the legislative drafting and institutional design stages, discussed above, in targeted support of long-term missions, and for conducting interactive investigational skills workshops. On the other hand, our experience has shown that they are rarely as effective as the type of assistance we can provide through long-term advisors.

A. Targeted missions in support of long-term missions

41. Short-term missions have a role in support of long-term missions. They can supplement and extend the skills of the long-term advisors once they are in place, and can provide follow-up assistance after a long-term mission ends.

42. Although the long-term advisor will doubtless have his or her own areas of specialised expertise, the long-term advisor is necessarily an antitrust generalist and cannot be expert in all of the disciplines of antitrust. When an important issue requiring specialised expertise arises, we have found that sending someone from FTC or DOJ with the appropriate expertise can make a big difference. For example, one agency we assisted was confronted with a highly controversial privatisation that was subject to agency merger review. Highly vocal opponents of the merger claimed it would result in the loss of tens of thousands of jobs; proponents argued that blocking it would result in loss of investor confidence. There was significant pressure on the agency to “get it right.” The long-term advisor had never handled a case involving that industry, so we sent an economist with experience in the industry to assist the agency in conducting a rigorous market analysis.

43. After our long-term advisor leaves, there are often significant unfinished projects. Follow-up short-term missions by the long-term advisor can help complete the work, and perhaps more importantly help give the agency staff confidence that they can handle tough cases on their own.

B. Interactive Regional Training Programs

44. We have also used short-term missions successfully to conduct interactive investigational skills training workshops based on hypothetical cases. We have developed hypothetical cases that would present a panoply of issues one might expect to encounter. One involves a hypothetical merger; one involves a possible abuse of dominance (or monopolisation); one involves a suspected cartel agreement; and one involves deceptive advertising⁹. In these exercises, participants are initially presented with some background information and the kind of document that might trigger an investigation in the real world: a competitor or consumer complaint or a pre-merger notification. Participants are then guided through the identification of appropriate issues for investigation and the formulation of an investigational plan¹⁰. Under our guidance, they formulate a document request. This, in turn, results in purportedly responsive documents (prepared in advance) being produced. Simulated interviews are conducted. Interspersed with the practical exercise are lectures on investigational skills based on our staffs’ own experience. Participants from numerous agencies have told us that these seminars are of great value because they convey real-world investigational experience in the context of an actual case. These interactive exercises were designed by experienced former long-term advisors with extensive domestic experience and expertise with the type of investigation at issue. They are designed to approximate, as closely as possible, actual investigations that antitrust enforcement staff anywhere might encounter. We have modified each “case” to fit the facts of the countries in which they are employed.

9 The FTC has broad jurisdiction over the U.S. consumer protection laws, including those directed at marketing fraud and deceptive or false advertising. In cases where foreign agencies, like the FTC, have both antitrust and consumer protection authority, we offer technical assistance.

10 See also, William E. Kovacic, *Antitrust and Competition Policy in Transition Economies: A Preliminary Assessment*, *supra* n. 6 (advantage of short-term missions focused on hypothetical cases and role playing).

45. Our most successful training exercises have been conducted on a regional basis. Given the high turnover in foreign agency personnel, it is difficult to assure that technical assistance is learned and retained over time, but we believe that regional approaches to assistance are a measure of assurance that countries continue to learn from each others' experiences. Regional conferences have permitted the sharing of experiences and a broader approach to conveying the most important message, which is how to conduct an actual competition investigation. In particular, regional programs create other synergies that ultimately lead to more effective law enforcement. They promote regional networking. Agency staffs often receive little opportunity to meet with their counterparts in other countries, and in some cases, contacts formed at regional conferences have led to co-operation on investigations. We have also structured conferences so that more advanced agencies in the region can develop mentoring relationships with less experienced agencies, such as by co-hosting events with the U.S., and offer approaches that are indigenous to conditions within a region. This has recently been undertaken, for example, in Hungary with respect to Southeast Europe. At the end of the conference, participants leave with a full set of materials so that they can present the hypothetical case in their own office.

46. Larger international conferences, while generally successful, have proven more cumbersome and less cost-effective than regional conferences. Between 1992 and 1995, FTC and DOJ cohosted four large international antitrust conferences in Vienna, and the FTC conducted an additional program devoted to consumer protection. These events were attended by delegations from as many as eleven nations. Materials were translated into each language, with oral presentations simultaneously interpreted in each language as well. As many as ten U.S. personnel formed the faculty, and the teaching materials were of a fairly high order of sophistication, including brief hypothetical cases illustrating what to look for in investigations of specific suspect conduct. While we were pleased with the results of the conferences, we no longer are able to justify these activities. If done "right," they are extremely expensive, costing several hundred thousand dollars each. In today's environment, the amount of money needed to stage a large conference is almost as much as we need to field a resident advisor and supporting short-term missions for a year. We feel the resident advisor program is a better value, given scarce resources. It is also difficult to measure the lasting effect of what may be taught at a week-long conference. There are more effective delivery systems, such as interactive case analysis, for short-term missions.

C. *Other short-term missions*

47. In some countries, budgetary limitations or the desires of the host countries have prevented us from using long-term advisors, and we have attempted to rely exclusively on a program of short-term missions instead. While these have proven of some use in limited circumstances, they have generally not proven an effective substitute for long-term advisors.

48. Short-term missions of this sort tend to focus on lectures and, in some cases, the presentation and discussion of ongoing cases. Lectures, however, tend to focus on theoretical or general themes which cannot be readily transformed into real-world applications. One competition agency official, before setting off for another international conference, told us of her expectations for the conference and hopes not to be once again hectored on the "theory of competition." Moreover, visiting lecturers often have a difficult time adapting and interpreting concepts in ways that make sense in a developing economy. American lawyers, for example, often have difficulty adapting their comments to the civil law systems that prevail in much of the world. Discussions of judicial review and judicial enforcement of compulsory process often do not take adequate account of the limitations of judicial systems that lack the training, status, and pay of their American counterparts. Analyses of barriers to entry may ignore the subtle but real effects of corruption and the pervasive influence of networks connecting dominant firms with regulatory officials. Short-term experts without technical assistance experience cannot be expected to absorb these nuances immediately, and we have found that experts who demonstrate ignorance of them quickly lose credibility.

49. One type of short-term mission that we do believe to be worthwhile is the case analysis seminar such as those sponsored by OECD. We have participated in such seminars in Vienna, Ukraine, Russia, and Brazil, and have found that by bringing together competition agency working staffs from various countries to present and analyse cases of their own, with participation by more officials from more experienced countries, real educational synergies occur. Competition agency staffs from developing countries can be each others' toughest critics.

50. Another situation in which stand-alone short-term missions have proven valuable is when a relatively advanced agency correctly identifies an area in which its expertise is deficient and asks for focused help to remedy the deficiency. In those cases, we can dispatch a lawyer or economist with experience in the area that has been identified and can provide useful help. Recently, for example, we received a request from a moderately advanced agency that we help it learn how to analyse bank mergers. They were confronted with several such mergers and realised that they did not understand the analysis as well as they needed to. The assistance of a DOJ banking expert was well-received and useful.

Internships and Study Visits by Foreign Personnel in Washington, D.C.

51. The original U.S. program included funding for internships in Washington for teams of employees of foreign competition agencies. The theory of such internships is that by working beside U.S. counterparts, foreign representatives could learn first hand how the U.S. agencies do their work in actually conducting investigations. In practice, this proved not to be feasible because of the U.S. confidentiality laws that protect many documents, testimony, and interviews obtained in investigations from disclosure to persons not on the U.S. agency's staff. The U.S. hosts were left with arranging a series of lectures and discussions that may have had some worth because of the relatively large human resource base that existed in the Washington area.

52. Internships are very expensive because of travel and per diem costs, and require a good understanding of English to work best. The actual U.S. experience in the mid-1990s was that some of the most able interns did not remain long at their sponsoring agencies upon their return. In programs where funds are limited, there may be more cost-effective forms of assistance.

53. Our current approach is to host visiting delegations who have been funded outside the USAID programs administered by the U.S. agencies, and to divide the visitors' time between our agencies for usually no more than a week each. Each agency offers a series of presentations by a diverse group of experienced people, who describe their work and their role in the larger enforcement picture. We leave plenty of time for questions, which is one way to direct our advice to real world problems of concern to the visitors.

Advantages of Long-term Missions Over Short-term Missions

54. Long-term advisors see virtually all of the cases that are under investigation, the important and the relatively insignificant, the well-conceived and the unlikely, the successful and the ill-fated. They can interject themselves into debates and steer the analysis before opinions solidify and entrenched positions make dialogue unproductive. Open and useful discussions of agency cases requires a background of trust and rapport. A short-term advisor, on the other hand, does not have time to develop such a relationship, and cannot get to know the agency's staff, the law, or the language as well, nor can they be put in place at the critical "teachable moment."

55. Long-term advisors meet and get to know the senior decision-makers. Deference and respect for senior political appointees is ingrained in U.S. government professionals, and over time this respect

becomes mutual. The advisor can work with these decision-makers and give them the understanding of competition concepts to make them useful contributors to the debate. Often, long-term advisors have seen their advice reflected in questions that a senior decision-maker asks at hearings or in remarks for public presentations. While the expertise of short-term advisors will be respected, they cannot expect to win similar confidence.

56. Long-term advisors meet and work with agency staff at all stages of an investigation. They discuss the initial decision on whether to open an investigation, advise on requests for documents, help identify potential witnesses to interview, and encourage and train staff actually to do the interviews. They may help structure the written report or recommendation, helping to identify what is and what is not important and to identify the important issues. Short-term advisors will at best see cases at an isolated point or in retrospective, and are unlikely to learn the full story. Having a wise and seasoned helping hand involved in the process and modelling for younger staff is how we teach our own staff. Absent such seasoned staff of their own, young agencies in developing countries can use long-term advisors as their next best option.

57. Over the longer term, long-term advisors can observe problems that can be effectively “swept under the rug” in the short term. As some EC advisors have learned, agency progress cannot be judged from a distance. Well written laws and carefully edited annual reports can give the impression of a well functioning system, but they can mask a big gap between good laws and sound enforcement. Because antitrust law is very fact specific, it is relatively easy to present the facts in a way that makes an agency action designed to protect incumbent local businesses from new competition appear to be a sound use of the antitrust laws intent upon protecting the competitive process. The often too-short and too-pithy “motivations” that agencies publish may report what appears to be a good result that was reached for the wrong reasons.

58. Long-term advisors also work with the supporting institutions, or may help to build supporting institutions. Young staff in the agencies sometimes ask their law or economics professors to invite advisors to give lectures. Chambers of Commerce and trade associations receive support for market enhancing initiatives. Bar associations can seek advice, support and ideas for educating the bar and the public.

59. To summarise our conclusion favouring resident advisorship in foreign agencies, we believe there are at least five goals to be advanced that no substitute program serves as well to promote:

1. Advice on setting priorities that emphasise the matters of greatest significance.
2. Application of rigorous legal and economic analysis in real life situations.
3. Instill self-confidence in foreign counterparts through developing long-term professional and personal relationships.
4. Managing the influence of non-antitrust considerations in conducting investigations.
5. Stressing the value of written explanations and conclusions for actions undertaken with emphasis on the rationale for decisions taken.

Questions That OECD Has Posed For Discussion And Our Responses

1. *Is the supply of and demand for technical assistance currently in balance? If need for assistance exceeds the supply, what steps might be taken to make donors more aware of this need?*

60. There can be no doubt that the demand for technical assistance greatly exceeds the available supply. The ability of the U.S. to respond to this demand turns on whether additional developing nations seek commercial law reform, and Congress responds by approving assistance funds for commercial law as well as more traditional projects. The prospects for this happening are strongest in South America, Africa and Asia. Several countries have asked the U.S. agencies for technical assistance. The agencies have personnel who are qualified and could be made available to meet this demand, if funds were available to pay the costs. In some cases, we have supplied the demand within the constraints imposed by limited funding by providing short-term missions in the nature of seminars or conferences. We have even assisted one country entirely through telephone, email and fax communications, which does not require an actual travel mission. As detailed in our paper, we do not believe that short-term missions are the optimal means for meeting the demand for technical assistance. In some cases, countries have very specifically requested long-term resident advisors. We are working with USAID to respond to those requests. Once a need for assistance is identified and we are aware that funding is available, we have had no difficulties in writing proposals for giving assistance that we know are likely to be effective and low cost.

2. *What are the advantages and disadvantages of providing technical assistance through competition authorities as opposed to private contractors?*

61. Both private contractors and competition authorities share a familiarity with the ultimate goals and purposes of competition policy, but competition authorities also have familiarity with the practical and unique difficulties in implementing the policy in the public interest.

62. Competition laws and policies, unlike most other commercial laws and policies, are enforced in the public interest exclusively by government enforcement agencies. As a result, technical assistance must be geared toward implementing competition laws and policy through a government enforcement agency. Competition authorities are familiar with the practical difficulties that a government enforcement agency encounters and how to overcome those difficulties. Private contractors with significant and recent government experience are also familiar with the difficulties connected with implementing the policy. If private contractors have enforced competition laws only in private actions, as is possible in the U.S., they would be familiar with only a few of those difficulties. Prioritising investigational resources, assessing the effect on the public interest of remedies, and writing decisions that send a clear message to business and industry are only a few of the issues that are unique to government agency enforcement.

63. Providing technical assistance is more than just a matter of sharing know-how. It also entails personal relationships. The shared experience of government law enforcers is an advantage that private contractors, even those who were once part of a government agency, lack.

64. Another way of putting it is to say that the effectiveness of a program turns, more than any other thing, on the quality and quantity of human resources that can be brought to bear on the project. To match a government program, a consultant would need not only an expert on competition law with government investigative experience, and a superior written teaching product, but a way to match the ability of the government representatives to fall back on the depth and breadth of expertise within their own organisations to deal with virtually any legal or economic problem encountered, whether substantive or

procedural. An advisor from a competition agency can draw on the full resources and experience of that agency, which a contractor is unlikely to be able to duplicate.

65. It is also important to note that in a world of scarce resources, the cost of the government assistance program is the cost of government salaries and standard travel per diems, and the standard USAID percentage for administrative cost.

3. *Is it desirable and possible to give competition authorities a greater role in the provision of technical assistance without straining their limited resources? If so, what are delegates' reactions to the following possibilities?*

- a) *Legislators could allocate significant financial resources to competition authorities for the provision of technical assistance, including resources to cover the costs of having employees dealing specifically with technical assistance;*
- b) *Contracts from government funding agencies could cover the agencies' total costs of providing technical assistance;*
- c) *Competition authorities could be given a much larger share of available funding, with discretion to provide assistance through its staff or to use their expertise to shape technical assistance projects and select qualified private subcontractors; and*
- d) *Competition authorities could advise funding agencies on the design of their technical assistance projects and on the selection of qualified private contractors.*

66. As a practical matter, we acknowledge that the universe of deserving targets for foreign assistance funds is very large, and that even within commercial law, competition law is but one of more than a half-dozen components. It is unrealistic to expect a legislative appropriation earmarked for competition technical assistance alone. We have been comfortable advocating that some small portion of funds earmarked for much broader purposes (creation of a Free Trade Area of the Americas, for example) be employed in what is obviously a project that facilitates attainment of that goal. Currently, in the U.S. the vast majority of funding for technical assistance is provided to government agencies and private contractors through USAID, drawn from congressional appropriations directed to just such broad foreign policy goals. While we would like to see effective competition laws and implementing institutions in all countries, we believe that USAID is in the best position to prioritise the allocation of resources among regions of the world, among countries and among programs within countries. At times USAID has funded technical assistance to regions and given the agencies the discretion to determine where within those regions to dedicate the most time and energy. We have, therefore, found that we have sufficient discretion within the confines of USAID contracts to make effective use of the funds provided.

67. We do believe that our domestic law enforcement mission priorities necessitate compensation to the U.S. agencies for salaries and administrative costs. We have not generally absorbed the costs of technical assistance by allocating resources to them as one of our own agency programs. Technical assistance is a "reimbursable program," where the U.S. agencies recover costs.

68. It does make sense that if private contractors are to be utilised, the government agencies that possess ten years of expertise in these programs help establish the specifications and qualifications necessary for USAID funding. This very recommendation appears in the 1996 DevTech report, which USAID commissioned to evaluate the first three years of the DOJ/FTC technical assistance program in Eastern and Central Europe.

4. What are the likely costs and benefits of the following forms of co-ordination?

- a) *Reducing the cost of organising technical assistance events and providing advice by creating some sort of virtual “library;”*

69. While such a library may have benefits, it is unlikely to reduce the costs of technical assistance. Making materials available is not the same as knowing how to use it or knowing which materials are relevant and reliable. A library, traditional or virtual, can help to answer a question, but is of less use to someone who doesn't know what question to ask. Moreover, the answers to many investigational and institutional questions come from experience and judgement, not written materials. Easy access to vast amounts of material through Internet searches and to knowledgeable people by e-mail diminishes the need for collecting those materials in one virtual library. A useful project would be to assemble a bibliography of all published work in this field, in all languages.

- b) *Minimising unwarranted overlap and duplication by more and earlier sharing of information on planned events;*

70. Recipients are in a good position to minimise overlap and duplication. It would be very helpful for providers know what kinds of technical assistance have been provided in the past in order to aid long-term planning, and there may be some benefits to beneficiaries who may learn of potential sources of technical assistance. An annual report listing all technical assistance programs would be helpful and sufficient. It would be difficult to assemble a reliable pre-program list, at least with respect to U.S. programs, since we believe in flexibility and are sometimes willing to modify our programs right up until they are scheduled to begin.

- c) *Promoting better assistance through voluntary joint ventures involving international panels by even greater and earlier sharing of information on geographic and substantive areas of individual donor's interest and perhaps information on the assistance requested by particular potential beneficiaries; and/or*

71. Joint ventures such as the OECD's Vienna Conference are a good example of effective co-ordination on international panels. As stated in our paper, these case analysis seminars are useful for learning and uniquely useful for providing networking opportunities for attendees.

- d) *Rationalising technical assistance by combining extensive information sharing with the creation of a central body to advise on how donors might best meet recipients' needs.*

72. In our experience, recipients have found the direct contact with donors and the task of dealing with one government and its agencies relatively simple. In particular, they have found larger multinational entities especially cumbersome when providing resident long-term advisors, the form of technical assistance that both they and we believe is optimal. The U.S. program is a client service operation, and we prefer to deal directly with the countries and organisations we are assisting. We see no need for an additional layer of consultation, which, at best, would be a subjective “second opinion” on our plans.

Unclassified

CCNM/GF/COMP/WD(2002)24



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

07-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM AUSTRALIA

-- Session II --

This note is submitted by Australia under Session II of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120513

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)24
Unclassified

English text only

AUSTRALIA'S EXPERIENCE AS TECHNICAL ASSISTANCE PROVIDER

Australia has an active program of technical co-operation and policy dialogue with developing countries. Australia's competition regulator, the Australian Competition and Consumer Commission (ACCC) has been involved in numerous technical assistance programs under which it makes available its resources and expertise in competition law enforcement, consumer protection and utility regulation. The programs aim to strengthen capacity to engage in global and regional trading arrangements and to encourage the exploitation of trade opportunities.

Australia recognises that the provision of technical assistance is important for developing countries, many of which have had difficulty in securing anticipated gains from international trade liberalisation.

Australia's international aid program

Australia's technical assistance in the field of competition law is undertaken primarily by the ACCC. Funding for substantive technical assistance derives from the Australian Government's overseas aid program, managed through the Australian Agency for International Development (AusAID).

The aim of the overseas aid program is to assist developing countries to achieve sustainable development, economic growth and the reduction of poverty. The underlying principles include openness to innovation and new ideas and the provision of responsive, practical and well targeted assistance.

Australian aid programs prioritise effective partnerships. Many individual programs are designed, delivered and assessed jointly with recipient governments and ordinary citizens.

Programs focus on meeting the most pressing developmental needs and aim to identify and assist in the management of the economic and social impacts of trade and investment liberalisation. The identification of market opportunities, new sources of revenue and the provision of guidance with institutional and regulatory requirements of the global trading system are also addressed.

Almost eighty per cent of Australian aid work is undertaken in the Asia Pacific region. Papua New Guinea is the largest beneficiary followed by Indonesia, Vietnam, the Philippines and China. The program also responds selectively to developmental needs in other South Asian countries, Africa and the Middle East.

Effective competition policies and regulatory mechanisms are an important part of the governance framework of nation states. In recognition of this, in 1997 governance was made a specific focus for Australia's aid program. Good governance means competent management of a country's resources and affairs in a manner that is open, transparent, accountable, equitable and responsive to people's needs.

Australian aid helps developing countries in four main interdependent areas of governance:

- improving economic and financial management;
- strengthening law and justice;

- increasing public sector effectiveness;
- developing civil society.

Recent aid activities directed at governance include the provision of assistance to the competition authorities of South Africa and Indonesia and a workshop on competition issues for ASEAN countries.

Budgetary issues

In its 2001-02 Budget, the Australian Federal Government allocated A\$1.725 billion of public funds to overseas aid (or 0.25 per cent of GNP). This sum is discrete of independent departmental or agency spending. The projected breakdown of budgetary funding by geographic region is as follows: Multilateral and other (26 per cent), East Asia (31 per cent), Papua New Guinea (20 per cent), Pacific (10 per cent), Africa and other (8 per cent) and South Asia (5 per cent).

Support for good governance is a priority of the Australian aid program and approximately fifteen per cent of Australian aid is devoted to it. Of this expenditure, nearly one quarter is specifically targeted at economic policy issues, including competition law. In 2000-01, governance overtook education as the largest sector of aid expenditure, accounting for around 21 per cent of direct aid flows (over A\$360 million). One third of this was spent in East Asia while a further 42 per cent was spent in Papua New Guinea and the Pacific.

The relationship between the ACCC and AusAID

Requests for assistance are assessed on a case by case basis by AusAID working with the ACCC. Applicant countries contact the ACCC and through discussions the needs of the developing country are identified. A suitable assistance program is then devised in general form by the ACCC and submitted to AusAID, which assesses the proposed program against Australian aid policy for the applicant country and may recommend amendments to the draft. The final proposal must then be submitted to the relevant overseas AusAID office by the recipient agency. It should be noted that the ability of Australia to make a valuable contribution according to its skills and expertise is taken into account in the selection of aid projects. AusAID recognises the ACCC as the primary source of expertise in Australia on competition law and consults with it in determining its priorities and forms of support.

As a result of this process the ACCC is able to obtain information regarding AusAID's current funding priorities and whether the proposal is likely to receive a positive response, its viability and whether it is worth pursuing. It also ensures that AusAID is aware of the types of requests for assistance being received in the area of competition law, should there be a change in priorities in the future.

The delivery of technical assistance

The ACCC

The ACCC's experience suggests that the effectiveness of co-operation activities strongly correlate with the stage of development of the country's competition regime. For instance, in-country training appears most effective where competition legislation exists. Where it does not, it is seen as more effective to train persons in Australia where they can examine legislative and regulatory structures and ACCC operations first-hand.

In relation to training in Australia, the ACCC has deduced from experience that smaller delegations are most effective in facilitating interactive learning. In addition, where the composition of inbound delegations is mixed, there is more effective exchange of information and experiences. The open discussion of issues with ACCC staff is also welcomed.

In-country consultancies and staff exchanges are most appropriate for countries that have established competition laws and require specific technical assistance. The ACCC regularly engages in short and long term staff exchanges and consultancies aimed at sharing its experience. These arrangements are effective in providing practical skills based training.

The ACCC's International Internship Program began in 2000. This program enables officers from developing economies to work as interns at the ACCC for a period of approximately one year. Participants are expected to develop sound knowledge and understanding of the Trade Practices Act 1974 and related legislation, and gain an awareness of the political, commercial and social environments and the management framework in which the ACCC and its counterparts operate. To date officials from Samoa, Zambia and Papua New Guinea have participated in the program. The 2002 program involves interns from Zambia and Zimbabwe.

The ACCC also runs on a regular basis a five day basic Investigation Course and where possible endeavours to accommodate participation by international officials, on a cost recovery basis. The course exposes participants to aspects of the ACCC's enforcement work and attendees participate in exercises designed to develop skills in areas such as interviewing potential defendants and obtaining witness statements, as examples.

The ACCC employs six full time officers to manage its international activities. This work involves the organisation and hosting of conferences and workshops in Australia and overseas; organising and receiving delegation visits to Australia; organising international staff exchange programs; negotiating and developing co-operation agreements with international counterparts and responding to their requests for information and assistance. Staff also participate in workshops, conferences and international training programs.

The ACCC using private consultants

The ACCC engages consultants with practical expertise in competition law policies and administration to deliver technical assistance programs. Consultants may be former staff members, and in order to develop an entire 'culture of competition' the ACCC will often also engage members of the judiciary, academia, business and consumer organisations in its capacity building teams.

Consultants must be experienced in the development, implementation and administration of a competition regime. Ideally the experience should be extensive across a range of competition issues, including aspects of policy, enforcement, merger analysis, adjudication functions, investigation techniques and market definition.

The ACCC also considers it vitally important for consultants and competition policy experts to have an awareness and appreciation of cultural, political and social differences. These factors have an enormous impact on business practices. What may be considered the traditional approach to addressing competition issues in developed countries may not work in developing economies. Consultants often therefore need to adopt broader, more flexible and creative strategies and approaches to competition policy than might normally be the case.

By private contractors

Some AusAID projects in the competition policy field are open to public tender processes. These projects are often for longer term consultancies or are research based. The ACCC focuses more on practical, results-oriented assistance to its counterpart agencies and hence does not always apply for such tenders.

The ACCC is occasionally approached by AusAID to discuss the framework of certain projects. It is also sometimes asked to offer suggestions or recommendations on appropriate consultants for an activity and to provide briefing to the consultant prior to the commencement of an activity. However, the ACCC generally does not play a large role in projects undertaken by private contractors.

The main advantage of engaging consultants is the ability to tap into the skills and expertise of consultants in other fields, such as regulatory, academic, or legal.

One disadvantage is that the ACCC does not always receive feedback on the effectiveness or achievements of outsourced technical assistance activities. In addition, the details of useful contacts that may be made by the consultant are not automatically provided to the ACCC. However, the ACCC is aware of this, and it is continuing to develop stronger links with AusAID as a countermeasure.

Conclusion

The ACCC believes that the shift to a second generation of technical assistance activities has begun, particularly in the field of competition law and policy in the Asia-Pacific region. The first generation involved discussion of the theory, rationale and models for competition law and policy. The ACCC is of the opinion that the second generation involves the giving of assistance in moving beyond this theoretical level, to assistance in the implementation of competition laws, the conduct of investigations, market definition, the institution of compliance mechanisms, identifying and setting priorities and designing an effective media strategy.

The ACCC considers it can be of greatest practical assistance to its international counterparts by sharing its experiences and expertise with countries that may be facing these types of problems for the first time.

In order to ensure that concrete and sustainable development occurs in emerging economies, it is essential that competition policy remains an integral part of technical assistance programs.

Competition agencies should endeavour to educate and work with their Government colleagues responsible for funding and aid priority setting to ensure that they are aware of, and committed to, the goals of competition policy.

Unclassified

CCNM/GF/COMP/WD(2002)26



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

**CAPACITY BUILDING AND TECHNICAL
ASSISTANCE IN THE AREA OF COMPETITION POLICY:
KOREA'S EXPERIENCES AND SUGGESTIONS**

NOTE BY KOREA

-- Session II --

This note is submitted by Mr. Joseph Seon HUR (Korea) for the Session II of the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120642

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)26
Unclassified

English text only

**CAPACITY BUILDING AND TECHNICAL
ASSISTANCE IN THE AREA OF COMPETITION POLICY:
KOREA'S EXPERIENCES AND SUGGESTIONS**

**By
Joseph Seon Hur
Korea Fair Trade Commission**

Introduction

Ladies and gentlemen! I am very pleased to have this opportunity to speak at the Global Forum on Competition (GFC), which is leading the efforts to promote a competition culture around the globe.

Today's topic, "capacity building and technical assistance", is very meaningful and pertinent. It is becoming increasingly clear that competition policy contributes greatly to advancing not only the national economy but also the global economy as a whole. At this juncture it is crucial to share each country's experience and know-how in the field of competition policy. This, in my view, is why the WTO Ministerial Meeting last November decided to strengthen the efforts of technical assistance to developing countries, while including competition issue in the Doha Development Agenda(DDA).

In a short time span of two decades, Korea was able to elevate its status from a recipient to a donor of technical assistance. I believe that such experiences will offer meaningful implications for setting the direction of technical assistance activities. In particular, Korea has experiences of drafting and implementing competition laws while pursuing the economic development. Its experience in this process will serve as useful reference for us to design desirable technical assistance programs for countries that are in the process of drafting competition laws or at the initial stage of implementation.

Competition Policy and Economic Development

As was discussed in the morning session, competition policy is now regarded as a key economic policy that is pivotal for the sound and sustainable economic development. With the market economy becoming an irresistible trend in the economic history, I cannot emphasise enough the significance of competition policy as the bulwark of market economy.

However, as appeared at last WTO meeting, there seems to be no strong consensus on the need for competition policy. Some still view competition policy as a luxury of developed countries. Some think that their priority is expanding the size of economy through economic development, and that competition policy should come only after the much-needed economic growth.

In fact, such view was shared by many in Korea 20 years ago, when the country attempted to introduce competition law. However, we became convinced through our experience that without pressure from competition, it would be impossible to attain sustainable economic efficiency. Korea adopted competition law in 1980, while its 5 year economic development plan was being implemented. At that

time, many criticised the measure as too early. Now, however, the enactment of competition law is regarded as a wise move that paved the way for an upward level of economic growth.

It is true that economic development policy can bring about rapid economic expansion to some degree in a short period of time, through strategic allocation of scarce resources and protection of selected industries by the government. However, the economic fundamentals are easy to become fragile, since the growth is not supported by efforts of economic players to self-innovate and stand on their own. It is only natural that companies that grow under the shelter of government regulations and monopolies are less competitive than companies that operate under fierce competition- just like plants that grow in a greenhouse are weaker than those in the field. Professor Mr. Michael Porter at Harvard Business School stressed in the presentation of his empirical study on the close relations between per capita GNP and business environment at the 2000 World Economic Forum (WEF), that rather than traditional environment such as physical infrastructure, demand conditions such as the effectiveness of competition law enforcement and open trade and investment are more important.

After all, I recommend that countries should introduce competition policy as early as possible, corresponding to their phase of economic development, rather than after achieving some degree of the economic development. Competition policy is not a luxury of advanced countries. It is a necessity for all, including developing countries.

Of course, I have to admit that it is not easy to enact competition law in the middle of economic development process. Korea's experience clearly illustrates this point. Basically, competition policy places trust on market functioning rather than on government intervention. In economies where the function of market is premature, it is difficult to reach consensus on the need for competition policy. In particular, conflicts and tensions with industrial policy inevitably arise in the process of introducing and implementing competition policy. Complaints can be raised not only by industrial policy enforcers but also by companies that receive benefit and protection from the industrial policy. Sometimes, repeated trial and error, caused by lack of relevant experience and know-how, may erode public and political consensus supporting competition policy.

This is the reality that countries face when they attempt to adopt competition law for the first time, which necessitates technical assistance. In a policy environment where government intervention is commonplace, efforts of developing country matter more than anything else to build trust in the market forces and promote the perception that competition policy contributes to sustainable economic development. However, when countries with successful experiences in operating competition law join our efforts and share their experiences and know-how, the efforts will become much easier. The same holds true for designing the framework of competition policy that is suitable for each country's specific economic situation. In this context, technical assistance is important not only for capacity building of countries that have competition laws in place, but also for developing countries that are yet to introduce competition laws.

Korea's Experience in Competition Law Enforcement

Based on this understanding, I would like to elaborate on Korea's experience in competition law enforcement and technical assistance.

Though Korea went through various difficulties in the process of introducing and operating competition law, I can proudly say that our efforts resulted in a great success. This is mostly because the Korean government has set the direction for competition policy in a way that befits Korea's economic situation. We have identified key economic issues that arose each time and addressed them successfully through competition policy.

In the 1970s, high-speed economic growth created the problems of price instability and chaebols' monopoly in the market. Believing that these problems will undermine market efficiency in the long run, the government resolutely enacted competition law in the early 1980s, though it managed the economy through five year economic development plan. In the late 1980s, chaebols' concentration of economic power emerged as a serious threat to the sound economic development. In response, we added new provisions in our competition law aimed at curbing the concentration of economic power.

After the financial crisis broke out in 1997, we focused our efforts and energy on competition advocacy and restructuring to promote the market economy, in the belief that inefficiency accumulated in the process of economic development was the root cause of the crisis. Since the dawn of the new millennium, we have paid greater attention to the introduction of foreign competition and the increase in competition pressure by consumers. This is based on our understanding that in the 21st century, in this era of globalisation, only fierce competition can enhance competitiveness.

While Korea recognised the significance of competition law and enacted competition rules on its own, it has also worked hard to learn from the experiences and acquire the know-how of advanced countries as necessary in each stage of law enforcement. Korea Fair Trade Commission (KFTC) has seconded its staffs to competition authorities and research centers in advanced countries having similar experience. It has also invited foreign experts to draw lessons from their countries' experiences. I would like to take this opportunity to thank the U.S., Australia, Canada and Japan, among others, for their support in technical assistance.

Korea's Experience in Providing Technical Assistance

If Korea's path of economic development can serve as a model for developing countries, so can Korea's experience in competition law enforcement. In my view, sharing Korea's experience with developing countries can help them put in place competition law enforcement mechanism that is suitable for their economic situations. In addition, it can help narrow the gap between developed and developing countries in the area of competition law.

In this respect, Korea has actively engaged in technical assistance activities since 1996, to serve as a bridge between developed and developing countries. It has been constantly improving the quality and expanding the size of its technical assistance programs. Programs that are currently or will be implemented include International Workshop on Competition Policy, Training Program for developing countries and expert secondment to developing countries and UNCTAD.

International Workshop on Competition Policy has offered a unique opportunity to share Korea's experience in competition law enforcement with countries that have introduced competition law for the first time. At first, mostly APEC member economies were invited to the Workshop, which are closely linked to Korea in economic and geographical terms. However, the annual Workshop, co-hosted by the OECD, has evolved every year, and in 2001, similar number of APEC members and countries in transition were represented at the Workshop. In my view, more transition countries have joined the Workshop because Korea's experience regarding chaebol reform and privatisation of State-Owned Enterprises (SOEs) can offer implications for addressing their pending issues. To date, 122 people from 22 countries have joined the Workshop. While most participants consisted of working-level officials at the beginning, high-level officials now actively take part in the Workshop. To improve the quality of the program, we have received feedback from participants through questionnaire since 2000 and reflected the opinion of the recipients in designing the next Workshop program.

This year, we plan to dramatically expand our technical assistance activities. In addition to the Workshop, we plan to launch a Training Program for the working level officials of developing countries and transition economies. We will also make contributions to the OECD Project aimed at helping China enact competition law. We will second our competition law experts to UNCTAD and countries which are interested in competition law enforcement to share with them Korea's experiences and expertise.

The OECD has closely co-operated with us in this respect, having sent instructors to the Workshop. I believe that such co-operation has rendered our technical assistance projects more effective. In the case of resources required, the International Workshop has been held with KFTC's allocated budget, while the Training Program and China support program are funded by Korea International Co-operation Agency (KOICA), a government agency in charge of overseas assistance under the Ministry of Foreign Affairs and Trade (MOFAT). We expect to see a rising demand for technical assistance in the field of competition policy. In response, Korea plan to expand and improve its technical assistance programs. At the same time, efforts will be made to raise the awareness of MOFAT and other relevant government agencies on the need for technical assistance, to secure required resources.

Korea's Suggestions on Desirable Technical Assistance

Now, based on Korea's experiences, I would like to make a few suggestions on technical assistance.

First, we need to identify best practices in technical assistance in the area of competition policy to effectively meet the increasing demand in this field. Technical assistance require resources and as such, it cannot be expanded indefinitely. Therefore, within the resource constraints, it is necessary to offer programs that are most suitable for developing countries, demand.

Second, technical assistance programs should be designed to reflect the stage of economic development and specific economic structure of beneficiary countries. Countries that are in the process of drafting competition laws or at the initial stage of implementation may encounter difficulties due to the lack of knowledge on competition policy. To address this issue, efforts should be made to enhance understanding on competition law and policy. In addition, it is necessary to understand specific issues that these countries are trying to resolve through the competition policy and explore possible solutions together. Examples include curbing of inflation, removal of economic concentration in conglomerates and monopolies, desirable means for privatisation of SOEs, and the integration of geographically divided markets.

Third, there is a need to co-ordinate various assistance activities carried out by each country in a systematic way. While it will be difficult to force an integration of assistance activities, we need to put in place a system for voluntary co-ordination through information sharing on the status of competition policy assistance activities.

Fourth, competition authorities that provide assistance need to make efforts to enhance others' understanding on the need for assistance. In general, technical assistance programs are funded by agencies other than competition authorities. Thus, it is necessary to raise these agencies' awareness on competition policy.

Closing

Ladies and gentlemen!

Competition policy is not an exclusive possession of some countries. It has now become an integral part of economic policy for countries around the globe. This is well-illustrated by the fact that more than 80 countries now have competition legislation in place and more than 30 countries are preparing to draft competition laws. However, we still have a long way to go before competition policy can function properly and the competition culture can take hold in each economy.

Today's session will provide a valuable chance for all to enjoy economic development, the fruits of competition policy, by sharing experience and expertise in competition policy and exploring ways to promote such endeavour. I hope Korea's experience that I have outlined here will help further lively discussions.

Unclassified

CCNM/GF/COMP/WD(2002)31



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

12-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

EXPERIENCES OF AND NEEDS FOR CAPACITY BUILDING AND TECHNICAL ASSISTANCE

-- Session II --

This note is submitted by Mr. Andrey Tsyganov, Deputy-Minister, Russian Ministry for Antimonopoly Policy and Support of Entrepreneurship, for Session II of the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120698

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Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)31
Unclassified

English text only

**“EXPERIENCES OF AND NEEDS FOR CAPACITY BUILDING
AND TECHNICAL ASSISTANCE”**

By
Mr. Andrey TSYGANOV, Deputy-Minister,

**RUSSIAN MINISTRY FOR ANTIMONOPOLY POLICY
AND SUPPORT OF ENTREPRENEURSHIP**

Russian competition policy – the history and actual activities

The antimonopoly authorities exist in the Russian Federation since 1991. They were created just at the beginning of the economic reforms in Russia as one of the first market-promoting institutions. The Law of the Russian Federation “On Competition and Limitation of Monopolistic Activities on the Goods Markets”, which was elaborated with the assistance of OECD, adopted in 1991 and modernized during the following years, was one of the first market oriented laws in Russia. While elaborating this Law, the existing foreign experience in this field was taken into consideration.

Now the antimonopoly policy plays an important role both in the macroeconomic state policy and in the creation of the favorable business environment in Russia. This may be explained by the remarkable influence exerted by the antimonopoly law and policy on the economic growth, competitiveness and those on the whole character of the market relations.

In Russia the main responsibility for developing of effective economic competition belonged firstly to the State Committee on Antimonopoly Policy and Support of Entrepreneurship, and then, since 1999 - to the Ministry for the Antimonopoly Policy and Support of Entrepreneurship (MAP).

In the past ten years the Russian competition authorities have contributed to the high extent to successful economic development in Russia, safeguarding transition from the planned-administrative system to the market and creation of sound competition environment. In these years a big experience has been accumulated by MAP both in the development and in the implementation of the competition law. The competition policy, based on this law, is directed at stopping monopolistic activities, prevention of monopolization and promotion of fair competition on the market. The role of MAP is not limited by the antimonopoly policy – it consists also in promoting procompetitive reforms and economic development. MAP plays nowadays a significant role in the processes of deregulation and restructuring of natural monopolies.

In accordance with the Antimonopoly Law MAP undertakes wide-scale activities on promoting the development of goods markets, competition and entrepreneurship. A big attention is paid to develop “competition advocacy” – activity directed at better understanding of the goals and results of competition policy in the society. In the framework of these activities the antimonopoly authorities take part in elaboration and realisation of federal, regional and inter-regional programs and projects directed at development of competition. This work is undertaken in accordance with the Decrees of the President, Governmental Decrees and on the own initiative of the Ministry.

International cooperation and technical assistance (main partners and programs)

The international cooperation and technical assistance on the part of foreign countries and international organizations has played from the beginning and continues to play an extremely important role in developing an effective competition policy in Russia.

The international cooperation and technical assistance to MAP Russia is provided both on multilateral and bilateral levels (see Annex B). Sometimes it is difficult to specify, what kind of relations do you have- international cooperation or technical assistance: MAP Russia is now not just a “recipient” of technical assistance but brings also its own experience for consideration of international institutions and foreign partners.

On the bilateral level we appreciate very much our co-operation and technical assistance provided to MAP Russia in the competition sphere by Republic Korea, France, Germany, Italy, Finland. The regular consultations organised on bilateral level with competition authorities of Finland, Poland, Bulgaria, Rumania, Lithuania and other countries, are also very useful.

A visit to Russia of the President of the Bundeskartellamt and the Head of French competition authority in June 2001 was very productive. The hold meetings and discussions with Russian authorities and business have been extremely useful for further development of competition policy in Russia, for better mutual understanding and further co-operation. We appreciate very much the assistance of the Bundeskartellamt provided for our participation in International Cartell-conference in Berlin in Mai 2001.

Very productive have been also meetings and consultations with experts from Italian and French competition authorities which took part in the framework of the technical assistance programs.

In most cases bilateral co-operation is undertaken on the basis of the interstate Agreements or bilateral programs on co-operation in the field of competition.

On the multilateral level OECD was the first and remains one of the main consultants and sponsors of the technical assistance for Russia in the field of competition policy.

The cooperation between OECD and MAP Russia in the field of competition is organized on the basis of the annual plans of cooperation between OECD and Russia. The assistance, provided by OECD, includes legal advise on basic antimonopoly legislation and its modernization, seminars for staff of the antimonopoly authorities and judges on competition law enforcement, consultations on methodology of competition policy, high-level meetings on the deregulation of natural monopolies.

The provided possibility to participate regularly in sessions of CLP and roundtables is very useful for Russian specialists, enabling them to exchange opinions with highly qualified specialists and to get comprehensive documentation in competition area. The Recommendations, elaborated in OECD in the last years in the field of competition, provide us with excellent guidelines in the process of development of legislative and methodological work.

And of course, the participation in the recently established OECD Global Forum for Competition provides us with a good possibility to be involved in the intensive international dialog on the most actual issues.

Only in 2001 OECD has organized a number of seminars on antitrust enforcement and reform of natural monopolies. On 21 January 2002 in Moscow a high-level meeting on the results of deregulatory

events took part. The summary materials on results of these measures have been submitted to the Government of the Russian Federation.

With a purpose to improve the enforcement mechanism of the antimonopoly law and to raise the efficiency of the prevention and stopping of the monopolistic activity and unfair competition, the Ministry has prepared in 2001 amendments to the Law "On Competition...". The expertise currently provided by OECD on these amendments is extremely useful for our Ministry.

A number of events in the framework of competition policy and regulatory reform was organized in recent years by OECD together with other partners – APEC and USAID. The events, organized together with APEC, covered important issues of regulatory reform and the main aspects of competition policy.

A number of seminars, organized in different regions of the Russian Federation by OECD and USAID on the key elements of the antimonopoly law and enforcement, were very useful for the staff of MAP enabling it to compare current Russian enforcement practices with approaches of foreign competition authorities.

We are very thankful to OECD and to the Fordham Corporate Law Institute (USA) for the provided possibility to participate in 2001 in the Fordham Annual International Antitrust Conference in New York. The materials of this Conference including decision on creation of International Competition Network, presentation of the position of the Russian Federation on polit-economy of antitrust, participation in the debates on actual problems of competition policy were very useful.

A special place in our international cooperation takes a cooperation with the European Commission based on the Agreement on Partnership and Cooperation which took in force in 1997. Article 53 of this Agreement includes the obligations of the Parties in the area of competition and state aid. In addition to this Agreement, obligations on competition were also included into the Russia-EU Agreement on Trade in steel goods. This Agreement provided for the gradual liberalization of trade in steel products under the condition of creation of a proper competition in Russia.

During the last years the Parties have established a good dialog in this area in the framework of the Russia-EU Committee on Cooperation. In 1998-99 in the framework of TACIS a big program of technical assistance to MAP Russia was successfully realized in the sphere of competition. This program contributed to high extent to developing competition in the Russian Federation by means of effective competition law and policy. The program included such important aspects as legal advice, training in European Commission and European competition authorities, forming Information Center in our Ministry, consultations on main problems of antitrust enforcement etc.

In 2001 the Head of DG "Competition" of the European Commission Mr.A.Schaub visited MAP and its regional office in St.Petersbourg. The high-level discussions on main trends of competition policy in European Union and Russia, including regional aspects (on the example of MAP' St.-Petersbourg Regional Office) were very interesting and useful.

The Russian and European experts continued in 2001 consultations in the framework of Russia-EU Committee on Cooperation both in Brussels and Moscow. A big attention was paid during these meetings to expertise of the draft Law "On State Aid" which was elaborated in MAP Russia.

In 2002 we expect the launching of the new TACIS project "Antimonopoly Policy and State Aid", which will concentrate on the modernization of the antimonopoly legislation and creation of the effective system of state aid control in accordance with the Agreement on Partnership and Cooperation.

UNCTAD belongs to our main traditional partners. The contribution made by this organization into the process of developing competition law and policy in Russia in the past decade is difficult to overestimate.

The Russian antimonopoly authorities put into attention, while elaborating its competition legislation, the provisions of the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices”, which was adopted by the UN General Assembly in 1980 and which remains the sole multilateral document of the universal character in this area.

MAP is an active user of the documentation published by UNCTAD on competition issues. In particular we will highlight the Model Law which contains the main, most typical elements of different national competition laws.

The representatives of our Ministry participate regularly in the UN Review Conferences on RBP and in the meetings of UNCTAD Intergovernmental Group of Experts on Competition Law and Policy. The exchange of opinions among experts from different countries and high quality documents distributed on these meetings make these events very useful for our work.

One of the big advantages of UNCTAD activity is that the Russian language is used there as a working language both in discussions and publications.

UNCTAD is contributing actively to promotion of regional cooperation between competition authorities in the Commonwealth of Independent States (CIS), regularly assisting in organization and participating in sessions of CIS Antimonopoly Council.

One of the very important elements of the technical assistance from UNCTAD is promoting “competition culture” in Russia and other CIS countries by means of seminars, conferences and publications. A very good example is here the recent publication by UNCTAD of the book “Competition Policy: Law, Regulation, Cooperation” (in Russian) prepared by the Russian expert. This book is widely used in CIS countries as a teaching and informative material in competition sphere.

International cooperation among antimonopoly authorities of CIS countries has strengthened in the last years. This cooperation is mainly undertaken on multilateral basis in the framework of the Interstate Council for Antimonopoly Policy in accordance with the Interstate Treaty about Coordinated Antimonopoly Policy in CIS countries, signed in 1993. In 2000 a new version of the Treaty was signed in Moscow.

In 2001 two sessions of the Interstate Council took place – in Moscow and in Astana (Kazakhstan). The next, XY session is planned to be held in Odessa (Ukraine) in April 2002. The sessions are usually organized and financed by the Governments of CIS member-countries with financial and intellectual assistance of UNCTAD.

The cooperation of CIS countries in competition area plays an extremely important role for development of the harmonized competition policy in these countries. On the sessions of the Council there are considered the most actual issues and taken common decisions of recommendatory character, which are then taken in mind by national authorities while developing their competition law and policy.

The strong and weak points of technical assistance

The current technical assistance to Russian antimonopoly authorities generally corresponds to real needs of the Ministry in the realization of the task to develop effective competition policy.

Very effective and positive are programs of technical cooperation which cover different aspects of competition policy, as for example TACIS projects (EU). This enables MAP to organize activities parallel in many areas, such as study of new trends of foreign antitrust experience, discussion of amendments to legislation, joint consideration and discussion of the most important cases etc.

One of the most effective methods of technical assistance is providing ad-hoc operative legal consultations on draft laws, methodologies and other normative documents or proposals. We appreciate very much such operative legal advice and consultations provided by OECD and EU.

Very useful are such methods of technical assistance which are directed at improvement of enforcement practices, especially in regions. A good example here is organization by OECD/USAID practical seminars in Regional offices of MAP to consider and discuss actual case on special articles of the law (cartels, abuse of dominance or mergers). This enables to bring together key specialist in the concrete area of competition law and make high professional comparative discussions. A very strong point of such methods is an advance distribution of the relevant materials among the participant in Russian language.

At the moment, when CIS countries have to the high extent the same tasks in developing their competition policies, it is very productive to use the synergy effect while providing technical assistance to these countries. Such approach is traditionally practiced by UNCTAD, which is sponsoring integration events of CIS antimonopoly authorities contributing thus to harmonization of their competition law and practices in accordance with international principles. As it was mentioned earlier, the usage of the Russian language is also a big advantage of this assistance.

Taking in mind the remaining lack of the literature on competition law and policy in Russian, the antimonopoly authorities in Russia and other CIS countries have a big need in publications in Russian in this area. We appreciate very much the technical assistance in this regard from UNCTAD and EU, but still the requirements are here much more than provided assistance, and we stress again the importance of technical cooperation directed at competition advocacy in transitional countries, which may be realized by means of publications.

This task may be also achieved by organization of different kinds of round tables and press conferences with participation of governmental officials, society and business. The sending of Recommendations to the Government is also very useful for support of the competition policy in the country. These methods are actively used by OECD while providing technical assistance.

I would like to stress also that from the point of view of competition advocacy the visits to the Russian Federation of the leaders of competition authorities such as Mr. Bernard J. Phillips, Mr. Phillippe Brusick, Mr. Alexandr Schaub play an extremely important role.

Now, after ten years of existing competition policy, we have accumulated rather rich experience in this field. We think that we could also share our experience with less developed countries, which are in the process of creation and modernizing their competition policy. The example, when UNCTAD and German Foundation for International Development invited in 2000 specialists from our Ministry to Vietnam to share our experience on the seminar on competition issues, is new, successful and very interesting in this regard.

It is not very convenient for me to speak about the weak points of technical assistance, because we are really very thankful to everybody who provides such assistance which plays a very important role in developing competition policy in Russia. Nevertheless I will mention some difficulties which we meet in the process of technical assistance.

One of the main weak points of the provided technical assistance is a high bureaucracy. Sometimes a very long period is needed from the getting of principal decision to provide the technical assistance till the beginning of the project.

Sometimes in case of technical assistance for short term events a recipient is requested to provide a sponsor with a lot of calculations and data what makes a big additional pressure on the staff taking in mind very limited human and technical resources in antimonopoly structures in transitional countries.

The specificity of the Russian Antimonopoly Ministry as a recipient of foreign technical assistance (as well as other CIS antimonopoly structures) is that very few people still speak foreign languages there. This fact creates high barriers for exchange of information and consultations. In these circumstances we need very much inclusion of translatory works in technical assistance and, especially – further organization of courses for Business English for the staff of our Ministry.

In some cases sponsors' assistance for the participation of MAP specialists in the events held abroad is limited to the accommodation expenses. For Russia and other CIS countries it is a very actual need that technical assistance for these purposes covers also transport expenses. Otherwise, due to limited financial resources, the participation in very important international events becomes impossible. This is evident also here – the most CIS antimonopoly authorities (which exist in all CIS countries) still remain outside international competition dialog.

We would be glad to make more intensive our bilateral contacts and receive replies on our requests for technical assistance from the countries which have rich experience in antitrust policy. I mean first of all the Ministry of Justice and Federal Trade Commission of USA whose theoretical and practical experience in antitrust is very interesting for us.

Actual tasks of international cooperation

In our understanding technical assistance is very important but only one of the various forms of international cooperation. That is why we consider as an actual task the strengthening of other forms of international cooperation. For us it means first of all active participation in elaborating common approaches for competition policy and in cooperation on concrete cases with other antimonopoly authorities.

The competition authorities' interaction by investigations of concrete cases is extremely important from the point of view of harmonised approaches, reduction of administrative barriers and cutting budget expenses. Till now we have a limited practice of such co-operation - only with CIS' competition authorities. Unfortunately with other countries such practice is still not developed, due to the lack of corresponding inter-state agreements and rather limited volumes of transnational operations. But the significance of such interaction between competition authorities seems to grow, and the regulation of the procedure of such interaction shall be specified in the bilateral agreements.

Very important is also another form of international co-operation – it is the common elaboration of new approaches to competition policy' methods. The economic realities are raising quite new problems before competition authorities, and it is impossible to solve them along. In this case we are speaking not

only about transmission of experience from one group of countries to others – the new economic situations require new decisions, which are possible to elaborate only through common efforts, taking into account specificity of different groups of countries.

So, for example, to our opinion, the problem of determination of relevant market in the conditions of global economy and internet-technologies is very important. The reduction of trade-and economic transborder barriers, the growth of international production are leading to higher integrity of national economics. While determining a relevant geographical market it is not more possible to orient on national borders – the markets became regional or international characters. The harmonised approach of competition authorities is here needed.

The rapid development of internet-technologies is also raising new problems before competition authorities, which may be solved also through international co-operation. This was stressed in particular on the X Cartellconference in Berlin in May 2001.

Another import issue, which needs common solution, is the elaboration of new criterion for considering effects of economic concentration. Shall this or another transaction be prohibited or allowed? In the conditions of growing markets and keen international competition it is difficult to find exact reply to this question.

Another new form of international co-operation may be organisation of international dialog between state authorities and business community.

Competition law is now one of the most difficult branches of law, and the lack of transparency may constitute a significant administrative barrier for business. In the circumstances when transnational economic relations are raising, this problem may not be regarded as a pure national: being too complicated and not homogenous, competition regulations may become a hamper of international economic integration.

In these conditions the competition authorities shall initiate a permanent international dialog with business, seeking maximum transparency of competition regulation, its simplification and harmonisation.

The current forms of international support are very useful but not sufficient for effective regulation of competition in international scale. The effective regulation is to our opinion possible only on the basis of multilateral agreed mechanisms. The issue of elaboration of the international Agreement on competition in the WTO is widely discussed for the long time and may become reality in the future.

We fully support the creation and activities of the Global Forum for Competition as well as International Competition Network and may presume that international co-operation between competition authorities from different countries will become more effective in the framework of these initiatives and may provide a good basis for the future international competition rules in WTO.

In the last time there are arising new arguments towards creation of such rules. Even when national competition legislation is very effective, it covers only acts and actions of companies and sometimes – regulatory bodies, but it does not touch the international activity of governments, which may also have anti-competitive character. The competition authorities are often not involved in the process of such decisions –making and thus may not influence such processes. Sometimes competition authorities are even not informed about them.

In December 2001 the negotiations on Multilateral Steel Agreement have started in the framework of OECD on the initiative of the United States. The goal of such agreement shall be limitation

of production and introducing international delivery' quotas. As we know, mostly trade authorities were participating in these negotiations – competition authorities have been not involved. The fact, that the proclaimed goal of this agreement is the stabilisation of the corresponding market, may not hide the anticompetitive nature of such agreement which constitute in fact international legal cartel. But if cartels limiting production and introducing delivery' quotas are prohibited by competition legislation in main countries, why such cartels shall be allowed on the intergovernmental level? We are convinced that this problem shall be discussed only with the participation of competition authorities and suggest that next OECD negotiations shall be undertaken jointly by Trade and Competition structures of OECD. We think that this problem shall be in the center of international co-operation of competition authorities and suggest to consider it on the Global Forum.

Unclassified

CCNM/GF/COMP/WD(2002)30



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

13-Feb-2002

English - Or. French

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION BY UEMOA

-- Session II --

This contribution is submitted by Mr. Jean-Luc SENOU (Commission of the West African Economic and Monetary Union -WAEMU) for Session II of the Global Forum on Competiiton, to be held on 14-15 February 2002.

JT00120773

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CCNM/GF/COMP/WD(2002)30
Unclassified

English - Or. French

DEVELOPMENT OF COMMUNITY COMPETITION LAW WITHIN WAEMU: THE ROLE OF TECHNICAL ASSISTANCE

By

Jean-Luc SENOU
Director of Trade and Competition,
WAEMU Commission

Ladies and Gentlemen,

Permit me, first of all, to thank the staff of the OECD, especially Mrs H el ene CHADZYNSKA of the OECD Competition law and policy division, for kindly inviting the Commission of the West African Economic and Monetary Union (WAEMU) to take part in the work of this Forum.

Ladies and Gentlemen,

As you know, the West African Economic and Monetary Union is made up of eight countries¹ which, after using a common currency, the CFA franc, for several decades, decided to strengthen their monetary cooperation by adding an economic component.

In this respect, the Union set itself four main objectives designed to achieve a wider aim, namely, to strengthen competitiveness in economic and financial activities in the member States, in the framework of an open, competitive market and a rationalised and harmonised legal environment.

One of these four specific objectives is the creation of a common market based on free movement of people, goods, services, capital and the right of residence, as well as a common external tariff (CET) and a common trade policy.

In bringing about this common market, WAEMU embarked on a series of reforms in May 1996, the date of the Conference of Heads of State and Government, which led, in particular, to the conversion of the area into a customs union on 1 January 2000.

To this end, the member States of the Union made enormous efforts, within the three and a half years from July 1996 to December 1999, to eliminate all tariff barriers on intra-community trade.

This internal liberalisation was accompanied by a major effort in favour of external liberalisation since, in relation to the rest of the world, the introduction of the WAEMU/CET led to external tariff reductions which brought the overall level of entry duties from a peak of 65.5%² to 22% and the average rate of taxation from 13.6% to 11.2%.

The regional market ushered in by the customs union and common trade policy allows businesses to produce on a large scale, introduce modern production methods and reduce their costs, to the benefit of consumers. These changes, which should result in a reallocation of resources within the community area,

¹ WAEMU consists of the following eight countries: Benin, Burkina Faso, C te d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

² Guinea-Bissau had a top tariff rate of 105% at 1 January 1998.

revolutionise the terms of supply and end the traditional customs and behaviour which led to the cloistering of national markets.

We have, of course, seen cases of companies that did not properly prepare themselves for the new competitive environment engaging in practices designed to maintain their profit levels, damaging both the competitiveness of community production and the welfare of consumers. Likewise, national legislations allow domestic companies to continue to escape competition from products originating in other countries of the Union. It was thus to ensure that the common market worked properly that article 76 of the Treaty provided for the institution of common competition rules applicable to public and private enterprises, and to government subsidies.

In this connection, the Commission has been engaged since 1999 in work preparatory to the adoption by the Council of Ministers of Regulations and Directives in application of the main treaty provisions on competition.

Support in the form of technical cooperation, particularly from the European Union, has played an important part in this task. That is why I thought it would be useful, in the light of the terms of reference which Mrs CHADZYNSKA sent me, to share with you the unique experience of the WAEMU Commission in developing community competition law within the Union.

I have planned my speech around two points:

- Analysis of technical assistance in preparing community competition law within WAEMU,
- WAEMU's current and future technical assistance needs.

ANALYSIS OF TECHNICAL ASSISTANCE IN PREPARING COMMUNITY COMPETITION RULES WITHIN WAEMU

The preparation of community competition rules within WAEMU was a particularly rewarding experience, both for the staff of the WAEMU Commission and the administrations of the member States of the Union.

The process comprised a number of phases:

- drawing up by the Commission of the terms of reference of the study on preparation of community law;
- execution of the study, with European Union financing, by a consortium³ of consultancy firms;
- determination by the Commission of the options to be retained in finalising the preliminary draft legislation;
- discussion with experts from member States;

³ The consortium consisted of a Belgian law firm, responsible for the legal aspects and an American consultancy firm, which dealt with the economic aspects.

- consultation with the WAEMU Court of Justice on the interpretation of articles 88, 89 and 90 of the Treaty on competition rules;
- involvement of other partners: World Bank, UNCTAD, etc.;
- adoption by the Council of Ministers.

This study, carried out with the support of the European Union, based on terms of reference prepared by the WAEMU Commission, resulted, in particular, in:

- an assessment of the state of existing provisions on control of competition in member States;
- preliminary draft community competition legislation, based on the strengths and weaknesses of national provisions, the competition rules laid down in articles 88 to 90 of the WAEMU Treaty, and considering the experiences of the European Union, Mercosur and the results of the work undertaken under the auspices of UNCTAD by the intergovernmental group of experts on competition law and policy.

It should be stressed at the outset that, among the several dozen technical assistance projects financed by the European Union since 1996, the study on the development of community competition law is regarded as one of the most satisfactory to the WAEMU Commission. Two main reasons have been put forward for this: the quality of the terms of reference drawn up by the Commission and the high level of professionalism of the consultancy firms involved.

The greatest benefit of this particular form of technical assistance was the on-going dialogue between the WAEMU Commission and the consultancy firm in choosing the options most pertinent in terms of the WAEMU Treaty, the European Union's experience and the constraints in the environment specific to the WAEMU member States.

This approach certainly strengthened the capacity of WAEMU Commission staff and experts from member States subsequently involved in the process of validating the results of the study.

However, the technical assistance provided nevertheless proved to have certain limitations:

- Firstly, selecting a consultancy firm was not easy because of the lack of private firms in the WAEMU member States with the right profile. This explains the choice of firms from the North which had to work with many time constraints. Consequently, some aspects of the actual application of national laws could not be covered in the study. Such information, of course, would have facilitated the compromises concerning the division of responsibilities between the Commission and the member States. This crucial issue had to be decided later by the WAEMU Court of Justice in its opinion no. 03/2000/CJ/WAEMU.
- The second limitation concerns the choice of the European competition regulation model, without properly evaluating the resources required to implement it. It should be noted that this weakness is also found in some member States which enjoyed considerable technical support from UNCTAD or French Cooperation in formulating their laws, but which ran into difficulties due to the mismatch between the volume of rules adopted and the domestic capacity to enforce them.

This last remark in no way detracts from the great value of the seminars organised by UNCTAD in the subregion, nor its technical advice on draft legislation submitted to it by our States. Likewise, it should

be stressed that the study tours financed by French Cooperation for African staff to the Directorate General of Competition and the French *Conseil de la Concurrence* are generally well regarded.

However, adjustments need to be made in connection with this technical assistance, which would be more effective if there was more emphasis on the prerequisites for implementation. These concern both personnel and equipment available to competition authorities.

In the case of personnel, the period of training should be longer, more detailed and practical. It is also essential to stabilise this personnel whose mobility from one department to another is a major factor in the loss of capacity to control competition. This is primarily a matter for States, which must ensure that people who are trained have a stable career, but donors are also concerned to a lesser extent.

With respect to equipment acquired from both external and domestic resources, it needs to be ensured that it is actually used by national competition authorities.

In concluding this first part, I think that the development of competition in African countries with the help of technical assistance can only be done effectively through well constructed projects, implemented over a period of at least three years.

These projects should clearly indicate all aspects of technical assistance, in particular:

- the number of beneficiaries of training programmes, their profiles and conditions for their future employment;
- temporary and transitional financing of the start-up of competition authorities over the period;
- arrangements for takeover by States, which should clearly identify in their budgets the amounts necessary for the operation of these authorities once the projects come to an end.

WAEMU'S TECHNICAL ASSISTANCE NEEDS

With the adoption of community competition rules, envisaged in March 2002, the WAEMU Commission will have to deal with several pressing issues, some concerning the formulation of provisions in application of the basic rules, others concerning the implementation of community legislation.

With this in mind, the Commission drew up an action plan covering three areas:

- the institutional and technical framework,
- sectoral studies,
- information, education and communication.

The institutional and technical framework

The co-operation necessary between the Commission and competition authorities in member States requires this issue to be addressed under a global programme with the following elements:

- finalising the standardisation of competition rules and procedures, especially monitoring of institutional reforms expected of member States;
- strengthening the human and logistical capacities of community and national competition authorities.

In the context of strengthening capacities, the emphasis should be on training consisting of modules on the principles and practices of competition, and relevant technical documentation. This training comprises seminars for staff, training of trainers and study tours to help familiarise beneficiaries with conducting investigations, producing reports and other administrative tasks to be carried out in a competition authority.

Apart from training, which must be continuous, community and national competition authorities must be provided with adequate operating resources. *The Commission's objective is to establish an interactive cooperation network between itself and national competition authorities.*

In addition, the draft economic partnership agreement between WAEMU and the European Union requires the legislation of both to be harmonised, especially in respect of concentrations. The current work in the WTO and the negotiations with the WTO under the Doha Development Round⁴ should form a good working basis.

Studies in priority sectors

To ensure effective implementation of community competition law, WAEMU must make strategic choices, examining as a priority those sectors which have a positive impact on the fight against poverty.

Priority sectors are those which cut across the market to a considerable extent and which perceptibly influence other sectors. Those which have specific features which might justify the adoption of exemptions for particular categories should also be included.

A good knowledge of these sectors and clearly identifying the trade practices that hold sway can facilitate the work of the Union's competition authorities. Financed by the EDF, the WAEMU Commission has programmed studies in the land transport sector, as well as banking and financial institutions in 2002. These two sectors, together with energy and telecommunications, are considered to be areas where the Commission's action will be rapidly visible, with a tangible impact on the cost of factors of production.

As can be seen, the value of these studies on priority sectors lies in the fact that they allow competition policy to be harmonised with other sectoral policies and social programmes such as combating poverty and good governance.

Information, education and communication (IEC)

Information plays a key role in the application of competition rules, a feature of which is that they involve government authorities, public or private enterprises and civil society. Indeed, to be sure that

⁴ It should be recalled that in the common negotiating positions decided by the WAEMU Council of Ministers for Seattle and Doha, the member States of the Union were in favour of opening negotiations on trade and competition.

market supervision and regulation mechanisms are understood by everyone, regular communication between them is essential.

The nature of competition rules, the application of which assumes compromises between not always convergent interests, requires adequate explanations to be given to all concerned, both business and consumers. Successful implementation of competition rules is dependent on this advocacy relating to the issues and objectives.

It may take the form of seminars or the use of audio-visual aids and periodical publications which help to create a framework of interactive communication through which, it is to be hoped, a culture of competition can be developed.

These activities, whose essential objective is to develop a culture of competition in the WAEMU area, require the mobilisation of technical and financial resources. The Union has high expectations of technical assistance in making these available.

CONCLUSION

The reforms undertaken in creating the WAEMU common market demand various adjustments from member States, affecting both their budgets and the competitiveness of their businesses. The customs union has exerted increased competitive pressure on enterprises in the Union in two ways, which has increased due both to companies in other member States of the Union and goods imported from the rest of the world.

To support the customs union and ensure that the WAEMU common market worked properly, it proved essential to equip the Union with good community legislation to implement a competition policy which must:

- guarantee the unity of the common market by preventing companies carving it up among themselves by means of illegal practices;
- avoid the monopolisation of some markets by preventing large companies from abusing their dominant position to impose conditions or absorb competitors;
- prevent governments from rigging the rules of the game through aid to private sector companies or discrimination in favour of public enterprises;
- encourage economic efficiency by creating a climate propitious to innovation and technical progress.

This legislation, which is expected to be adopted in March 2002, involves a new area, where the Treaty has given the WAEMU Commission its own decision-making power, including sanctions against private and public enterprises and States. It will certainly help to transform the WAEMU economic area into a "community of law" and increase transparency for the foreign investor.

The draft legislation envisages a mechanism for cooperation between the Commission and national competition authorities in member States, with a view to uniform application of community competition law throughout the territory of the Union.

In consequence, the Union's priority needs in terms of technical assistance and capacity building concern:

- establishment of an interactive and effective cooperation network between the Commission and national competition authorities;
- financing of studies on priority sectors to ensure that community competition policy has a tangible impact on combating poverty and reduction of the cost of factors of production;
- development of a culture of competition in the WAEMU area through the financing of integrated information, education and communication programmes (IEC).

Ladies and Gentlemen,

I would like to conclude my remarks by reiterating my concerns about the importance of issues of implementation. Competition law as practised in African countries has shown that they attach little weight to sanctions, even if laid down in the legislation.

However, the importance of sanctions should not be overlooked, since an economically justified law may be completely derailed and have perverse effects if guarantees of independence and procedure, which are an indispensable adjunct of competition law, do not exist.

It is for this reason that those who drew up the WAEMU Treaty gave the Commission a central role, giving it the widest powers, subject to control by the Court of Justice, to enforce community competition law. It is important for technical cooperation to provide support in strengthening the capacity of this supranational organ. So as to assure the system of these guarantees of independence and procedure.

Thank you for your attention.

International Co-operation in Merger and Cartel Cases

Unclassified

CCNM/GF/COMP(2002)6



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

05-Feb-2002

English - Or. English

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP(2002)6
Unclassified

OECD Global Forum on Competition

INTERNATIONAL CO-OPERATION IN MERGERS

SUMMARY OF RESPONSES TO QUESTIONNAIRE TO INVITEES AND SUGGESTED ISSUES FOR DISCUSSION

-- Note by the Secretariat, Session IV --

This document is submitted FOR DISCUSSION during Session IV of the Global Forum on Competition, to be held on 14-15 February 2002.

English - Or. English

JT00120372

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

**INTERNATIONAL CO-OPERATION IN MERGERS
SUMMARY OF RESPONSES TO QUESTIONNAIRE TO INVITEES
AND SUGGESTED ISSUES FOR DISCUSSION**

1. This note will summarise the responses to a questionnaire issued to invitee and observer jurisdictions on international co-operation in merger and cartel investigations, and will then offer a brief analysis of the responses relating to mergers and suggestions for discussion of this topic. The questionnaire is attached as an annex to this note.

The questionnaire

2. The questionnaire was in three parts. The first part requested

- copies of all international co-operation agreements to which the respondent jurisdiction was a party; and
- a description of the respondent's laws or regulations that relate or affect the competition agency's ability to exchange information or to co-operate with another competition agency.

3. The second part contained the same questions that were asked of Member countries in a separate questionnaire on co-operation in cartel investigations. Those responses are described in the note for item V. of the agenda for the Global Forum, CCNM/GF/COMP(2002)3. The third part of the questionnaire related to international co-operation in merger investigations. It requested the following information, for the period 1 January 2000 to the present:

- the identification of each merger reviewed by the respondent that was, to the knowledge of the respondent, also reviewed by the competition agency of another country;
- information about each merger investigation or proceeding in which the responding competition agency communicated with a foreign competition agency, including: the identity of the merging parties and the foreign agency with which there was communication, a description of the communications, whether the merging parties agreed to a waiver permitting the exchange of confidential information, and the effect of the communications on the respondent's investigation or proceeding;
- identification and description of any merger investigation or proceeding in which the responding agency sought the either the assistance of a foreign competition agency or a confidentiality waiver from the parties; and
- identification of merger investigations or proceedings in which co-operation would have been beneficial but it was not undertaken because the agency knew that it was not possible.

Description of responses

4. Twelve observer and invitee jurisdictions responded to the questionnaire: Brazil, Bulgaria, Chile, Estonia, Israel, Kenya, Indonesia, Lithuania, Romania, Russian Federation, Chinese Taipei, and Tunisia.

International co-operation agreements

5. Several observer and invitee jurisdictions are parties to one or more international co-operation agreements. Brazil has agreements with the Russian Federation and the United States. Bulgaria has signed co-operation agreements with Macedonia, Romania and the Russian Federation. Chile recently entered into an agreement with Canada. Israel and the United States are parties to an agreement. Lithuania is a party to bilateral agreements with Estonia, Latvia, Poland and the Ukraine. Romania reported that it has co-operation agreements with Belarus, Bulgaria, the Czech Republic, Georgia and the Russian Federation. The Russian Federation reported that it has bilateral agreements with Finland, Korea, Italy, France, Slovak Republic, Romania, the Czech Republic and Hungary. It also noted that within the framework of the Commonwealth of Independent States there exists a treaty on international co-operation in competition enforcement. Chinese Taipei has agreements with Australia and New Zealand.

Laws that affect ability to exchange information or co-operate

6. Not all jurisdictions responded to this question in the same way. Many did not discuss how their laws that restrict the use of confidential information affect their ability to co-operate with foreign competition agencies. Thus, Brazil stated that “Brazilian antitrust law does not impose any significant restriction on our ability to co-operate.” Bulgaria listed its Europe Agreement with the European Communities and implementing rules. Chile stated that its agency, the FNE, has the power to sign agreements and make other commitments with foreign agencies regarding international co-operation. The FNE can designate specific information as confidential, but in general its investigations are public and the parties have full access to them unless they are declared reserved, in which case certain notifications and authorisations are required.

7. Israel reported that its competition agency, the IAA, is considered to have “broad authority to exchange information and co-operate with foreign competition authorities to the extent deemed necessary for carrying out the IAA’s statutory tasks.” It can enter into bilateral co-operation agreements like that with the United States. Interestingly, Israel’s International Legal Assistance Law provides for extensive co-operation with other states and organisations in both civil and criminal matters, and does not require the foreign entity to be a party to a specific co-operation treaty. The areas of co-operation that are permitted include service of documents, collection of evidence, searches and seizures, investigative activities, transfer of information, verification of documents, confiscation of property and other legal actions.

8. Kenya’s competition agency cannot itself enter into a co-operation agreement. Only the Permanent Secretary of the Ministry of Finance and Planning can do so. Chinese Taipei provided excerpts from several of its laws – the Criminal Code, the Business Secrets Law, the Administrative Procedure Law and the Fair Trade Law – which together impose strict prohibitions against unauthorised disclosure of business or professional secrets or other confidential information relating to administrative or public affairs.

Identification of mergers also reviewed by another competition agency

9. Not all jurisdictions could respond to this question with specific answers, as competition agencies are not always aware that a given transaction may be subject to review elsewhere. Of the responding countries, seven reported that they had reviewed one or more mergers within the relevant period (2000 and 2001) that to their knowledge were also reviewed by other jurisdictions: Brazil, Bulgaria, Chile, Israel, Lithuania, Chinese Taipei, and Tunisia. Some jurisdictions reported several such mergers, notably Bulgaria (9), Israel (20) and Chinese Taipei (9). Lithuania reported five such transactions, Chile three and Tunisia two. Included among the mergers listed in these responses were some well-known, multi-jurisdictional mergers such as GE/Honeywell, Citicorp/Traveller Group, Chevron/Texaco, Exxon/Mobil, Glaxo Wellcome/Smith Kline Beecham, Nestle/Ralston Purina, Coca-Cola/Cadbury Schweppes, Swissair/Sabena, El Fi SA/Moulinex, Dow Chemical/Union Carbide and Philip Morris/Nabisco.

Co-operation in merger investigations

10. Five jurisdictions reported that they had engaged in communications with another competition agency about a merger, but none identified more than two such transactions. Brazil replied generally to the question, stating that it had had useful exchanges with other countries regarding market definition, competitive impact and remedies. Israel reported that it had engaged in informal communications with both the U.S. and the EC regarding the Dow Chemical/Union Carbide transaction, which all three jurisdictions were investigating. The exchanges were of a general nature, between staff employees, relating to policy considerations and potential competitive effects. The exchanges proved useful to the IAA.

11. Lithuania described co-operation in two cases. One involved the Carlsberg/Orkla beer merger, which affected several markets, including Denmark, Finland, Norway, Sweden and others, in addition to Lithuania. The Lithuanian Competition Council had communications with the Swedish competition authority, in which general information regarding market definition and remedy was exchanged. Confidentiality restrictions limited the exchanges, however. The second case involved the SEB/FSB bank merger in Sweden, which was reviewed by DGCOMP. The merger, which was ultimately abandoned by the parties, had potential anticompetitive effects in Lithuania and Estonia, as well as Sweden. The Lithuanian Competition Council consulted with both Sweden and DGCOMP in the period before the merger was abandoned.

12. Romania described an interesting case involving a merger of two Romanian cement companies, which were owned, respectively, by a Hungarian and a German company. The Romanian Competition Council engaged in discussions with the Hungarian Office for the Protection of Competition regarding the cement market in Hungary, which proved useful to the Romanian agency in its case, in which it imposed certain conditions upon the acquiring company. The Russian Federation provided the only description of attempted co-operation that was denied. The Rostov Territorial Office of the Ministry for Antimonopoly Policy was reviewing a merger in the metals sector, and sought information from the Donetsk Regional Office of the Ukrainian Antimonopoly Committee regarding holdings of the stock in one of the parties by Ukrainian interests. Ukraine denied the request, stating that the requested information was confidential under the laws of that country and could not be disclosed.

Co-operation not attempted

13. Competition authorities were asked to describe instances in which a merger investigation would have benefited from international co-operation but it was not attempted because the authority knew that it

would not be granted, and to assess the significance to the investigation of the absence of the co-operation. No jurisdiction responded specifically to this question.

Analysis and suggested topics for discussion

14. It would be useful first to review the lessons learned from the roundtable discussion on international co-operation in merger cases held in Working Party No. 3 on 29 May 2001. That roundtable disclosed that among Member jurisdictions there is a growing practice of exchanging information and informal discussions among national competition agencies on mergers that are under review in more than one jurisdiction. (A compilation of the documents resulting from that roundtable discussion was provided for the October meeting of the Global Forum. See CCNM/GF/COMP/WD(2001)1). Competition officials are also more frequently consulting one another on general issues that arise in the context of merger investigations. For example, an agency conducting an investigation of a merger in a given sector may informally ask its counterpart in another jurisdiction about its experiences in investigations and cases in that sector.

15. The discussion disclosed that the most productive way to co-operate in merger investigations is on a frequent, informal basis, including direct communications between the case handlers as well as between their supervisors. This method of co-operation requires that a level of trust and confidence exist between the co-operating agencies. It takes time and experience to build such a relationship. Thus, co-operation is not universal among Member jurisdictions. It tends to occur most frequently between jurisdictions that have certain things in common: geographic proximity (but this is not always true), a strong trading relationship, a history of having been affected by the same mergers, and an existing competition co-operation agreement. Examples of ongoing, strong co-operative relationships are: Canada – U.S., European Commission – U.S., Nordic countries, Australia – New Zealand, and among various EU Member States.

16. Meaningful co-operation in merger investigations is often dependent upon another factor: the willingness of the merging parties to grant waivers of confidentiality protections, permitting enforcement officials to exchange confidential information and to engage in discussions and analysis of such information. Parties tend to grant waivers permitting disclosure only to jurisdictions that have a reputation for sound and fair merger control and for protection of confidential information. Thus, jurisdictions new to merger control that have not acquired such a reputation are less likely to benefit from co-operation with other competition agencies.

17. The questionnaire responses from observers and invitees bear out the proposition that jurisdictions world-wide are at different places in their development of competition policy. Some, of course, do not yet have a competition law; in others a competition law was only recently enacted. Some jurisdictions are heavily involved in merger control; others, especially those in which the competition law is new, do little or none of it. The responses show that virtually all observer and invitee jurisdictions that are active in competition policy have entered into co-operation agreements with one or more other jurisdictions. Indeed, within this set of jurisdictions the number of such agreements is comparable to that which exists among Member jurisdictions. Like Member jurisdictions, observers and invitees tend to enter into agreements with jurisdictions that are geographically close and/or that are close trading partners. The responses relating to confidentiality protections were not sufficient to permit generalisations about such laws in observer and invitee countries. Assuming that most countries do have adequate protections for such information, it seems that the framework is in place for enhanced international co-operation involving both Members and those observers/invitees whose competition policy is relatively more developed.

18. The questionnaire responses indicate, however, that observers and invitees tend to engage in international co-operation in merger investigations and cases infrequently. A majority of the respondents reported that they had reviewed one or more mergers that to their knowledge were also reviewed by other jurisdictions. A few countries listed several such transactions that occurred within the relevant two year period, but others listed only a few. Only five countries, however, reported that they had engaged in any communications with another competition agency about a merger, and none identified more than two such transactions.

19. The questionnaire responses were not helpful on the issue of whether the invitee jurisdictions would have liked to have engaged in more co-operation. Unquestionably, in some cases co-operation was not considered necessary or desirable. In others, however, observers and invitees might have welcomed it, had it been possible. It would be useful, therefore, to discuss the extent to which jurisdictions – Members, observers and invitees – could benefit from enhanced co-operation with one another in merger investigations, and the means for bringing that co-operation about.

- What types of co-operation in merger investigations and cases have been most useful for observer and invitee jurisdictions. Have they, like their counterparts in Member jurisdictions, developed ongoing, co-operative relationships with specific jurisdictions, and if so, what are the characteristics of these relationships?
- Can observers and invitees benefit from more frequent co-operation with other jurisdictions in merger investigations, and can Members profit from enhanced co-operation with their less experienced counterparts? If so, what are the obstacles to doing so, and how can they be overcome?
- If co-operation between less experienced and more experienced jurisdictions at the most intensive level is not possible, for example by exchanging confidential information (as permitted by the parties through waivers) or by discussing deliberative process information, what levels of co-operation are practical and useful?
- How can the parties to a merger be encouraged to grant waivers for disclosure to smaller, less experienced jurisdictions if such a waiver would be useful?

ANNEX
QUESTIONNAIRE TO INVITEES ON INTERNATIONAL CO-OPERATION
IN CARTEL AND MERGER INVESTIGATIONS

This questionnaire covers the period from 1 January 2000 to the present.

If you are unable to provide all of the information requested, either because it would impose too great a burden or because of confidentiality constraints, please provide as much as reasonably possible.

1. Provide a copy of each formal co-operation agreement between your country or your competition agency and a foreign country or competition agency relating to competition investigations or cases.
2. Describe your country's laws or regulations that relate to or affect your agency's ability to exchange information or co-operate with a foreign competition agency.

Cartels

3. If your agency issued one or more formal requests to a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

1. the number of such requests;
2. the requested country or countries;
3. descriptions of the requests, such as the type of information or assistance required;
4. the number of requests that were granted, and for those that were not, the reason(s) given, if any, by the requested country for the refusal; and
5. for the requests that were granted, your assessment of the usefulness and importance of the information or assistance received, and for those that were not granted, your assessment of the impact of the refusal on the investigation or case.

4. If your agency received one or more formal requests from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

- a. the number of such requests;
- b. the requesting country or countries;
- c. descriptions of the requests, such as the type of information or assistance required;
- d. the number of requests that were granted, and for those that were not, the reason(s) for the refusal.

5. Please describe any other instances of co-operation with a foreign competition agency in a hard core cartel investigation or case not described above, such as meetings, telephone or email communications, including, if possible, the co-operating country or countries, the nature of the co-operation and the importance or significance of the co-operation to your agency.

6. State the number of instances in which a hard core cartel investigation or case could have benefited from information or co-operation from a foreign competition agency but your agency did not request such assistance because you knew that it could not or would not be granted. Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement effort.

Mergers

7. Identify each merger that your agency reviewed that, to your knowledge, was also reviewed by the competition agency of another country.

8. For each investigation or proceeding involving a merger in which there was communication between your competition agency and the competition agency of another country during the course of the investigation or proceeding, please state or describe:

- a. the identity of the merging parties;
- b. the foreign competition agency or agencies with whom there was communication;
- c. the nature of the communications, including the means of communication, the parties to the communications, the subject matter of the communications and the type of information exchanged, if any;
- d. whether the merging parties agreed to a waiver of confidentiality restraints, permitting the exchange of information directly between your agency and a foreign agency, and if there was such a waiver, its terms and the type of information that was exchanged;
- e. the effect of the communications on your investigation or proceeding.

9. Describe any instances in a merger case or investigation

- a. in which your agency sought the assistance of a foreign competition agency but it was denied;
- b. in which your agency sought a waiver of confidentiality restraint from one or more of the merging parties but it was denied.

10. Describe any investigation or proceeding involving a merger that would have benefited from co-operation with a foreign competition agency but your agency did not pursue such co-operation because you knew that it would not be possible. Describe the type of co-operation that would have been useful and the impact of its unavailability on your enforcement effort.

Unclassified

CCNM/GF/COMP(2002)1



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

30-Jan-2002

English - Or. English

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

CCNM/GF/COMP(2002)1
Unclassified

OECD Global Forum on Competition

INFORMATION SHARING IN CARTEL INVESTIGATIONS

-- Note by the Secretariat -- (Session IV)

This note is submitted as the basis FOR DISCUSSION during Session IV of the Global Forum on Competition, to be held on 14 and 15 February 2002.

JT00120136

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English - Or. English

INFORMATION SHARING IN CARTEL INVESTIGATIONS

Introduction

1. In the meeting of Working Party No. 3 on 13 February 2001 there was an extended discussion with representatives of BIAC on standards for protecting the confidentiality of information exchanged among national competition agencies in cartel investigations. As background, the Secretariat had circulated a note that annexed both an October 2000 BIAC paper and relevant excerpts from the 2000 Hard Core Cartel Report. DAF/CLP/WP3(2001)2. During the meeting, BIAC presented some "talking points" that did not necessarily reflect a consensus position but served as a basis of discussion. While there was no disagreement about some of the safeguards BIAC proposed, there were doubts or disagreement about others. It was agreed that the discussion would continue in a later meeting.

2. This subject is highly relevant for the Global Forum. As markets expand beyond national borders, more cartels are international, and many recent cartels have been truly global. Without enhanced international co-operation, which includes the exchange of confidential information in appropriate circumstances, it will be increasingly difficult to successfully prosecute this conduct. Both the cartels' harm and the need for co-operation extend to the many non-Member economies that will attend the February Forum meeting. Moreover, BIAC will again be present, as will other non-government organisations whose views can contribute to discussion of this important topic.

3. As background for the 15 February Forum discussion, the Secretariat note for last year's discussion will be placed on the Forum website (and OLIS). After a very brief summary of the current situations in which information is banned or authorised, this note will set forth some general issues that are suggested for discussion at the February Forum meeting. The presentation will refer to BIAC's position during the 2001 meeting where doing so helps to clarify the issues.

4. The current rules on information sharing in cartel cases may be summarised as follows.

- Two sets of laws protect "confidential information," as that term is used in this note.
- General confidentiality laws protect generally against disclosure or misuse of business secrets and other such confidential business information.
- In addition, laws governing government agencies' treatment of company information generally regulate the handling of both (a) confidential business information, such as business secrets, and (b) any non-public information acquired in an investigation, even if it is not inherently confidential. In general, these laws prevent the improper disclosure or use of such information, but they sometimes authorise sharing such information with other domestic agencies that are also required to protect it.
- With very few exceptions, laws establishing the investigation powers of competition authorities do not provide for the use of compulsory process to gather information on behalf of foreign authorities.
- Competition authorities are normally permitted, but not required by law, to limit access to internal information such as the nature or status of their investigations, their investigation theories, or their preliminary conclusions. This note does not refer to such "internal agency information" as confidential information.

- Authorisation for foreign co-operation in information sharing or information gathering:
 - Some general international treaties provide for sharing confidential information. For example, letters rogatory have been used to obtain confidential information in competition cases. Pursuant to MLAT agreements, confidential information may be shared in criminal competition cases, and competition authorities can use compulsory process on behalf of a foreign authority. Member States share confidential information with the EC, and confidential information collected by the EC can in some situations be shared with Member States.
 - An increasing number of competition-specific bilateral treaties and laws also provide for sharing confidential information -- e.g., between Australia and New Zealand, between Australia and the U.S., and by France, the Netherlands, and some Nordic countries.
 - Authorisation for the sharing of confidential information has been much more common in the securities, tax, customs, and criminal areas than for competition law.
- Safeguards:
 - Where authorisation exists for such co-operation with foreign authorities, it contains requirements that the requested authority take steps aimed at ensuring that the confidentiality of any shared information will be protected. In general, the authority must determine that the requesting economy provides substantially equivalent protection for confidential information. Also, the authority may need to find that sharing the information would be consistent with the national interest. None of the current authorising provisions requires prior or after-the-fact notice to the firm whose information is to be shared.

Requirements relating to the nature of the case

5. In the international context, it is generally agreed that a requested authority should be authorised to share information only when the requesting authority is conducting an investigation under its competition law. If a requested authority considers that the alleged conduct would not be anticompetitive even if it did take place, it can turn down the request and would be required to do so if it considers the investigation so flawed that co-operation would not be in its national interest. BIAC has taken this a step further, suggesting that a requested authority should never be authorised to share confidential information if the conduct specified in the request would not constitute a violation of its own national law.

In what kinds of cases should competition authorities be authorised to share information? Assuming that a competition authority determines that the alleged conduct would be anticompetitive if proved and that sharing information would serve its national interest, should it be forbidden to co-operate merely because for one reason or another the alleged conduct would not violate its national law?

The need for "downstream protection" of confidential information

6. It is also generally agreed that before a requested authority furnishes confidential information to a requesting authority, it should assure itself that the latter has adequate means of protecting the information. This is referred to as assuring adequate "downstream protection" for the information. Somewhat differing standards have been mentioned, with some referring to protections in the requesting economy that are "comparable" or "substantially equivalent" to those in the requested economy, while BIAC has proposed that "at least equivalent" protection should be the standard. This distinction may not be significant. Literally, "at least equivalent" is not a higher standard than "equivalent." Moreover, whether a law refers to protections that are "substantially" or are "at least" equivalent, it seems unlikely that a law would be interpreted to mean that insubstantial differences in protection would prevent information sharing.

What should be the applicable standard in determining whether there are adequate protections for confidentiality in the requesting economy? If a requested authority has made a general determination that the laws and policies of a requesting economy are equivalent, to what extent should it need to revisit that issue in the context of reviewing a specific case?

Limitations on use of information in other matters -- other protections beyond equivalency

7. The Australia/US agreement provides that in the absence of the requested authority's specific consent, the requesting competition authority may use the shared information only in the investigation that is specified in the request.¹ BIAC, however, has taken the position that even with the consent of the requested authority, the requesting authority should not be able to use the information in any other way or matter. Thus the requesting authority would need to file another formal request if it wanted to, for example, (a) use the information in any other matter or (b) make the information available to another agency that is investigating the same cartel under a different law.

In general, what restrictions should be placed on the requesting authority's use of confidential information? To what extent, and in what circumstances, should those restrictions be removed if the requested authority consents to such use? Are there other protections BIAC is seeking that go beyond equivalency?

Notice to the providing party

8. One of BIAC's most strongly held positions is that the requested authority should give notice of a request for confidential information from a foreign agency to the provider of that information prior to the exchange. The provider should have the opportunity to oppose or discuss modifying the exchange and, if necessary, to appeal a decision to provide the information to an independent authority, such as a court. BIAC would not require prior notice if it "would jeopardise an investigation into a naked hard core cartel," but in that event there should be a retroactive right of review and appeal.

¹ In general, the Australia/U.S. agreement limits the use of the information to the investigation or proceeding specified in the request, but provides that the information can be used in other competition and non-competition cases upon the prior written consent of the requested economy, and in the case of a non-competition case, upon a showing by the requesting economy that such use is "essential to a significant law enforcement objective."

9. In the discussion of this topic in last February's meeting some delegates voiced disagreement with that position. It was said that there none of the existing laws and treaties that authorise information sharing have such a requirement, that there is no evidence of misuse or unauthorised disclosure of confidential information by competition agencies that would justify such a restrictive rule, and that such a notice requirement, even after the fact, could seriously interfere with the investigatory process.

10. There seems to be broader agreement that if confidential information is disclosed in an unauthorised manner by the requesting authority, it should notify the requested competition authority of the breach, and that competition authority should notify the providing party.²

Under what circumstances, if any, should the requested competition agency be required to notify the provider of confidential information that it may share or has shared the information with a foreign authority? Of an unauthorised breach of confidentiality in the receiving economy?

Requirement for a co-operation agreement

11. The United States law governing information sharing by its competition authorities requires that they first enter into a co-operation agreement with the foreign authority setting out the conditions under which they will share confidential information, as well as the applicable procedures. The law does not require that the agreement constitute an international treaty, though in at least some circumstances a treaty may be needed in order for the parties to meet their statutory obligation to protect downstream information. BIAC has argued that binding international treaties should always be required on the ground that they are needed to ensure adequate downstream protection and other safeguards.

12. The recently enacted laws of a few Members -- Denmark, France, Iceland, the Netherlands and Norway -- require finding of equivalent downstream protections and generally contain standards similar to those in U.S. law, but do not require that their national authorities incorporate their findings and the applicable procedures into formal co-operation agreements. In some instances, information has been shared under a law shortly after the law went into effect, and some of that co-operation might not have been possible had formal agreements been required. Denmark, Iceland and Norway have entered into a formal agreement regarding such exchanges, even though no agreement is required.

What are the benefits and costs of entering into co-operation agreements that set forth the details on when a competition authority will share confidential information? Where no such agreements exist, what steps do or should authorities take to ensure that a requesting authority's national laws provide equivalent protection and to communicate their conclusions to the public? Has the absence of such agreements caused any problems? How much information sharing has taken place that would have been impossible if a formal agreement were a requirement? Where there are agreements that were not required by law, what motivated the decision to negotiate agreements, and what benefits have they provided?

Downstream disclosure of information

13. It may be necessary to disclose confidential information in the course of a competition proceeding, for example in a hearing or trial of the matter. National laws differ in their requirements in this

² The U.S. International Antitrust Enforcement Assistance Act contains such a requirement.

area. In many countries the respondent or defendant is entitled to access to the relevant evidence that is in the hands of the competition agency, including confidential information. There are requirements for public trials or hearings in many countries, in which the evidence could be disclosed. The laws in most countries permit the withholding of confidential information from the public record in appropriate circumstances, but at the time a decision to share information is made the requested authority cannot know exactly what information may be disclosed at trial. Moreover, third parties with interests in a competition case, including third party complainants in agency proceedings or third parties seeking compensatory damages, may claim the right to evidence from the agency's file, including confidential evidence. Again, at the time it makes a decision whether or not to share confidential information, the requested agency cannot know with certainty whether such a third party claim may be upheld.

14. The Australia/US agreement provides that the requesting authority may disclose information that it receives to a defendant or respondent in a proceeding if the law of the requesting authority requires it. The agreement also requires the requesting authority to oppose, to the extent possible consistent with its laws, any application by a third party for disclosure of confidential information. BIAC has opposed disclosure outside the competition case for which it was provided, but it is unclear what position it takes on what limits, if any, should apply to disclosure within those case proceedings.

What limits should be placed on disclosure of confidential information in the context of the competition case or proceeding in which it is used? How can requested authorities assure themselves that adequate protections of confidentiality in these circumstances exist in the laws of requesting authority?

Preservation of legal privileges

15. BIAC holds the view that all legal privileges that apply to information in the hands of the requested authority should apply equally to information received by the requesting authority. This includes, in BIAC's view, privileges both for the benefit of the requested competition agency (e.g., investigatory or work product privilege) and of the providing party (e.g., attorney-client). It is not clear why private parties have an interest in protecting privileges held by the disclosing agency, or that the agency could not fully protect itself in this regard. As for privileges protecting private parties, BIAC might elaborate on how, to the extent such privileges continue to apply to information in the hands of investigators of the requested authority, the usual downstream confidentiality protections would not be adequate.

To what extent should legal privileges apply downstream to information that is exchanged?

Downstream leniency applications

16. In last year's meeting BIAC asserted that information exchanges should have no effect on leniency applications in the requesting economy. That is, the eligibility of a providing party for leniency in the requesting economy should not be affected by the fact that the requesting economy has received confidential information about the cartel or about that party from the requested economy. This view generated some controversy, and BIAC was questioned closely by some delegates who clearly did not agree with it. If eligibility for leniency turns on whether an agency already has information about a cartel, it would not seem to matter, on its face, where that information came from. In any event, it should be noted that most, if not all, leniency programmes provide for strict confidentiality of both the identity of and the information provided by a leniency applicant. It is not likely, therefore, that a requesting economy would receive any information that directly results from a leniency application in the requested economy.

What effect, if any, should the fact of an exchange of confidential information between competition agencies have on a leniency application in the requesting economy?

Internal agency information, including "work product" and "tips"

17. As noted above, competition authorities are normally permitted, but not required bylaw, to limit access to internal information such as the nature or status of their investigations, their investigation theories, or their preliminary conclusions. Additional restrictions may apply in criminal cases, but hard core cartels are not criminal offences in most economies. It appears that, as is known to occur in merger cases, some competition authorities discuss this kind of information with foreign authorities on a fairly frequent basis.

18. On the other hand, if a competition authority has obtained evidence of illegal conduct in a foreign jurisdiction from information it is not authorised to share with its foreign counterpart, some laws may be interpreted as preventing the authority from even giving its counterpart a "tip" suggesting that it investigate the industry in question. This may be the case even if the tip can be conveyed in such away that no actual confidential information is conveyed.

In what circumstances do competition authorities share internal agency information with foreign authorities in cartel cases? What kind of information is shared? How useful are such exchanges? How common is it for authorities to be banned from conveying "tips" that do not contain any confidential information? Have competition authorities been precluded from conveying such tips?

Unclassified

CCNM/GF/COMP(2002)2



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

24-Jan-2002

English - Or. English

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

INFORMATION SHARING IN CARTEL CASES -- SUGGESTED ISSUES FOR DISCUSSION AND BACKGROUND MATERIAL

-- Note by the Secretariat -- (under Session IV B)

This note was initially submitted to WP3 at its February 2001 meeting under the code DAFPE/CLP/WP3(2001)2 and is now submitted to the Global Forum as background for session IVB.

JT00119870

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP(2002)2
Unclassified

English - Or. English

**ROUNDTABLE ON INFORMATION SHARING IN CARTEL CASES --
SUGGESTED ISSUES FOR DISCUSSION AND BACKGROUND MATERIAL**

1. The CLP's 2000 Hard Core Cartel Report stated that: "To make possible the co-operation that would truly make anti-cartel enforcement more effective, the most important task of the Committee will be to assist interested competition authorities and Member countries to find appropriate ways to increase opportunities for information sharing in appropriate circumstances." The Working Party's February 2001 meeting will therefore contain a roundtable with BIAC to discuss the concerns of the business community relating to such information sharing.

2. This is the Working Party's first such roundtable with BIAC, but it will not be the first time in the last few years that the Working Party has benefited from its and other business groups' views on this topic. While the Cartel Recommendation was being prepared and during its June 1999 roundtable on information sharing, the Working Party considered, among other things, the ICC's 1996 policy statement. BIAC then made an oral presentation of its views at the Working Party's October 1999 meeting. The results of this prior work are reflected in the 2000 Hard Core Cartel Report, and the purpose of this roundtable is to build upon that work and obtain a more precise understanding of business' specific concerns and suggestions for resolving them. (Other relevant Working Party work on information sharing is noted in paragraphs 12-13 below.)

3. The purpose of this note is two-fold: to identify the issues whose discussion may yield the greatest benefits and to provide background material that facilitates that discussion by reminding everyone where matters currently stand. The most important background materials, which are included as annexes to this note, are (a) excerpts of the Cartel Report's discussion of relevant information sharing issues, and (b) the paper BIAC/ICC delivered at the October meeting containing questions and comments. The suggested issues for discussion are built upon those documents. The Secretariat's 1995 summary of Members' confidentiality restrictions is attached as Annex C. Although the summary is dated, it should be accurate for most countries, because in response to a more recent survey there were few indications of changes since 1995.

General considerations

4. Although there have been differences between the business community and competition authorities on some information sharing issues, there are also important areas of agreement. Most fundamentally, as noted in the Cartel Report, the CLP has always considered it fundamental that commercially sensitive information should be protected from improper disclosure or use. Thus, there is no need for BIAC to defend the basic proposition that countries should have laws protecting confidential business information or information that is gathered during an investigation. The CLP has said that it sees no reason why information cannot be both shared and protected, and BIAC is invited to focus on the safeguards it views as necessary to protect against improper disclosure or use of shared information.

5. To explore these issues, the Secretariat recommends that the roundtable pursue BIAC's October 1999 suggestion that the most productive approach is to identify ways to provide reasonable assurance that any shared information will receive comparable protection "downstream" by the receiving country. As noted in paragraph 65 of the Cartel Report, BIAC liked this approach

because legal protections are visible and able to be compared. In contrast, a system dependent on competition authorities' assessment of the confidentiality of the requested information would be more subjective, and even an international definition of "business confidential information" would be meaningless in this context.

Thus, BIAC is invited to be as specific as possible in identifying what it considers necessary to provide such assurance. If Member country X were considering a law that would authorise a competition authority to share information with a foreign competition authority if a particular process is followed and results in a finding that certain statutorily defined criteria are met, what processes and criteria would BIAC members consider necessary?

6. The vast majority of the issues raised in this note relate specifically to the downstream protection approach or to matters that are relevant to considering this or any other approach. The note closes by addressing two other topics. One set of questions asks whether a downstream protection approach could usefully be supplemented by an approach that permits different treatment for some categories of information. It is true that the principal benefit of downstream protection is its elimination of the need to make judgements about the confidentiality of materials, but those benefits do come with a price because they require that various non-confidential materials must be treated as confidential. Thus, even if a country wants only a small amount of non-confidential information – e.g., who attended a particular meeting – both countries must go through the same formalities as if business secrets were involved. This result may be justified, but BIAC and delegates may want to whether some categories of non-public, non-confidential could be defined with sufficient specificity and clarity to permit them to be shared using a more streamlined process.

7. Moreover, in one respect the roundtable should extend beyond questions relating to the protection of confidential information. Although business concerns in this area tend to be articulated in terms of the risk of the improper disclosure or use of confidential information, some suggested safeguards and concerns appear to reflect other business interests. Examples include the safeguard on immunity mentioned in Annex B, Question 3 and the concerns about convergence raised in the ICC's 1996 statement. In order to help the Working Party understand and assess the safeguards BIAC considers necessary, there should be some discussion of the extent to which these safeguards relate to the protection of legitimate business interests other than the proper handling of confidential information.

8. Two other preliminary comments may be appropriate. First, BIAC has previously made the point that articulating a position on information sharing in matters involving hard core cartels ("cartels") is complicated to some extent by uncertainty about what kind of horizontal agreements might be characterised as cartels by some Member and non-Member countries. BIAC is invited to expand on this point if it wishes but to focus, as it has in the past, on the protections it considers necessary for cases falling into in the traditional categories of "naked" agreements identified on the Cartel Recommendation.

9. Second, it is well known that the business community considers notice of some kind to be an important element of the necessary protection. This topic is very important, subject to some disagreement, and should of course be discussed during the roundtable. At the same time, this topic has received considerable attention, and it is important that this aspect of the discussion not prevent or obscure discussion of those safeguards that may have received less attention and on which it may be easier to reach consensus.

Comparable downstream protection

10. The Cartel Report (at paragraph 74) describes “comparable downstream protection” as follows:

Under this approach, a country authorises the sharing of confidential information with a foreign agency on the basis of a general finding that the requesting agency’s country provides comparable protections to any shared information and a case-by-case finding that adequate protections exist for the particular information being sought. A binding mutual assistance agreement or treaty may be required to assure the adequacy of the protections. Australia and the U.S. both took such an approach, and BIAC has suggested that this approach may be preferable from a business point of view because it does not depend on fine judgements made in characterising the confidentiality of information.

11. In considering this approach, as suggested by BIAC, discussion may be facilitated by reference to how downstream protection is provided in the Australia/US mutual assistance agreement and the legislative framework on which it was built. The legislative framework of the US law may be easier to consider, because unlike the Australian law it deals exclusively with competition cases.

Issues for discussion

Level of downstream protection

- *What level of downstream protection does BIAC consider necessary?*
- Is “comparable downstream protection” the standard, or is the standard “at least equivalent”(see Annex B, p.3). Does the Australia/US agreement and its implementing legislation provide the required level of protection? If not, what more does BIAC consider necessary?

The need for notice

- *What is BIAC’s current position on the need for notice – prior or after-the-fact?*
- In explaining its position, BIAC is invited to address (i) any changes since the ICC 1996 position statement and (ii) paragraph 68 of the Cartel Report, which contains two statements on the notice issue.
 - First, the Cartel Report states that the ICC’s 1996 recommendation -- prior notice unless it would jeopardise an investigation – “has limited application to investigations of hard core cartels, because secrecy is generally essential in such matters and would often be jeopardised by notice. And it should be recognised that even if the existence and general nature of an investigation may be known to the company in question, notice may well jeopardise the investigation.²⁵”
 - Second, it states that “no notice is required under MLATs, and it is unclear why there should be additional procedural requirements merely because a hard core cartel is investigated as a non criminal violation. Nor is notice required in connection with the sharing of confidential information between the EC and a Member State.²⁶”
- BIAC is also invited to address the lack of any notice provision in the Australia/US agreement or its implementing legislation.

Information gathering – no notice issue

- *What is BIAC's position with respect to the possibility of legislation that merely authorises information gathering on behalf of a foreign authority?*
- Paragraph 72 of the Cartel Report suggests that if a country is concerned that authorising the sharing of file information might seriously harm its ability to gather information, it might enact legislation that merely authorises gathering information on behalf of a foreign authority, using compulsory process if necessary, with disclosure of the purpose for which it is gathering the information. Discussion of the risks and benefits of such an approach is invited.

Appeal/redress

- *What appeal and/or redress provisions does BIAC consider necessary?*
- Again, it is hoped that BIAC's commentary will consider the implications of the lack of such provisions in MLATs, the Treaty of Rome, and the legislation underlying the Australia/US agreement.

The content of notice

- *What is BIAC's current position on the required content of notice? (See Annex B, Question 2)*
- In explaining its position, BIAC is invited to focus on the specific types of information that could *only* be in a notice, because they relate to a particular "case" of information sharing, as opposed to the types of information (e.g., the confidentiality laws of the requesting country) that would not vary on a case-by-case basis and would or could be publicly available.
- Do the Australia/US agreement and process provide sufficient information about the two countries' confidentiality laws?
- What is BIAC's position on the need for notice with respect to:

The recipient of the information

(See Annex B, Question 4: "All people entitled to have access to or request access to the information exchanged should be explicitly stated.")

Uses of the information.

(See Annex B, Question 5)

- BIAC is invited to expand on its comment regarding:
 - companies' need to know "what would happen in the case of conflicting legislation and to what extent and under what circumstances the home authority will condition or refuse co-operation"; and
 - privileges for solicitor/client communications and workproduct. (Annex B, Question 3)

Other safeguards

- *What other safeguards does BIAC consider necessary?*
- Are the safeguards in the Australia/US agreement and related legislation adequate? (Safeguards in the agreement are summarised in n.21 of Annex A, and one of the safeguards in the legislation is mentioned in n.22.)
- In particular, is it BIAC's position that a country should be able to share information with another country only if the receiving country identifies in advance all the people who will have access to it and/or requires a "chain of custody" record? (Annex B, Question 4) If so, please explain the need for such safeguards. Do any countries provide such safeguards for the information they collect or receive directly from business firms?
- When a firm provides information to an OECD country's competition authority, the firm receives protections against *improper* disclosure or use of its information. However, under the country's laws, the authority's *proper* use of most information it receives may result in its being (i) publicly disclosed in a trial or (ii) lawfully used by the authority or some other part of the government for a purpose other than that for which it was provided.
 - Assuming that a requesting country has been found by the requested country to provide comparable downstream protection, does BIAC consider it necessary to restrict a receiving country's ability to disclose the information in accordance with its own laws? To what extent?
 - Is it BIAC's position that a country should be able to share information only if the receiving country is able to use the information only for purposes of investigating the cartel, or are more limited restrictions on use adequate? (Annex B, Question 5) Does BIAC regard the more limited safeguards in the Australia/US agreement as inadequate?¹ If so, please explain the need for such a safeguard. Do any countries provide this safeguard for information they collect or receive directly from business firms?
- Does BIAC consider the Australia/US agreement and legislation adequate with respect to the return of information (Annex B, Question 6)?

Risk of improper disclosure or use

12. The Working Party shares BIAC's belief in the importance of protecting firms' confidential information. In considering possible safeguards in this (or any other) area, it is important to take into account both the nature and the extent of the risk. In this regard, it has been observed that competition authorities cannot expect business concerns to be removed merely by general statements about their good record in protecting confidential information. Competition authorities accept that some risk exists and that adequate safeguards are needed. At the same time, as is discussed in paragraphs 57 and 62 of the Cartel

¹ Under that agreement, as described in more detail in n.21 of Annex A, shared information may be used only for law enforcement purposes. With respect to antitrust enforcement, it may be used only in the investigation and for the purpose specified in the request, except with prior written consent by the country that provided the information. The information may be used to enforce other laws only if it is "essential to a significant law enforcement objective" and the country that shared the information has provided prior written consent.

Report, many competition authorities have shared confidential information on many occasions and do appear to have a good record in protecting such information. Despite the large amounts of confidential information that various Member countries can share in particular circumstances (usually as a result of treaties), all competition authorities are subject to general bans on sharing any confidential information and any non-public, non-confidential information they acquire in investigations. In this connection, delegates are reminded that their responses to an extensive questionnaire -- issued in 1994 -- were analysed [DAFFE/CLP/WP3(94)4/REV1], summarised [DAFFE/CLP/WP3(95)2/REV1], and discussed [DAFFE/CLP/WP3(95)4].

13. The Working Party has on two occasions attempted to assess the risk of improper disclosure or use by assessing the experience of information sharing among enforcement authorities in other areas of law. The Secretariat prepared a note on this topic in 1993 [DAFFE/CLP/WP3(93)3]. More recently, the Working Party held a substantial roundtable discussion in February 1997 on these issues. That roundtable included the presentation of a comprehensive report, prepared for (then) DGIV, concerning information exchanges in securities enforcement, criminal law, customs enforcement, tax law, and competition law. It also included presentations by French, UK, and US officials concerning the information exchange programs in their fields [See DAFFE/CLP/WP3/M(97)1/ADD1]. The Cartel Report notes in paragraphs 61-62 that safeguards appear to have worked well in these other fields, but that the record of protecting information in these fields is sometimes claimed not to be meaningful when considering competition law on the grounds that the information in competition matters is "more confidential" than that in other areas because it is prospective -- i.e., relates to firms' plans for the future. The Report concludes that those claims are flawed for reasons that are noted below.

Nature of the risk

- *What risks are of major concern to BIAC?*
- BIAC is invited to discuss the extent to which its concerns relate to the possibility that business information may inadvertently be publicly disclosed or be seen by other business interests? To what extent is the concern about deliberate "leaks"? Are there other significant concerns regarding the possibility of improper disclosure? About disclosure in accordance with the receiving country's laws?
- BIAC is invited to discuss the extent to which its concerns relate to the possibility that business information, although not disclosed to the public or other business interests, may nonetheless be improperly used.
- Is it BIAC's position that the success of information sharing regimes in other fields is not an indication that a similar regime would likely be successful in competition law enforcement because competition cases involve prospective information that is more confidential than that which is shared in other fields?
 - In explaining its position, BIAC is invited to comment on the Cartel Report's statement that there is no reason to believe that information in competition cases is more confidential than that in the other fields, because
 - Prospective information is not necessarily more confidential than historical information; indeed, business secrets, as opposed to business plans, are historical.

- Whether prospective or not, the information shared in the securities, tax, and criminal areas is sometimes highly confidential and may often be as or more confidential than that involved in competition cases.
- Most requests for information sharing in hard core cartel cases are likely to relate to establishing the fact of an agreement; such information is historical and not confidential.

Extent of the risk

- *How significant is the risk of improper disclosure or use?*
- In explaining its position BIAC is invited to address paragraphs 57 and 62 in the Cartel Report, which point out that considerable confidential information has been and is being shared *in competition cases* (i) within the EU, (ii) pursuant to MLATs, and (iii) through use of letters rogatory.
- BIAC is also invited to address the implications of another aspect of paragraph 62 – the statement that in merger cases, firms are increasingly willing to waive the confidentiality protections that prevent information sharing.
- BIAC is invited to comment on the Cartel Report’s observation (paragraph 62) that “[E]ven if the information in competition matters were more confidential than securities or tax information, the excellent record of these other programs in preventing improper disclosure or use would be a powerful indication that international information sharing programs are able to protect against improper disclosure or use.”

Utility of distinguishing confidential from other information

14. As noted above, the advantage of an approach that focuses on the comparability of the protection provided “downstream” by a receiving country is that it avoids judgements about the confidentiality of materials, which among other things facilitates the gathering of information. Certainly, making such judgements imposes costs, but there are also costs to treating non-confidential information as if it were confidential.

Confidential and non-confidential information

- *Does BIAC believe that there are some categories of non-public but non-confidential information that can be defined with enough certainty that information in those categories could be shared using a more streamlined process than may be necessary for confidential information?*
- *How would BIAC define the categories of information that are commercially sensitive enough to warrant being treated as confidential for international information sharing purposes? (Annex B, Question 1) What if any categories of information does BIAC consider to deserve protection for reasons other than commercial sensitivity?*

Business interests other than protecting confidential information

Other legitimate business interests

- *What legitimate interests other than protecting commercially sensitive information does the business community consider threatened by information sharing?*
- BIAC is invited to elaborate its views on the immunity issue (Annex B, Question 3).

Applicable safeguards

- *Which of the safeguards BIAC suggests are related in whole or in part to a legitimate interest other than protecting commercially sensitive information?*

Annex A

**NEW INITIATIVES, OLD PROBLEMS:
A REPORT ON IMPLEMENTING THE HARD CORE CARTEL RECOMMENDATION
AND IMPROVING CO-OPERATION**

[...]

13. To make possible the co-operation that would truly make anti-cartel enforcement more effective, the most important task of the Committee will be to assist interested competition authorities and Member countries to find appropriate ways to increase opportunities for information sharing in appropriate circumstances. The Committee considers it very important that confidential business information – including business secrets and other commercially sensitive information -- should be protected from improper disclosure or use, but most countries impose restrictions that go well beyond providing such protection.

- Most competition agencies are prevented from sharing any non-public, non-confidential information they acquire in a law enforcement investigation.
- Through vagueness or overbreadth, existing laws intended to protect confidential business information often restrict access to information that is not a business secret or commercially sensitive.
- When information obtained in an investigation indicates that illegal conduct is occurring in another country, some competition authorities are barred from providing any warning to their foreign counterparts, even through a “tip” that would not reveal the bases of the tip or any other potentially confidential information.
- With respect to actual confidential business information, most competition agencies are denied the authority, granted to a few competition agencies and to many agencies in other fields, to gather and exchange such information in appropriate circumstances.

14. In its 1994 Convergence Report, the CLP stated that:

“If Member countries wish to facilitate action against [hard core cartels], they would need to focus on developing for competition officials the legal mechanisms for co-operation in international cartel investigations and especially for the sharing of information among national offices.”

The Recommendation provides an affirmative answer to the question asked in 1994; Member countries do want to facilitate anti-cartel action. However, since most competition agencies still cannot share even non-confidential investigatory information, the need to focus on legal mechanisms for information sharing still exists and indeed is becoming more pressing. The Committee’s statements in prior work concerning the benefits of such co-operation have consistently been accompanied by acknowledgements of the need to protect confidential information, and the Committee has never found any reason why confidential information could not be protected and shared. Nor has it ever found any reason to ban the sharing of information that is not confidential but is given confidentiality protection simply because it was obtained in a law enforcement investigation. In the few situations -- but many instances -- in which confidential information has been shared in competition cases, the record is one of improved enforcement and proper protection of confidential information. Moreover, in at least the securities, tax, customs, and criminal areas, it is common for enforcement authorities to be able to use compulsory process on behalf of foreign

authorities and to share highly confidential information, and there too the record indicates that confidential information can be both protected and shared.

[...]

Obstacles to Effective Co-operation

44. Competition authorities' responses to a questionnaire by the Secretariat and delegates present during a May 1999 roundtable identified the major obstacle to effective co-operation as being the legal restrictions on sharing information with, and gathering information on behalf of, foreign competition authorities. . . .

45. . . .

- Today, confidentiality restrictions continue in almost all circumstances to stand as an absolute bar to providing foreign competition authorities (1) any of the non-public, non confidential information that is acquired during an investigation, or (2) any confidential business information. The laws of almost all Members prohibit the sharing of almost all of the information described in the 1995 Recommendation, except for information in the public domain. Moreover, with exceptions involving sharing between Australia and New Zealand, the EC and its Member States, and Australia and the US, no competition authorities are authorised to use compulsory process on behalf of foreign authorities except in criminal cases.

[...]

General Observations Regarding Benefits and Costs

56. Since requests to provide confidential information can be turned down if they impose undue direct costs or raise other policy concerns, the main potential costs of authorising information sharing are (a) the risk that some confidential information will be disclosed or used improperly, and (b) the risk that having such authority will make it more difficult for a competition authority to obtain the information it needs for its needs in its purely domestic cases. After a brief discussion of some preliminary matters, each of these risks will be discussed.

Past Record of Sharing Confidential Information in Competition Cases

57. Sharing confidential information in competition cases is currently authorised only in very limited situations, but there have been many instances of sharing such information in those situations. A number of general observations are possible.

- EC Member States are not only permitted but required in various circumstances to share confidential information with the EC, and confidential information collected by the EC can in some situations be shared with Member States. Competition enforcement in the EU has been built on this system, and its benefits are obvious and substantial. The EC and its Member States have in fact protected the confidentiality of the shared information, and the fact that this information sharing exposes enterprises to additional charges and penalties does not appear to be an impediment to any authority's ability to gather information.
- Pursuant to MLAT agreements, confidential information may be shared in criminal competition cases, and although the process for use of letters rogatory has some disadvantages, it does provide a means of obtaining confidential information in some cases. Most MLAT-based co-operation has been between Canada and the US, and the US reports that it has successfully obtained confidential

information through MLATs or letters rogatory from close to a dozen different countries. Again, the benefits to effective enforcement against hard core cartels are well known. Moreover, the Committee is not aware of either significant problems in protecting the confidentiality of the shared information, or harm to the authorities' ability to gather information.

- Confidential information may also be shared between Australia and New Zealand, and between Australia and the U.S. There has been little co-operation, in part because the agreement needed to permit it between Australia and the US was signed only recently.

[...]

The Risk of Improper Disclosure or Use of Confidential Information

60. It is perhaps axiomatic that sharing confidential information to some extent increases the possibility that it may be improperly disclosed or used. However, in competition law enforcement and in other fields, the sharing of confidential information has been authorised and practised subject to many safeguards. In general, a country's most important safeguard is the right to decline assistance on a case-by-case basis, which can be exercised whenever there appear to be unacceptable risks and can also be used to impose any conditions on assistance that are considered necessary to ensure adequate protection. This ability to condition assistance provides not only protection but flexibility, which could be particularly useful for a competition authority that is just beginning an information-sharing regime. For example, although information sharing is most valuable when the information can be used as evidence, a requested authority could -- at the outset of its program or in a particular case -- decide that information may be read but not copied, or may not be used as evidence in a criminal (or any) case. Moreover, enabling legislation and/or implementing agreements providing for such co-operation also typically contain additional safeguards, such as definitions of "covered offences" and mandatory descriptions of "permitted uses." The recent Australia/US mutual assistance agreement, for example, contains a variety of these kinds of safeguards, which have been used for many years by many Member countries to protect confidential information.²¹

61. As noted above, the applicable safeguards appear to have worked very well in the field of competition law enforcement. Moreover, they appear to have worked well in the securities, tax, customs, and criminal areas, where sharing confidential information is commonplace. In the securities area, where the program for sharing confidential securities information began in 1982 as a means to prevent conflict over "extraterritoriality," the program has not only promoted effective enforcement while protecting confidential information, but contributed to substantive harmonisation of securities law.

62. It is sometimes suggested that the record of proper protection of confidential information in the past is not meaningful to assessing the risks of improper disclosure or use of confidential information in competition investigations. The usual basis for this argument is that confidential information in competition matters is "more confidential" than that in other areas because it is prospective -- i.e., relates to firms' plans for the future. The argument is flawed in several important respects.

- First, the argument ignores the fact that a great deal of confidential information has been shared in the past in competition cases. Such sharing is routine between the EC and its member States, common under MLATs in criminal cases, and sometimes viable through letters rogatory. There is no evidence that there have been significant problems in protecting confidential information in those situations.
- Second, even if the information in competition matters were more confidential than securities or tax information, the excellent record of these other programs in preventing improper

disclosure or use would be a powerful indication that international information sharing programs are able to protect against improper disclosure or use.

- Third, prospective information is in general more likely than historical information to be confidential, but there is no logical or other basis for the assertion that information in competition cases is more confidential than that in the other fields -- either because it is prospective or for any other reason.
 - Prospective information is not necessarily more confidential than historical information; indeed, business secrets, as opposed to business plans, are historical.
 - Whether prospective or not, the information shared in the securities, tax, and criminal areas is sometimes highly confidential and may often be as or more confidential than that involved in competition cases.
 - Most requests for information sharing in hard core cartel cases are likely to relate to establishing the fact of an agreement; such information is historical and not confidential.

Moreover, delegates to the Committee have pointed out that in merger cases, which typically involve information that is much more confidential than that in hard core cartel cases, businesses increasingly make voluntary waivers of confidentiality protections in order to permit competition authorities to cooperate. This practice leads some to believe that confidentiality concerns about information sharing in cartel cases are often exaggerated, since businesses typically are viewed as having an economic incentive to expedite merger investigations but to slow down cartel investigations.

63. In terms of available protections, the only comparative information of which the Committee is aware relates to the protections available from the US securities agency and US competition authorities. The International Antitrust Enforcement Assistance Act clearly permits the US competition agencies to provide much greater assurances of protection than the securities agency can provide.²²

The Need and the Means to Protect Confidential Information

64. Despite the Committee's disagreement with some arguments concerning the risks of improper disclosure or use and about the relative confidentiality of information in competition cases, the Committee has consistently agreed with the business community concerning the importance of protecting confidential information in any information sharing system. Moreover, a great deal of the business community agrees that confidential information can be protected and shared, and as discussed below it appears that most of the protections desired by the business community are present in the laws of, and the agreement between, Australia and the US.

65. In the Committee's consultation with BIAC, the main thrust of the BIAC presentation was the central importance of providing comparable "downstream protection" for confidential information. In other words, any requested information -- regardless of how confidential it may or may not be -- should be shared only if there is adequate assurance that it will be subject to comparable protection in the requesting country. The BIAC representative considered this approach -- essentially, the approach taken by Australia and the U.S. -- to be the most promising approach because legal protections are visible and able to be compared. In contrast, a system dependent on competition authorities' assessment of the confidentiality of the requested information would be more subjective, and even an international definition of "business confidential information" would be meaningless in this context. . . .

[...]

67. The consultation also contained some discussion of the International Chamber of Commerce's March 1996 statement on sharing confidential information, as well as its May 1999 statement on sharing confidential information in merger cases. The ICC's 1996 statement noted that its European members felt that convergence in competition law was not sufficient for enforcement co-operation to include sharing confidential information, whereas other members, especially in North America, did not regard further convergence as a precondition for such co-operation. The statement went on to express the unanimous view of its members that any legislation providing for such co-operation should contain specified procedural safeguards, and as noted above most of these safeguards appear to exist in the Australian and U.S. systems.

68. The ICC's principal recommendation was that confidential information be shared only after notice to its submitter unless doing so would jeopardise an investigation.²⁴ This recommendation has limited application to investigations of hard core cartels, because secrecy is generally essential in such matters and would often be jeopardised by notice. And it should be recognised that even if the existence and general nature of an investigation may be known to the company in question, notice may well jeopardise the investigation.²⁵ Moreover, no notice is required under MLATs, and it is unclear why there should be additional procedural requirements merely because a hard core cartel is investigated as a non criminal violation. Nor is notice required in connection with the sharing of confidential information between the EC and a Member State.²⁶

The Risk that Authority to Share Information May Make it More Difficult to Collect Information

69. One issue that has concerned some Member countries is whether and to what extent being granted the authority to share confidential information would make it more difficult for them to collect information. The source of concern, in general, are warnings by business groups that their members are less likely to co-operate with investigations if the information they provide may be shared with other law enforcement authorities. The Committee considers this risk to be less substantial than some may have thought, particularly if one focuses the potential effects of authorising a competition agency to share information in hard core cartel cases.

70. Canada's experience is particularly relevant on this issue. Canada has always relied to a great extent on voluntary submissions of information in its competition investigations. Because of its MLAT with the US, Canada already can share confidential information with the jurisdiction that (a) has the severest sanctions and (b) is important to many Canadian businesses. In these circumstances, Canada's continuing ability to obtain information on a voluntary basis is an indication, with respect to Canada and more generally, that authorising information-sharing in hard core cartel cases may not hinder competition authorities' ability to collect information. It is also noteworthy that neither Australia nor the U.S. has reported any increased difficulty in obtaining information as a result of their mutual assistance legislation and agreement, and this has not been a significant issue either within the EC or in the international information programs that exist in other fields. Finally, the Nordic competition authorities have clearly concluded that any risks are outweighed by the benefits.

71. To some degree, assessing the likely impact of confidential information sharing on authorities' ability to collect information is a function of the risk, discussed above, that sharing information to a wider group inevitably increases the risk of improper disclosure or use to some extent. Since the available evidence suggests that in practice confidential information has been able to be shared and protected, the Committee believes that if Member countries incorporate confidentiality protections into an information sharing program, the theoretical increase in the risk of improper disclosure or use is generally unlikely to have a substantial impact on businesses' co-operation with competition authorities.

72. Moreover, the Committee notes that there has been a great deal of convergence with respect to hard core cartels, some of which is reflected in the Hard Core Cartel Recommendation itself. This convergence relates to competition laws' substantive and remedial provisions, and it appears that the differences that do remain can be dealt by competition authorities on a case-by-case basis. Under these circumstances, and given global integration that is increasing enterprises' multinational presence, the differences in Member countries' laws appear increasingly less likely to lead enterprises to resist co-operation with one authority because the information may be shared with another. However, to the extent that this risk is perceived as being a substantial barrier in any country that would otherwise desire to engage in deeper co-operation, it appears that there may be a simple way to eliminate this risk while making a significant step towards greater co-operation -- retain the ban on sharing confidential information in its agency's files, but authorise the agency to use compulsory process on behalf of foreign competition authorities, provided that the agency gives prior notice of the purpose for which it is gathering the information.

[. . .]

Future Work On Information Sharing

74. Despite recent actions in some Member countries, there is no reason to expect a swift and universal end to bans on sharing non-confidential information, or to exchanging confidential information in appropriate circumstances. The Committee's future work will, to the extent possible, focus more closely on the benefits and costs of various alternatives. In the past, there has been a tendency in many quarters to discuss information sharing in bi-polar terms: should there or should there not be exchanges of confidential information? In fact, there are degrees of information sharing, degrees of confidentiality, and there are different ways to address the relevant issues. Since the Committee is focused on voluntary co-operation, **all of the possible models discussed below assume that confidential information cannot be shared unless there is some sort of finding that doing so is in the national interest.**

- **Comparable downstream protection.** Under this approach, a country authorises the sharing of confidential information with a foreign agency on the basis of a general finding that the requesting agency's country provides comparable protections to any shared information and a case-by-case finding that adequate protections exist for the particular information being sought. A binding mutual assistance agreement or treaty may be required to assure the adequacy of the protections. Australia and the U.S. both took such an approach, and BIAC has suggested that this approach may be preferable from a business point of view because it does not depend on fine judgements made in characterising the confidentiality of information.
- **Violation-based co-operation.** Under this approach, a country might authorise the sharing of confidential information only in hard core cartel cases. Again, there would need to be a test for the adequacy of protections for confidential information, which could be the "downstream protection" test or a modification thereof. In effect, this would be similar to an MLAT but for non-criminal and criminal cases. Of course, competition authorities are generally interested in information sharing for their investigations of mergers and other conduct that does not constitute a hard core cartel, but a violation-based approach might be attractive to some countries as a moderate enhancement of co-operation.
- **Confidentiality-based co-operation.** Under this approach, a country would authorise exchanges of all but information that meets whatever standard of confidentiality it considers appropriate. Confidentiality risks and protections would be minimal. Of course, competition

authorities are generally interested in receiving confidential information as well, but a confidentiality-based approach might be attractive as a modest enhancement of co-operation.

- **Common standards co-operation.** The downstream protection model requires that similar protections be available in both countries, but none of the foregoing approaches would require that countries adopt common standards with respect to what is confidential or the elements of a particular competition violation. An alternative would be to agree to share information in cases that met commonly defined standards or to share only information that meets a common definition of “sharable information.” However, agreeing to common standards could be very difficult, and the resulting system apparently be less flexible.

75. The Committee intends to give further consideration to these and any other options, and notes that even if a particular option seems impractical, discussion of the underlying issues may have value. For example, even if an OECD definition of “business or trade secrets” would not be useful in establishing an information sharing program, consideration of different countries’ confidentiality definitions and procedures could have educational value.

NOTES

[...]

21. The safeguards in the Australia/US co-operation agreement begin in Article I, which defines the covered laws. In this agreement the definition is a broad one, but the definition of covered laws (or covered offenses) could be used by a Member to exclude a controversial legal provision from the agreement. Article III, Requests for Assistance, has two main requirements. First, there must be a general description of the subject matter and nature of the investigation, with an identification of the persons being investigated and citations to the applicable laws; the description must be detailed enough to explain how the subject matter of the request relates to the violation. Second, there must be an explanation of the purpose for which the information is sought and its relevance to the investigation. A request by the US must state whether criminal proceedings are contemplated and, if not, provide written assurance that the information will not be used in criminal proceedings. The request must also provide a written assurance that there have been no significant modifications to the requesting party's confidentiality laws.

Additional safeguards are contained in Article IV, Limitations on Assistance, which provides for denial of assistance for public interest and other specified reasons, and Article VI, Confidentiality, which provides for confidential treatment of shared information. Article VII, Limitations on Use, is clearest if one begins with paragraph B, which governs the use and disclosure of shared information for antitrust enforcement purposes. In antitrust cases, shared information may be used only in the investigation and for the purpose specified in the request, except with prior written consent to a different disclosure or use. Paragraph A states that shared information may be used or disclosed only for antitrust enforcement purposes, except as provided in paragraphs C and D. Paragraph C provides that shared information may be used or disclosed to enforce other laws only if it is "essential to a significant law enforcement objective" and the requested party has provided prior written consent. Paragraph D covers evidence that is introduced at trial. There is also a provision, Article XI, that requires return of shared information after the conclusion of the investigation or case.

22. The IAEEA authorises US competition authorities to use compulsory process to collect information on behalf of, and share confidential information with, foreign authorities that can and do enter into binding and reciprocal agreements that meet statutory requirements protecting the legitimate interests of enterprises and of the US. The IAEEA flatly forbids any disclosure of information in violation of an IAEEA agreement, whereas the securities agency may be obliged to provide information in its possession to other government entities in some circumstances.

[...]

24. The statement also raised a number of more technical suggestions dealing with issues of solicitor-client privilege and enforcement immunity, as well as a list of the information and assurances the requesting authority should be required to provide in its request. The identified issues are legitimate, and the recommended assurances are quite similar to rules in existing co-operation agreements, with the most significant difference being that the ICC recommended that competition authorities be denied authority to disclose shared information to anyone outside the receiving authority, even with the consent of the requested authority. Existing bilateral agreements usually take a more flexible approach, permitting disclosure outside the requesting agency with the consent of the requested agency.
25. The relevant issues are clearer, perhaps, in a somewhat similar suggestion the US Council recently made to the International Competition Policy Advisory Committee. The Council called

for notice “in all cases except those involving (a) certain types of cartel behaviour, (b) the national security of the United States, or (c) other identified circumstances where the enforcement interests of the United States would be specifically and substantially compromised by notification.” In discussing this suggestion, the Council suggested that notification should occur, for example, “when the existence and general nature of an investigation may be known to the company in question.” Competition officials do not believe that such knowledge would necessarily mean notice would not jeopardise an investigation.

26. The lack of a notice requirement in MLATs is very relevant to analysis of whether there should be such a requirement in connection with the transmittal of information between two countries in non criminal investigations, but the lack of a notice requirement in the context of the EC and its Member States is less so.

Annex B**BIAC/ICC QUESTIONS FROM BUSINESS REGARDING THE PROTECTION OF
CONFIDENTIAL INFORMATION IN THE CONTEXT OF INTERNATIONAL ANTITRUST
COOPERATION**

*Prepared by the Business and Industry Advisory Committee to the OECD (BIAC) jointly with the ICC
Commission on Law and Practices relating to Competition
October 23, 2000*

The Business and Industry Advisory Committee (BIAC) to the OECD, together with the International Chamber of Commerce (ICC), appreciate the opportunity to submit the following questions and comments to the OECD Committee on Competition Law and Policy, outlining concerns of business with regard to protection of confidential information in the context of international co-operation between antitrust authorities.

I. General

In today's global economy the administrative burden for international businesses to comply with competition law in numerous regimes is becoming increasingly costly and complex. International co-operation between antitrust authorities is increasingly important to address issues such as mergers and co-operation projects that often fall within several jurisdictions. As a result, businesses operating internationally are often confronted with the legal uncertainty of dealing with numerous national competition regimes. In this situation, both business and antitrust authorities stand to gain from improved efficiency, speed of investigation, and cutting of costs to be obtained from co-operation.

For companies there is a real risk that commercially sensitive information such as investment plans or strategic goals, is leaked in the process of information exchange. Addressing the concerns of international business is crucial to achieving the benefits of such collaboration. Authorities may risk their relationship with companies for their own investigations, once companies learn this information may be passed on in the future without proper safeguard of confidentiality. Business confidence in the legal framework on which co-operation is based will facilitate the work of the competition authorities. Companies will be more willing to cooperate and negotiate, allowing proceedings to progress more speedily and efficiently.

It is clear that the benefits of international antitrust enforcement cannot be achieved at the expense of reliable and fair provision of confidentiality for businesses. BIAC and ICC have therefore drafted the following questions and comments to assist national competition authorities with the development of enforcement procedures for the protection of confidential information in the context of international antitrust co-operation.

II. Questions from Business Relating to Protection of Confidential Information in the Context of International Antitrust Cooperation

Question 1: *How is "confidential" information defined?*

Is confidentiality limited to commercially sensitive information? Who decides what is "confidential" and according to what criteria? Will the business(es) concerned have input into these decisions?

Different types of information or information compiled by different means are often distinguished in legislation. It is therefore important that it is made clear how the different categories of information are defined and what their respective treatment will be.

Members of BIAC and ICC believe that no generalised distinction should be made based on the manner in which information has been obtained. Information provided voluntarily should be subject to the same criteria to determine the level of confidentiality, as that obtained as the result of a compulsory process with the same right for companies to review and appeal any decision relating to its confidentiality. To assume that information volunteered is commercially less sensitive will discourage companies from providing information except when formally required to do so.

Question 2: *Will the company be given notice prior to any exchange of information?*

Before any decisions relating to the use of information obtained from a company are made, the company should be given sufficient opportunity to oppose or discuss modifying such a decision, unless this would jeopardise an investigation, in which case there should be a right to retroactive review and appeal. BIAC and ICC respectfully submit that the general rule should be that notice will be given before the fact in all civil matters and whenever possible in criminal investigations to permit companies to take appropriate action to protect their rights. This should apply in all cases, except where prior notice clearly would violate a treaty obligation of the jurisdiction or a court order, or jeopardize an ongoing investigation into a hard core cartel. It should be noted however, that this opinion is divided and some BIAC and ICC members believe that prior notice and the opportunity for judicial review should always be provided before exchange, and this without exception.

Nevertheless, if prior notice is not given, notice after the fact should be given as promptly as possible, and when information is voluntarily provided to enforcement authorities, restrictions on use or disclosure should be respected. In the absence of consent from the company, there should be a right to independent review of any adverse decisions. This review could be provided by a higher court with the authority to impose sanctions for violations of protective orders and penalties for any breach of confidentiality. The issue of notice has important implications for companies and merits further discussion. In any event, whether notice is provided before or after the fact, it is essential that adequate safeguards are applied to ensure the protection of any confidential information exchanged.

Decisions on all factors affecting confidentiality (which information should be treated as confidential, who should be allowed to see the information, for what purposes the information should be used, the fate of materials provided after an investigation etc.) should all be subject to this right to prior notification to allow appeal to amend decisions.

Question 3. *What are the legal frameworks in force for the protection confidential information in the context of cooperation between Antitrust Authorities? Is the protection afforded similar to that of a business's home country?*

- What provisions for appeal/redress exist? What consequences/sanctions exist for a breach of confidentiality? Are these a sufficient deterrent?
- To what extent should legal privileges that ordinarily attach to communications and work product of a client and its outside counsel also attach to communications and work product of a client and its inside counsel? Should these rules be harmonized internationally?

Substantial divergences in the rules, procedures, and enforcement of different antitrust authorities leave companies uncertain as to how the information that is obtained from them will be treated during a joint investigation or when handed over to a foreign authority. Thus it should be clearly communicated by national authorities under what legal framework an investigation will operate. A clear laying out of all the relevant legislation should be provided. As well as anti-trust legislation this could also involve other laws such as those protecting solicitor-client privilege, ethics codes of government agents, trade secrets and freedom of information acts. Companies need to know what would happen in the case of conflicting legislation and to what extent and under what circumstances the home authority will condition or refuse co-operation.

Members of BIAC and ICC believe that the legal protection provided to a business should be at least equivalent to that of its home country. BIAC and ICC members feel that confidential information should not be shared with the enforcement authorities of other jurisdictions which have not enacted appropriate safeguards for the protection of such information under their own laws or which have not demonstrated a commitment to protect confidential information. In particular, the same immunity should exist. When information is provided to gain immunity in one jurisdiction, this immunity should not be threatened by the possibility of criminal sanctions later being brought in another.

Question 4: *Who will have access to the information handed over? Is it susceptible to further disclosure? To what extent will it be possible for a company to track, step-by-step, the circulation of its confidential information and to determine who was responsible for preserving confidentiality at each step along the way?*

All people entitled to have access to or to request access to the information exchanged should be explicitly stated. Are these people subject to the same requirements to protect confidentiality and the same sanctions for breach of confidentiality? Will any information be placed on a public register? Is it susceptible to use in later court proceedings? Will these be held in camera?

There is a fear among companies that information might be passed on to another agency and even subsequently to private plaintiffs. This again raises the concern that the information might be used in criminal proceedings.

Question 5: *For what purposes is the information liable to be used?*

BIAC and the ICC would like to see an assurance from competition authorities that information will only be used for the purposes for which it was disclosed. Companies very often tailor presentation of information to suit the immediate purpose and this may not be suitable for any subsequent undisclosed

proceedings. It is not appropriate for governments to use information provided to enhance international antitrust enforcement to further their other objectives or policies.

Question 6: *What will happen to the information once the investigation is over?*

Provisions should be made for the return of any original materials at the end of an investigation. If the authority is entitled to keep copies, companies should be told of the fate of these copies.

III. Conclusion

Current differences in substance and procedure in national competition regimes will create problems during international cooperation for companies and authorities alike, unless a properly enforced and clearly laid out framework is established. BIAC and ICC hope that the considerations set out above will assist in finding a solution that will maintain confidentiality for companies in a predictable and justified manner, allowing the benefits of cooperation to be achieved without adversely affecting the interests of those involved.

Annex C

**SUMMARY OF RESPONSES TO QUESTIONNAIRE
ON NATIONAL LAWS GOVERNING CONFIDENTIALITY**

The responses to the questionnaire on national laws governing confidentiality issued on 21 October 1994 are summarised country-by-country below. Each question is separately listed, followed by the responses thereto.

1. *Please list each law, regulation, or official policy (collectively referred to as "confidentiality rules") relating to confidential treatment of information possessed by your agency and that imposes a constraint on the ability of your agency to provide the information to a foreign competition agency. For each such confidentiality rule, provide the following information, if applicable:*
- a. *the official citation; and*
 - b. *a brief description of the confidentiality rule, including the type of information to which it applies and the constraints on disclosure that it imposes.*

Austria

Kartellgesetz 1988, BGBl. Nr. 600/1988, in der Fassung Kartellgesetz-Novelle 1993, BGBl. 693/1993 (Austrian Cartel Act), Section 118(3). The confidentiality rule for the Paritary Committee on Competition, an advisory body to the Cartel Court composed of representatives of the Chamber of Commerce, Chamber of Labour, and the Austrian Trade Union. All information acquired by the Committee by way of documents or hearings is confidential and may be used only for fulfilment of the Committee's tasks.

Austrian Cartel Act, Section 100. The confidentiality rule for the Cartel Courts of First and Second Instance. All information acquired by the courts exclusively in their official function is secret unless otherwise provided by law. The president of the court may lift the secrecy obligation in individual cases.

Canada

Competition Act, Section 10(3). Requires that inquiries initiated pursuant to this section be conducted in private. The Director of Investigation and Research does not disclose the fact or existence of an inquiry or any information received in the course thereof except the extent necessary to carry out his mandate investigating the matter under inquiry.

Competition Act, Section 29. Protects: the identity of anyone providing information pursuant to the Act, whether voluntarily or pursuant to compulsory process, including the identity of persons making premerger notifications and requests for an Advance Ruling Certificate; information obtained through compulsory process; the fact that a premerger notification has been made, and information provided by any person relating thereto; information provided in support of a request for an Advance Ruling Certificate.

Information that is otherwise public may be disclosed. The Director may communicate protected information to a "Canadian law enforcement agency", and otherwise "for the purposes of the administration or enforcement" of the Act, which is interpreted as meaning the advancement of a specific investigation pursuant to the Act.

Non-Section 29 Information. Is not specifically protected by the Act, but is subject to non-statutory constraints such as common law privileges or common law duty of confidentiality. However, the current policy of the Director is to treat non-section 29 information as if it were covered by Section 29.

Denmark

Competition Act, Statute No. 370 of 7 June 1989 as amended by Statute No. 280 of 29 April 1992 ("Competition Act"), Sections 5, 7, 10; Act on Public Access to Documents and Administrative Files, Statute NO. 572 of 19 December 1985 (Act on Public Access to Documents). Agreements and decisions by which a dominant influence is exerted or may be exerted on a market must be notified to the Competition Council (Competition Act, Section 5). Where the Council finds that competition is not sufficiently workable, or where, for other particular reasons, it is necessary to observe the competitive conditions or create transparency of price conditions, the Council may order the submission of information on prices, profits, and other operational and business information (Competition Act, Section 7(1). The Act on Public Access to Documents applies to such Section 5 and Section 7 information, which means generally that the information is public, and can be disclosed to foreign competition agencies. In other respects the Act on Public Access to Documents does not apply to information in the hands of the Council. The Council may not disclose information when such disclosure could cause financial loss to an enterprise, or if other enterprises could derive unjustified competitive advantage there from, or in other special circumstances. Except in cases of Section 5 or Section 7 information, non-public information may not be disclosed except pursuant to a Council decision making such information public (Competition Act, Section 10).

Finland

Publicity of Official Documents Act (9 February 1951/83; amended in 601/1982, 472/1987, 739/1988, 804/1989 and 673/1991). A lengthy law governing public access to official documents. In general, official documents are public. Documents produced internally by an authority, however, such as drafts, reports, and memoranda, are not public. Documents may be ordered by Decree to be kept secret for reasons, among other things, of protection of the commercial activity, legal proceedings or data protection of the State, a self-governing association or a private individual.

Decree on Certain Exceptions to the Publicity of Official Documents (22 December 1951/650; amended in 731/1977). Provides generally that documents collected by authorities in their line of official duty regarding commercial activities of the State or private entities shall be kept secret unless the entity gives permission for publication.

Act on Restrictions on Competition, Section 24. Information acquired by the Office of Free Competition or Provincial State Offices pursuant to the Act relating to business or professional secrets shall not be disclosed without the permission of the entity affected.

Act on the Competition Council, Section 12. Includes rules on publicity and confidentiality of matters treated in the Competition Council.

Germany

Basic Law (Grundgesetz). Protects certain basic rights, including protection of property, including trade and business secrets, and the right of individuals to decide, in principle, themselves on the disclosure and use of their personal data.

Law on Administrative Procedures (Verwaltungsverfahrensgesetz), Section 30. Protects from unauthorised disclosure by the competition authority information relating to the private lives or trade or business secrets of parties.

Federal Data Protection Act (Bundesdatenschutzgesetz). Processing and use of personal data is prohibited in principle, unless expressly allowed by the Act or other statutory provision. No such provision permits the systematic use or disclosure of personal data in the context of cartel and competition law proceedings. Likewise, while under specified conditions the communication of data to foreign countries is permissible, no provision permits such exchanges in the context of cartel and competition law proceedings.

Ireland

Competition Act 1991, Schedule, Paragraph 9. A member of the Authority may not disclose information obtained by compulsory process except in the execution of his functions under the Act. Assisting a foreign authority is not considered as part of the functions under the Act. This rule applies only to information obtained by compulsory process. Information obtained voluntarily is governed by the rule of common law confidentiality.

Common law confidentiality. Obligates the Authority not to disclose information that the giver has designated as confidential or which under the circumstances the Authority should know is confidential. The Authority may publish such information as is necessary to meet its statutory obligation to make public its decisions, however. Otherwise, it is not within the statutory functions of the Authority to assist foreign governments.

Italy

Competition and Fair Trading Act (Law no. 287 of 10th October 1990), Section 14, Par. 3, 4; Regulation no. 461/91, Section 8, par. 1. All information acquired as a result of the enforcement of the Competition Act shall be used only for the purpose of the relevant request and shall not be disclosed even to other government departments. The law does not differentiate between information acquired by compulsory process and information acquired voluntarily. Officials of the Competition Authority are considered "public officials" and are sworn to secrecy.

Law no. 241/90 on Administrative Proceedings. Governs access to administrative documents. Requires each public administration to enact a regulation specifying categories of documents that are to be deemed confidential, according to certain specified criteria. The Italian Competition Authority is in the process of promulgating such a regulation. The regulation is likely to classify as confidential all information on industrial, financial and commercial interests.

Japan

Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, Section 39.

No active or former Chairman, commissioner or other personnel of the Fair Trade Commission shall divulge or make surreptitious use of trade secrets of entrepreneurs which come to their knowledge in the course of their duties.

Government Official Law, Section 100, Subsection 1. Government officials shall not disclose secrets which they come to know in the course of their duties.

These rules operate to prohibit disclosure to foreign competition authorities of all information acquired in the course of enforcement of the competition law.

Mexico

Federal Law of Economic Competition, Articles 31, 34. The information and documents obtained directly by the Federal Competition Commission in connection with its investigation, as well as those submitted to it, are strictly confidential. Unauthorised disclosure of such information may result in civil or criminal sanctions.

Norway

Except as provided in the EEA Agreement, it is not possible for the Norwegian Competition Authority to gather confidential information on behalf of the competition agency of another country.

New Zealand

Official Information Act 1982. Provides generally that information shall be made available unless there is good reason for withholding it, as provided elsewhere in the Act and in other acts.

Section 6. Provides for withholding of information if disclosing it would, among other things, prejudice the prevention, investigation and detection of offenses and the right to a fair trial.

Section 9. Provides for withholding of information (unless the withholding is outweighed by other considerations of the public interest) for purposes of, among other things, protection of privacy of natural persons, protection of trade secrets and commercially sensitive information, protection of the source of supply of information, maintenance of free and frank communication to and between government officials, and prevention of disclosure or use of official information for improper gain or improper advantage.

Section 52. Permits withholding of information if required by another Act or by a court or the House of Representatives.

Commerce Act 1986, Section 100. Permits the Commerce Commission to issue temporary confidentiality orders on information gathered during an investigation. The Commission's policy is to issue such orders relating to nonpublic information that is supplied in confidence and which is commercially sensitive and could be used to the detriment of the supplier. An order will not be issued, however, when it would unduly hamper the Commission's investigation.

Privacy Act 1993. Protects information held about natural persons, generally forbidding disclosure of nonpublic information without the individual's permission unless, among other things, disclosure is necessary for the maintenance of the law by a public agency, the enforcement of a law imposing a pecuniary penalty or the conduct of proceedings before a court or tribunal.

Evidence Act 1908, as amended by the Evidence Amendment Act 1890, Section 48I. Permits the Attorney General to prohibit the production of documents requested by a foreign authority if **(f)** the foreign authority is exercising or proposing to exercise jurisdiction in a manner that infringes or is prejudicial to New Zealand sovereignty; **(g)** it is desirable for the purposes of protection the trading, commercial or economic interests of New Zealand; **(h)** the request is made for purposes other than those of any civil criminal proceedings already instituted overseas; or **(i)** the request is made for the purpose of pretrial discovery of documents other than civil or criminal proceedings already instituted.

Spain

Act 16/1989 of 17 July for the Protection of Competition, Article 52. Information in the files created under the Act is secret, including information contained in voluntary notification of mergers and the fact that such notification was filed. All those taking part in proceedings under the Act are bound to observe such secrecy.

Sweden

The Secrecy Act, Sekretesslagen (1980:100).

Chapter 8, Section 6. Secrecy shall apply within a State authority's activities relating to production, commerce, transport activities, or other commercial and industrial activities, to commercial information which, if disclosed, would cause a person loss, and to other economic or personal circumstances of a person who has entered into a business or similar relationship with a person who is the object of the authority's activities. The government may provide for exemptions from the secrecy requirement in specific cases if it deems it important that the information be provided.

Chapter 1, Section 3. Protects information that is secret according to the Act from disclosure to a foreign authority unless disclosure is permitted by a specific act or decree or unless information in a corresponding case might be given to a Swedish authority and the authority holding the information deems it compatible with Swedish interests to communicate the information to the foreign authority.

Switzerland

Cartel Act, Art. 23; Penal Code, Art. 320. Members of the Cartel Commission and other public officials are bound by official secrecy, and may not reveal information that is acquired in the course of their official duties.

Penal Code, Art, 273. Prohibits the disclosure of economic information, except that in certain circumstances, if only the person furnishing such information has an interest in preserving its confidentiality the decision to release it may be left to that person.

United Kingdom

Fair Trading Act (FTA) 1973, Section 133; Competition Act (CA) 1890, Section 19; Restrictive Trade Practices Act 1976 (RTPA), Section 41. Business information which has been obtained under the relevant Act cannot be disclosed without the consent of the person carrying on the business, except that disclosure may take place for the purposes of facilitating the performance of the functions of the Director General of Fair Trading under the Acts. Under this exception it might be possible to provide confidential information to a foreign competition agency which would further an investigation being carried on in the United Kingdom.

RTPA Section 23. Causes details of agreements restrictive of competition to be placed on a public register and the most significant thereof to be referred to a court. Such information is public unless placed on a special section of the register which is not open to the public. The Secretary of State makes such a determination on a public interest standard, which includes whether publication of the information would substantially damage the legitimate business interests of any person.

United States

Freedom of Information Act, 5 U.S.C. sec. 552 ("FOIA"). Permits any person, including a foreign competition agency, to request disclosure of information possessed by federal government agencies. A series of exemptions, however, routinely permit the withholding of many classes of information.

Hart-Scott-Rodino Act, 15 U.S.C. sec. 18a. Requires the submission of information to the Antitrust Division of the U.S. Department of Justice ("Antitrust Division") and the Federal Trade Commission ("FTC") relating to certain proposed merger transactions. The information submitted is exempt from FOIA disclosure, and may not be disclosed except as relevant to an administrative or judicial proceeding to which either the Antitrust Division or the FTC is a party.

Federal Trade Commission Act, ("FTC Act"), Secs. 6, 9, 20, 21(b),(c),(f) (15 U.S.C. secs. 46, 49, 57b-1, 57b-2(b)). Authorises the FTC to use various forms of compulsory process requiring the submission of documents, reports or answers to written questions, and oral testimony. The FTC Act forbids disclosure of information submitted in a law enforcement investigation pursuant to compulsory process as well as trade secrets and confidential or privileged commercial and financial information obtained from a person unless authorised by:

- i) express statutory language authorising the sharing of information with domestic agencies;
- ii) provisions for disclosure to the U.S. Congress and in judicial and administrative proceedings; or
- iii) bilateral agreements entered into with a foreign antitrust regulator pursuant to the IAEAA (described in response to question 2).

Such authorised disclosures are subject to safeguards designed to maintain confidentiality consistent with the purpose of disclosure.

In addition, pursuant to the FTC Act and its Rule of Practice and Procedure 4.10(d), the Commission has provided the same protection to information submitted voluntarily in lieu of compulsory process (whose disclosure is not otherwise prohibited under the Act, e.g. trade secrets and confidential/privileged commercial and financial information) as is given to information submitted pursuant to compulsory process, provided the information is designated by the submitter as confidential. Other

voluntary submissions designated as confidential by the submitter may be subject to disclosure under the FOIA. All voluntary submissions, whether submitted in lieu of compulsory process or otherwise, are subject to the provisions for authorised disclosure noted above with appropriate safeguards to maintain confidentiality consistent with the purpose of disclosure.

Antitrust Civil Process Act, 15 U.S.C. secs. 1311-1314. Authorises the Antitrust Division to issue civil investigative demands (CIDs) requiring the submission of documents, answers to interrogatories and sworn testimony. Disclosure to anyone other than an authorised official of the Department of Justice without the consent of the person who produced such materials is prohibited, except that disclosure may be made in the course of the taking of oral testimony pursuant to a CID, in the course of a court, grand jury or federal administrative or regulatory proceeding, to the FTC in connection with one of its investigations or proceedings and subject to the conditions that apply to the Department of Justice, to either body of Congress or any authorised committee or subcommittee of Congress, and to defendants in an action based on information obtained by CID pursuant to their rights of discovery. In all such cases the material is disclosed subject to safeguards maintaining confidentiality consistent with the purpose of disclosure.

Rule 6(e), Federal Rules of Criminal Procedure. Prohibits, with few exceptions, disclosure of "matters occurring before a grand jury." Disclosure may be made without a court order only to U.S. Department of Justice attorneys or to other government officials, or to another federal grand jury, for the purpose of prosecuting a criminal violation of U.S. law. Disclosure may be made pursuant to a court order "preliminary to or in connection with a judicial proceeding", upon a showing of "particularized need", or for the purpose of enforcing a state criminal law at the request of a state and after approval by the U.S. Attorney General.

Trade Secrets Act, 18 U.S.C. sec. 1905. Provides criminal penalties for unauthorised disclosure of trade secrets or confidential business information acquired in the course of the official business of a government employee.

Hungary

Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices (Competition Act), Art. 34 par. 3; Art 5 par. 3(a). The competition authority is obliged to keep confidential any business secrets of which it becomes aware. Business secrets are defined as ". . . any fact, information, accomplishment or detail related to economic activity, in the sustaining secrecy of which its holder has a reasonable interest."

Law-decree No. 5 of 1987 on state and office secrets, Art. 10, par. 1, 2. State and office secrets are classified differently from business secrets, which are defined in the Competition Act above. Commercial information created prior to the enactment of the Competition Act may be considered one of these types of secrets. State and office secrets can be disclosed to a foreign entity only with the permission of an authorised person who is entitled to determine the scope of state and office secrets.

Act XLVI on Statistics. Art. 17, par. 2; Art.20; Act LXIII of 1992 on the "Protection of Personal Data and the Publicity of Public-related Data". Results of official statistical surveys and other public-related data are generally public, but state secrets, office secrets and "individual data" may not be disclosed.

Korea

Monopoly Regulation and Fair Trade Act (Section 62); Governmental official's law (Section 60); Criminal law (Section 127). Confidential information acquired in the course of official business shall not be disclosed, including information in the possession of the Fair Trade Commission.

2. *List each (a) national law, (b) treaty, that permits disclosure to a foreign competition agency of information otherwise subject to any confidentiality rule described in response to question 1, and briefly describe the rules that govern such disclosure.*

Only those responses that indicated that such a law or treaty exists are described below. If a country is not listed its response indicated that no such instrument exists.

Australia/New Zealand

Co-operation and Co-ordination Agreement between the Australian Trade Practices Commission and New Zealand Commerce Commission. Provides for co-operation and co-ordination between the competition agencies of the two countries and for, among other things, access upon request to information in the files of the requested agency, including confidential information, unless that information cannot be disclosed because disclosure is prohibited by the law of the requested country or because the information was provided to the requested agency on the basis that it must not be disclosed. The Agreement requires the requesting agency to maintain the confidentiality of the information it receives according to the Agreement and to measures specified by the requested agency.

Canada

Competition Act, Section 29. Protected information may be disclosed by the Director of Investigation and Research when necessary for the purpose of advancing a specific Canadian investigation, and where the foreign agency provides satisfactory assurances regarding the use and confidentiality of the information.

Non-Section 29 Information. May be disclosed in the same circumstances described above relating to Section 29 information.

The Treaty between the Government of Canada and the Government of the United States on Mutual Legal Assistance in Criminal Matters ("Canada/U.S. MLAT"). Competition authorities in each country may obtain information directly from persons in the other country relating to criminal antitrust investigations with the assistance of officials and the courts of the requested country, unless the requested country judges the assistance to be contrary to its public interest.

United States

International Antitrust Enforcement Assistance Act, Pub. L. No. 103-438, 108 Stat. 4597 (1994) (IAEAA). Permits the Antitrust Division and the FTC to furnish confidential information in their files, including that obtained pursuant to FTC compulsory process or CID, to a foreign antitrust authority, pursuant to an "antitrust mutual assistance agreement," which is defined in the statute and which itself must have its own strict confidentiality protections. Hart-Scott-Rodino information may not be disclosed, however, and information constituting matters occurring before a grand jury may be disclosed only if permitted by a court order, subject to a showing of particularised need. National defence or foreign policy information that is classified or for which classification is pending may not be furnished.

Mutual Legal Assistance Treaties ("MLATs"). The United States has entered into MLATs with a number of countries. The MLATs provide for the exchange of confidential information in certain circumstances for criminal investigations, including in some instances criminal antitrust investigations.

Hungary

Law-Decree No. 13 of 1979 on international private law. Provides for bilateral or multilateral legal assistance treaties, pursuant to which the minister of foreign affairs may authorise a Hungarian authority to render legal assistance upon request of a foreign authority, according to the terms of the treaty.

3. *For each type of competition information listed below that your agency acquires, state whether the confidentiality rules listed in response to question 1 permit your agency to provide the information to a foreign agency. Please provide any further explanation of the application of your confidentiality rules to each type of information that may be necessary to clarify your response.*

Only those responses that indicated that information could be provided in certain circumstances are described below. If a country is not listed its response indicated that information could not be provided.

- a. *Submitted in response to compulsory process in a civil investigation.*
-

Canada

Section 29 information. See discussion above under questions 1 and 2 relating to such information.

Denmark

May not be provided unless the Competition Council has by a formal decision made the information public.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the standards described above under question 1.

United States

Disclosure may be made only pursuant to the provisions of the IAEEA described in the response to question 2.

b. Voluntarily submitted at the request of the competition agency in a civil investigation.

Canada

Non-Section 29 information. See discussion above under questions 1 and 2 relating to such information.

Denmark

May not be provided unless the Competition Council has by a formal decision made the information public.

Ireland

May be disclosed if it is not protected by common law confidentiality, discussed above under question 1.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the standards described above under question 1.

United States

There is no general prohibition of the disclosure of such information, but several confidentiality rules may apply. Disclosure ordinarily would not be required by FOIA. The agency ordinarily would honour the terms of any confidentiality commitment made to the person who submitted the information. Disclosure by the FTC also is subject to the standards under the FTC act discussed in the response to question 1.

c. Submitted voluntarily by a person or enterprise complaining about the conduct of another person or enterprise.

Canada

The identity of a complainant is Section 29 information. Information submitted voluntarily in support of a complaint (to the extent that it does not identify the complainant) is non-Section 29 information. See discussion above under questions 1 and 2 relating to such information.

Denmark

May not be provided unless the Competition Council has by a formal decision made the information public.

Ireland

May be disclosed if not protected by common law confidentiality, discussed above under question 1.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Generally disclosure is subject to the standards described above under question 1.

United States

Exempt from disclosure under FOIA. Both the FTC and the Antitrust Division have a policy of not disclosing the identity of an applicant or complainant. See also discussion of information submitted voluntarily in lieu of compulsory process in the response to question 1.

d. Submitted by merging parties pursuant to voluntary or compulsory premerger notification.

Canada

Information submitted pursuant to compulsory premerger notification is Section 29 information. See discussion above under questions 1 and 2 relating to such information. On occasion, merging parties will voluntarily submit information relating to a merger that is not subject to mandatory notification for the purpose of obtaining an advisory opinion. Treatment of that information is discussed below under question 3.e.

Ireland

Information submitted voluntarily may be disclosed if not protected by common law confidentiality, discussed above under question 1.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the FTA 133 standards described above under question 1.

United States

See the answer to question 3.b. with respect to information submitted voluntarily. Hart-Scott-Rodino information may not be disclosed. In the case of the FTC, information that is submitted in an application for prior approval of proposed divestiture, acquisition or other transaction subject to Commission review under an outstanding order and that constitutes trade secrets or confidential or privileged commercial or financial information may not be disclosed.

e. Submitted by parties to a nonmerger agreement pursuant to voluntary or compulsory notification or registration.

Canada

There are no notification requirements relating to nonmerger agreements. Parties to such agreements, and to merger agreements not subject to mandatory notification, may voluntarily submit information about the transaction in connection with a request for an advisory opinion. As such information relates to future transactions the Director of Investigation and Research normally would not disclose it to third parties. If the transaction subsequently becomes the subject of an investigation or inquiry, however, the information may be disclosed according to the rules governing Section 29 and non-Section 29 information, discussed above relating to questions 1 and 2.

Denmark

When the information is submitted pursuant to Sections 5 or 7 of the Competition Act, the information may be disclosed upon request, including to a foreign competition agency.

Ireland

Information submitted voluntarily may be disclosed if not protected by common law confidentiality, discussed above under question 1.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the RTPA 23 standards described above under question 1.

United States

There are no compulsory notification requirements for nonmerger agreements. See the response to question 3.b. relating to information submitted voluntarily. Certain arrangements may be notified to the antitrust agencies in order to benefit from limited statutory antitrust exemptions. These include notifications pursuant to the **National Cooperative Research and Production Act, 15 U.S.C. secs. 4301-06**, the **Webb-Pomerene Act, 15 U.S.C. secs. 61-65**, and the **Export Trading Company Act, pub. L. No. 97-290, 96 Stat. 1234**. Nonpublic information contained in these notifications may not be disclosed.

f. Acquired in the course of a criminal investigation.

Canada

Section 29 and non-Section 29 information. See discussion above under questions 1 and 2 relating to such information.

Denmark

May not be provided unless the Competition Council has by a formal decision made the information public.

United States

Information that is subject to grand jury secrecy rules may be disclosed pursuant to the provisions of the IAEEA, described in the response to question 2.

g. Submitted pursuant to compulsory process in a judicial trial or administrative proceeding.

Canada

Information submitted pursuant to compulsory process during an investigation leading to judicial or administrative proceedings is section 29 information. See discussion above under questions 1 and 2 relating to such information. Information submitted pursuant to subpoena during such proceedings is normally public, unless otherwise ordered by a court of the Competition Tribunal. See discussion under question 3. Public information may be communicated to a foreign agency.

Denmark

In a judicial trial in which the Competition Council is itself a party, the Council has no authority to disclose information. In an administrative proceeding before the Council, information may not be made public unless the Council has by a formal decision made the information public.

Finland

Non-public information on commercial or industrial activity may not be disclosed without the consent of the entity involved or unless specifically ordered by the Competition Council or the Supreme Administrative Court.

New Zealand

Subject to any confidentiality rulings made by the court pursuant to the rules of the court.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

If information acquired during the judicial process is disclosed only for the benefit of the court, and otherwise should not be disclosed, disclosure is prohibited.

United States

The disclosure of such information that is not made part of the public record is governed by the terms of applicable court orders, if any, that had been entered in the particular case.

h. Introduced into evidence or made part of the record in a judicial trial or administrative proceeding.

Canada

Criminal proceedings are usually held in public, and the evidence introduced into the record is usually public. Courts have discretion to exclude the public for good cause, but the test for exclusion is onerous. The public has never been excluded from a criminal trial under the Competition Act. Administrative proceedings before the Competition Tribunal are also usually public and the record therein is public. The Tribunal may for good cause order that non-public hearings be held or that certain documents be excluded from the public record. Such evidence may not be disclosed to foreign competition agencies.

Denmark

In a judicial trial in which the Competition Council is itself a party the Council has no authority to disclose information. In an administrative proceeding before the Council, information may not be disclosed unless the Council has by a formal decision made the information public.

Finland

The Competition Council normally hears all cases in camera unless it specifically decides otherwise. Documents of the Council are not disclosed to the public unless specifically ordered otherwise. Decisions of the Council and the Supreme Administrative Court are normally available to the public, but portions containing business or professional secrets may be specifically ordered to be kept secret.

Ireland

The record in a judicial trial is in the public domain and can be disclosed. When an administrative proceeding is held in public the record can be disclosed.

Mexico

All administrative proceedings are conducted within the Federal Competition Commission and are considered confidential. Judicial trials are open to the public, but documented information obtained for the proceedings is confidential, as is documented information made part of the record.

New Zealand

Subject to any confidentiality rulings made by the court pursuant to the rules of the court.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Information made part of the trial record is generally public.

United States

Information entered into evidence in the proceeding is generally public, unless protected by an order of the court or administrative law judge.

-
- i. Studies, analyses or recommendations (collectively, "studies") prepared by employees of the competition agency based on (1) in whole or in part, information subject to one or more of the confidentiality rules listed in response to question 1, or (2) public information only.*
-

Canada

Studies containing non-public information are governed by the rules applying to Section 29 and non-Section 29 information, discussed above under questions 1 and 2. Studies based solely on public information may be disclosed at the discretion of the Director of Investigation and Research.

Denmark

Studies containing non-public information are subject to the rules discussed above under question 1. Studies based solely on public information may be disclosed by the Competition Council.

Ireland

Studies based on confidential information could be disclosed in the discretion of the Authority if they did not reveal precise confidential information. For example, market share information that is sufficiently aggregated could be disclosed.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the standards described above under question 1.

United States

Disclosure of information in any such report that is subject to any of the confidentiality rules described in the response to question 1 continues to be subject to those rules. Disclosure of such materials containing only public information is often required under FOIA. If disclosure is not required by FOIA, the agencies would exercise their discretion in responding to a request from a foreign antitrust agency.

Presentation and Discussion of Cartel Meeting Tape(s)

Unclassified

CCNM/GF/COMP/WD(2002)1



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

21-Jan-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

**AN INSIDE LOOK AT A CARTEL AT WORK:
COMMON CHARACTERISTICS OF INTERNATIONAL CARTELS**

-- US Department of Justice --

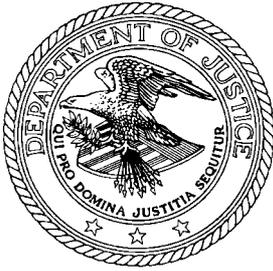
This document is a background to the presentation scheduled under section VII of the draft agenda of the Global Forum on Competition (14 and 15 February 2002).

JT00119689

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CCNM/GF/COMP/WD(2002)1
Unclassified

English text only



U.S. DEPARTMENT OF JUSTICE

American Bar Association

Section of Antitrust Law

48th Annual Spring Meeting

**An Inside Look At A Cartel At Work:
Common Characteristics Of International Cartels**

By

**James M. Griffin
Deputy Assistant Attorney General
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U.S. Department of Justice**

Presented at

**Omni Shoreham Hotel
Washington, D.C.**

April 6, 2000

**AN INSIDE LOOK AT A CARTEL AT WORK:
COMMON CHARACTERISTICS OF INTERNATIONAL CARTELS¹**

I. Introduction

I would like to talk to you this afternoon about some of the common characteristics of international cartels -- how cartels are initiated; how they operate; and how they attempt to conceal their activity from law enforcement. In order to do this, I am going to rely on some audio and video tapes of actual meetings involving members of the lysine cartel.² These tapes were, of course, made covertly by the FBI with the consent and assistance of a cooperating witness. They were first shown publicly at the trial of three former top executives from Archer Daniels Midland Company ("ADM"). ADM and its co-conspirators from Europe and Asia conspired to fix prices and allocate sales volumes of the food additive citric acid and the feed additive lysine. ADM pled guilty before trial and was sentenced to pay a \$100 million fine - which at the time was nearly seven times larger than the previous record fine in an antitrust case in the United States. The ADM executives were convicted at trial and were recently sentenced to fines of up to \$350,000 and lengthy prison sentences ranging from 24 to 30 months.

The lysine tapes offer a rare bird's eye view of the inner workings of an international cartel. You will see executives from multi-national firms reaching agreements to carve up the world by allocating sales volumes among the cartel members and agreeing on what prices would be charged to customers worldwide. Before I play the tapes, I want to make one point clear. While the lysine tapes are extraordinary in the sense that they give us an insider's view of the inner workings of an international cartel, the cartel itself is far from extraordinary. The objectives of the lysine cartel and the methods the conspirators used are common among the international cartels that we have detected in the last few years. At their core, international cartels have essentially the same purpose -- to increase profits among the conspirators by carving up world markets -- and they operate pursuant to the same methods -- fixing prices, rigging bids, allocating territories and customers, and allocating sales volumes among the conspirator firms on a worldwide basis.

¹ The material in this paper draws heavily, and often verbatim, from materials developed and prepared by my predecessor, Gary R. Spratling. It was Mr. Spratling, working closely with James H. Mutchnik, formerly of the Division's Chicago Field Office, Scott D. Hammond, the Division's Director of Criminal Enforcement, and myself, who first developed an International Anti-Cartel Enforcement Educational Program based on the lysine tapes. Mr. Spratling conducted numerous programs based on these materials primarily for our sister foreign law enforcement agencies. Mr. Spratling and I had planned to make these materials publicly available at an international antitrust workshop, but he left the Division before that could be accomplished. It is with sincere gratitude to

Mr. Spratling that the Division makes these materials available to the public today.

² Copies of the tape shown today, as well as additional copies of this accompanying booklet containing transcripts of the tape segments, are available at no charge. Please mail or fax (202-616-4529) your request to the United States Department of Justice, Antitrust Division, Freedom of Information Act Unit, 325 Seventh Street, N.W., Suite 200, Washington, D.C., 20530. You should receive your copy within two weeks.

II. The Importance Of An Effective Antitrust Compliance Program

Before turning to the tapes and the common characteristics of international cartels, let me say a few words about why the Division is presenting this program today and making these materials available to the private bar and corporate counsel. We are doing so because we believe that these materials will be tremendously valuable to the bar and to corporations in conducting antitrust compliance programs, and the Division believes that it is important to American businesses and consumers that there exist effective programs to deter antitrust offenses and to detect as early as possible those violations that are not deterred.

Effective antitrust compliance programs are not only important in protecting potential victims of antitrust crimes, they can literally mean the difference between survival and possible extinction to a corporation whose responsible officers or employees are tempted to engage in -- or are engaging in -- an antitrust conspiracy. In today's enforcement environment, a multinational firm, and its executives, engaged in cartel activity face enormous exposure: criminal convictions in the United States; massive fines for the firm and substantial jail sentences for the individuals; proceedings by other, increasingly active antitrust enforcement agencies around the world where fines may be, individually or cumulatively, as great as or greater than in the United States; private treble damage actions in the United States; damage actions in other countries; and debarment. Given this exposure, it would be difficult to overstate the value of a compliance program that prevented the violation in the first place. Moreover, if such a violation does occur, it again would be difficult to overstate the value of a compliance program in detecting the offense early because amnesty is available to only one firm, the first to successfully apply in each cartel investigation. (See the Antitrust Division's Corporate Leniency Policy at Tab 12.)

It is not the purpose of this paper to give a detailed exposition of the content of an effective compliance program and I do not intend to speak at length on the subject. But I do want to make two brief points about antitrust compliance programs and how these materials may be incorporated into a successful program. First, an organization's compliance program should provide for affirmative steps to detect price fixing, bid rigging, and market allocation, steps premised on the possibility, or even the assumption, that education and admonition will not deter personnel determined, for whatever reason, to act in bad faith. An example of an affirmative step would be active monitoring of employee conduct -- of, say, particular pricing and bidding decisions and practices -- to improve the chance of detecting and deterring questionable conduct. The program should also provide for both regular and unannounced audits of price changes, discount practices, and bid sheets, conducted by those familiar with the firm's past and present business practices and trained in recognizing divergence. Furthermore, in our view, it is critical to have both regular (scheduled) and unannounced audits of front-line pricing and bidding personnel to test their level of understanding of the antitrust laws and their degree of compliance with a program's requirements and standards relating to prevention and detection, backed up by disciplinary mechanisms and potential penalties for failures. Finally, the compliance program should include any additional provisions that are designed to unearth violations in the context of the firm's specific organization, operation, personnel, and business practices.

Second, firms, particularly multinational firms, should be thinking about the common characteristics of international cartels discussed in this paper when conducting compliance monitoring and audits. For example, many of the international cartels the Division has prosecuted have used trade association meetings as an effective "cover" for their secret cartel meetings. With that in mind, counsel will want to scrutinize international trade association meetings, which typically bring together every significant producer/seller of a particular product on the planet. Counsel will certainly want to review the association's official antitrust compliance policy and by-laws, advise the client's executives to avoid discussing competitively sensitive information with their competitors, and review meeting agendas and minutes. But counsel also should take a very close look at the purpose of association meetings, personally attend association meetings, and ask hard questions about what's going on there. Counsel also may want

to consider the possibility that agendas and minutes of association or committee meetings are fictitious, and being used as a cover for illicit conduct. Further, counsel may want to inquire into what the executives intend to do during periods of time at these gatherings when there are no scheduled association activities, or even inquire into the travel itineraries of executives from other firms in order to assess the opportunities for meetings among executives of two or more firms at places and times other than those officially scheduled. Many of the international cartels prosecuted by the Division could not have functioned in the manner they did, if at all, under this degree of compliance scrutiny with respect to trade association meetings.

We believe that the materials being made available today -- particularly the tape -- will be useful in impressing upon corporate executives, as well as counsel, that cartels are pervasive in today's global economy; that they are sophisticated in their understanding and manipulation of the markets they affect; that they employ elaborate methods to avoid detection; that they often involve senior management of huge multinational corporations; and that they do get caught, prosecuted, and punished. In addition to their educational value as part of an antitrust compliance program, we believe that these materials also will be useful to the private bar and corporate counsel in planning other aspects of the program. For example, having the opportunity to see this cartel at work, we hope will assist counsel in focusing on audit areas that might previously have been overlooked. I have no doubt that those of you who are far more experienced than we in planning and conducting antitrust compliance programs will think of many creative uses for these materials and we are delighted to make them available to you for that purpose.

III. Early Detection Of Antitrust Violations Through Compliance Programs

As noted earlier, effective antitrust compliance programs have two goals: (1) the prevention of antitrust violations in the first instance; and (2) the early detection of violations that do occur. It is this second objective, which is often overlooked, that I want to briefly address. If, despite the existence of a compliance program, an antitrust offense occurs, then the most significant benefit of a compliance program is early detection of the offense. Early detection affords the organization the opportunity to apply to the Antitrust Division's Corporate Leniency Program ("Amnesty Program"). Acceptance into the Program can result in a complete pass from criminal prosecution for the company as well as all of its officers, directors, and employees who cooperate with the Division's investigation.

A. The Antitrust Division's Revised Amnesty Program

In August 1993, the Antitrust Division expanded its Amnesty Program to increase the opportunities and raise the incentives for companies to self-report and cooperate with the Division. Under the old policy that was put into place in 1978, the grant of amnesty was not automatic, but rather an exercise of prosecutorial discretion, and was not available to any company once an investigation had begun. In 1993, the Amnesty Program was revised in three major respects: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution. The Division's revised Amnesty Program was, and is, unique. No other U.S. governmental voluntary disclosure program offers as great an opportunity or incentive for companies to self-report and cooperate.³

³ For a more detailed discussion of the Antitrust Division's application of its Corporate Leniency Policy, see, "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998) attached at Tab 13; and "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before Bar Association of the District

Today, the Amnesty Program is the Division's most effective generator of large cases, and it is the Department's most successful leniency program. Prior to 1993 the Division received amnesty applications at the rate of approximately one per year. Over the past several years we have received on average more than one per month. Moreover, in the last two years, cooperation from amnesty applications has resulted in dozens of convictions and over one billion dollars in fines.

B. A Head Start In The Race For Amnesty

Many of the Division's recent amnesty applications were initiated as a result of early detection by the firm's antitrust compliance program -- which, ultimately, saved some of these companies tens of millions of dollars and one company at least one hundred million dollars. In these cases, the applicants understood that early detection gave them a head start in the race for amnesty, and they were unwilling to gamble that the activity would not be detected by another company which would take advantage of the Amnesty Program.

Our hope is that these materials being made available today will assist the private bar and corporations in conducting effective antitrust compliance programs -- programs that actually deter antitrust violations, or failing that, lead to the early detection of such violation so that the corporation is in the best position to minimize its exposure through the Division's Corporate Leniency Policy.

IV. Common Characteristics Of International Cartels

Now let me turn to a discussion of some of the common characteristics of international cartels and to the tapes, which so vividly depict a cartel at work.

A. Brazen Nature of Cartels

One of the characteristics we see over and over again in international cartels is the brazen nature of the conspiracies. By that, I refer to the contempt and utter disregard that the members of the cartel typically have for antitrust enforcement. I think this is a good place to begin, because we are often asked by defense counsel to treat a certain member of a cartel more favorably because he/she resides in a country where cartel activity is treated differently than it is in the United States. The fundamental problem with this argument is that it is our experience, without exception, that the conspirators are fully aware that they are violating the law in the United States and elsewhere, and their only concern is avoiding detection. The international cartels that we have cracked have not involved international business persons who for cultural, linguistic or some other innocent reason find themselves mistakenly engrossed in a violation of U.S. antitrust laws. Rather, the cartels that we have prosecuted criminally have invariably involved hardcore cartel activity -- price fixing, bid-rigging, and market- and customer-allocation agreements. The conspirators have discussed the criminal nature of their agreements; they have discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they have gone to great lengths to cover-up their actions -- such as using code names with one another, meeting in secret venues around the world, creating false "covers" -- *i.e.* facially legal justifications -- for their meetings, using home phone

of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999) attached at Tab 14.

numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy. In one cartel, the members were reminded at every meeting -- "No notes leave the room."

B. Involvement of Senior Executives

Moreover, the cartels typically involve senior executives at firms -- executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs. For example, the vitamin cartel was led by the top management at some of the world's largest corporations, including one company -- F. Hoffmann-La Roche -- which continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy. Just imagine - some senior executives of this multi-national firm knew about the firm's participation in international cartels in two industries. When the firm's illegal activities were uncovered in one industry, and the firm had to plead guilty and pay millions of dollars in fines, those executives could have and should have terminated the firm's cartel activities in the second (and larger) industry. Instead, those executives orchestrated false statements to enforcement authorities, took steps to further conceal the firm's illegal activities, and continued to lead the world's other producers in a global cartel -- actions which will end up costing the firm billions of dollars in fines and damages. This amazing and costly failure to heed a warning takes us back to the characteristic I just mentioned: the contempt of cartel members for antitrust enforcement and the brazenness with which they perpetrate their offenses.

The first segment on the tape demonstrates not only the brazen nature of the lysine cartel, but the utter contempt that the conspirators exhibited towards their victims and the law enforcement community. The meeting that you are about to see was attended by executives from the world's five dominant lysine producers. As you will see in this tape, the cartel members took steps to conceal their meeting, including staggering their arrival and departure times for the meeting so as not to arouse suspicion by having the entire group enter and leave the room at the same time. The members of the cartel had to be careful because the meeting coincided with the largest poultry industry trade association convention, so all of their customers were in town for the trade show. But, as you will see, the lysine executives laughed at the thought of being observed by their customers or by law enforcement. The videotaped recording of this meeting shows that, as the meeting begins, there are some empty seats around the table because of the staggered arrival times. The cartel members are captured on tape jokingly discussing who will fill those empty seats. One cartel member offered that one empty chair was for Tysons Foods, the largest purchaser of lysine in the United States, and that another chair was for Con Agra, also a large U.S. customer. Another cartel member mocked, ironically, that one chair was for the FBI, and a third cartel executive added that the remaining chairs were for the Federal Trade Commission.

- *Tape Segment One: January 18, 1995 Cartel Meeting in Atlanta, Georgia -- The Lysine Cartel Members Show Disdain For Customers And Antitrust Enforcement (Transcript at Tab 1)*

The knock at the door heard at the very end of this tape segment, in fact, was an FBI agent, disguised as a hotel employee returning to the cooperating witness the briefcase containing a hidden audio recorder he had mistakenly left in the hotel restaurant.

In another tape played at the lysine trial, ADM's President summed up the company's attitude toward its customers in a single phrase, when he told a senior executive from his largest competitor that ADM had a corporate slogan that "penetrated the whole company": "Our competitors are our friends. Our customers are the enemy." Imagine, one of the world's largest companies, which bills itself as "the supermarket to the world," having such a disdainful slogan as its internal corporate trademark.

Not only are cartel members disdainful of their customers and law enforcement authorities, some are even defiant of their own company's rules – rules adopted to protect the company and them from criminal conduct. Clearly, some executives will go to great lengths to make sure that you, as inside or as outside counsel, don't find out about their criminal activity. For example, consider the impressive, yet unsuccessful, antitrust compliance efforts of the general counsel of a corporation we recently prosecuted for its participation in an international cartel.

This general counsel had instituted a comprehensive antitrust compliance program, and had made sure that the senior executives were well schooled on the antitrust laws. He had laid out specific rules to follow and adopted stiff penalties for failure to follow those rules. When a top executive at his firm arranged a meeting with his chief foreign competitor to discuss exchanging technological information, the executive, as required by the policy, notified the general counsel's office of the meeting. The general counsel (perhaps suspecting the worst) insisted on accompanying the executive to the meeting and remaining at his side throughout the meeting -- never letting him out of his sight even when the executive went to the bathroom. He was certain that this way there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. Surely no antitrust problems could arise in such a setting. And the general counsel must have taken some comfort when he, the executive, and the executive from the competitor firm greeted one another at the start of the meeting and the two executives introduced themselves to each other, exchanged business cards, and engaged in small talk about their careers and families that indicated that the two had never met each other before. Imagine how that general counsel must have felt when he learned, during the course of our investigation, that the introduction between the two executives had been completely staged for his benefit - - to keep him in the dark. In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive worldwide price-fixing conspiracy for years. Furthermore, other employees at the company knew of this relationship and were instructed to keep the general counsel in the dark by referring to the competitor executive by a code name when he called the office and the general counsel was around.

We hope that, armed with these materials and the glimpse inside an international cartel at work that they provide, all of you will be able to avoid the repetition of this shameful conduct on the part of senior executives of your corporate clients.

C. Fear Of Detection By U.S. Enforcers

While cartel members know full well that their conduct is illegal under the antitrust laws of many countries, they have a particular fear of U.S. antitrust authorities. For that reason, international cartels try to minimize their contacts in the United States by conducting their meetings abroad. This has been particularly true since 1995, when the lysine investigation became public. In fact, cooperating defendants in several recent cases have revealed that the cartels changed their practices and began avoiding contacts in the United States at all costs once the Division began cracking and prosecuting international cartels. However, the cartel members continue to target their agreements at U.S. businesses and consumers; the only thing that has changed is that they conduct nearly all of their meetings overseas. This next segment demonstrates the reluctance of foreign cartel members to conduct cartel activity in the United States for fear of detection. The conversation is between an ADM executive, who also was a cooperating witness, and an executive at the Japanese firm, Ajinomoto. They are discussing the location for the next cartel meeting. As you will hear, the Ajinomoto executive is clearly reluctant to have a cartel meeting in Hawaii, but ultimately agrees to consider it because Hawaii is a convenient location for everyone and because of the lure of the golf courses located near the meeting site. The Ajinomoto executive's reluctance was well founded, as the meeting was video taped by the FBI and became a critical piece of evidence in the prosecution of the lysine conspirators.

- *Tape Segment Two: July 13, 1993 Telephone Call From ADM Headquarters -- Foreign Co-Conspirator Expresses Reluctance To Meet In The United States (Transcript at Tab 2)*

D. Using Trade Associations As Cover

Another characteristic of international cartels is that they frequently use trade associations as a means of providing “cover” for their cartel activities. In order to avoid arousing suspicion about the meetings they attended, the lysine conspirators actually created an amino acid working group or subcommittee of the European Feed Additives Association, a legitimate trade group. The sole purpose of the new subcommittee was to provide a false, but facially legitimate, explanation as to why they were meeting.

As I mentioned, the lysine cartel members did end up meeting in Hawaii, and the FBI was there to video tape the meeting. As you are about to see, the executives discussed how they would use the trade association as the “perfect cover” for their price-fixing meetings. They also talked about such details as preparing false agendas and false minutes of the meeting to send to the parent association based in Brussels. In addition, they discussed their shared concern that the EU authorities not discover their activities.

- *Tape Segment Three: March 10, 1994 Cartel Meeting In Maui, Hawaii -- Cartel Members Use Trade Association As A Cover For Conspiracy Meetings (Transcript at Tab 3)*

In your binders (at Tab 10) is an example of one of the false agendas that was created by the lysine conspirators and submitted to the parent trade association, listing legitimate topics that, according to witnesses at trial, were never discussed at the meetings. None of the items on the agenda were addressed at the meeting except agenda item “Miscellaneous” -- a euphemism for the negotiations by cartel members to divide up the world lysine business among themselves and to fix the prices they charged their customers worldwide.

Similarly, the citric acid cartel used a legitimate industry trade association to act as a cover for the unlawful meetings of the cartel. The cartel’s so-called “masters,” *i.e.*, the senior decision-makers for the cartel members, held a series of secret, conspiratorial, “unofficial” meetings in conjunction with the official meetings of ECAMA, a legitimate industry trade association based in Brussels. At these unofficial meetings, the cartel members agreed to fix the prices of citric acid and set market share quotas worldwide. A former ADM executive testified that the official ECAMA meetings provided a “combination of cover and convenience” for the citric acid cartel. As he explained it, ECAMA provided “cover” because it gave the citric acid conspirators “good cause” to be together at the particular location for the official meetings -- which were held in Belgium, Austria, Israel, Ireland, England, and Switzerland. Since the cartel members were all attending those meetings anyway, it was convenient to meet secretly, in an “unofficial capacity” for illegal purposes, during the time period set aside for the industry association gathering.

E. Fixing Prices Globally

Another common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately. Prosecutors got an unprecedented view of the incredible

power of an international cartel to manipulate global pricing in the lysine videotapes. Executives from around the world can be seen gathering in a hotel room and agreeing on the delivered price, to the penny per pound, for lysine sold in the United States, and to the equivalent currency and weight measures in other countries throughout the world, all effective the very next day. Our experience with the vitamin, citric acid, and graphite electrode cartels, to name a few, shows that such pricing power is typical of international cartels and that they similarly victimize consumers around the globe. Cartel members often meet on a quarterly basis to fix prices. In some cases the price is fixed on a worldwide basis, in other cases on a region-by-region basis, in still others on a country-by-country basis. The fixed prices may set a range, may establish a floor, or may be a specific price, fixed down to the penny or the equivalent. In every case, customer victims in the United States and around the world pay more because of the artificially inflated prices created by the cartel.

In the next two tape segments you will see international cartel activity at its core -- price fixing and market allocation on a global basis. In the first segment the lysine cartel members agree upon the prices to be set for the United States and Canada.

- *Tape Segment Four: March 10, 1994 Cartel Meeting In Maui, Hawaii -- Cartel Members Fix Prices On A Global Basis (Transcript at Tab 4)*

The lysine cartel used the U.S. price as the primary benchmark for the world price, and then specific prices were fixed on a country-by-country basis at the meetings. As you just saw, the cartel became very efficient in fixing prices, and it did not take them long to agree on price increases. Remember that these cartel members were not discussing general price levels or a range of prices; rather the lysine cartel fixed the price to a specific penny per pound in the United States or, in the case of the Canadian market, to the penny per kilogram. These executives sitting in a room in Hawaii decided that the truckload price in the United States and Canada would be \$1.16; not \$1.10, not \$1.20, but \$1.16. All prices to be effective the very next day. Later in the meeting, they did the same thing for other countries.

F. Worldwide Volume-Allocation Agreements

The members of most cartels recognize that price-fixing schemes are more effective if the cartel also allocates sales volume among the firms. For example, the lysine, vitamin, graphite electrode, and citric acid cartels prosecuted by the Division all utilized volume-allocation agreements in conjunction with their price-fixing agreements. Cartel members typically meet to determine how much each producer has sold during the preceding year and to calculate the total market size. Next, the cartel members estimate the market growth for the upcoming year and allocate that growth among themselves. The volume-allocation agreement then becomes the basis for (1) an annual "budget" for the cartel, (2) a reporting and auditing function, and (3) a compensation scheme -- three more common characteristics of international cartels.

In this next tape segment, you will see the lysine cartel members divide up the world's lysine market. The meeting was attended by two high-ranking ADM executives. Representing all of the Japanese and Korean cartel members were two senior executives from Ajinomoto. Earlier in the meeting, the cartel members had determined how much each producer had sold in the prior year. Then, they used those figures to determine the total market size. Next, they estimated what they believed the sales growth would be in the coming year. All of these figures were written down on the easel board by one of the cartel members. On the tape, you'll see them decide how they are going to allocate that sales growth among the five cartel members. As you will hear, the growth in the market is estimated to be 14,000 tons, and the question posed by the senior ADM executive is: how do we divide this market growth?

- *Tape Segment Five: October 25, 1993 Cartel Meeting In Irvine, California -- Cartel Members Allocate Worldwide Sales Volumes (Transcript at Tab 5)*

G. Retaliation Threats -- Policing The Agreement

As is often said, there is no honor among thieves. Thus, cartel members have to devise ways -- or even make threats -- to keep their co-conspirators honest, at least with respect to maintaining their conspiratorial agreements. It is common for cartel members to try to keep their co-conspirators in line by retaliating through temporary price cuts or increases in sales volumes to take business away from or financially harm a cheating co-conspirator. Sometimes, the mere threat of such retaliation is enough to keep would-be cheaters in line. In this next tape segment, you will see one of the ADM conspirators pose such a threat in order to get his co-conspirators to agree to his proposed volume-allocation scheme.

- *Tape Segment Six: October 25, 1993 Cartel Meeting In Irvine, California -- Co-Conspirator Threatens Retaliation If Others Don't Agree To Proposed Market-Allocation Scheme (Transcript at Tab 6)*

H. Audits And The Use Of Scoresheets

Most cartels develop a "scoresheet" to monitor compliance with and enforce their volume-allocation agreement. Each firm reports its monthly sales to a co-conspirator in one of the cartel firms -- the "auditor." The auditor then prepares and distributes an elaborate spread sheet or scoresheet showing each firm's monthly sales, year-to-date sales, and annual "budget" or allocated volume. This information may be reported on a worldwide, regional, and/or country-by-country basis and is used to monitor the progress of the volume-allocation scheme. Using the information provided on the scoresheet, each company will adjust its sales if its volume or resulting market share is out of line. An example of such a scoresheet from the lysine cartel can be found at Tab 11.

I. Compensation Schemes

Another common feature of international cartels is the use of a compensation scheme to discourage cheating. The compensation scheme used by the lysine cartel is typical and worked as follows. Any firm that had sold more than its allocated or budgeted share of the market at the end of the calendar year would compensate the firm or firms that were under budget by purchasing that quantity of lysine from any under-budget firms. This compensation agreement reduced the incentive to cheat on the sales volume-allocation agreement by selling additional product, which, of course, also reduced the incentive to cheat on the price-fixing agreement by lowering the price on the volume allocated to each conspirator firm.

In this next segment, one of the lysine conspirators from ADM explains the importance of a compensation scheme to the cartel and gives the other cartel members a motivational speech that has to be one of the best pieces of evidence ever obtained in a cartel investigation.

- *Tape Segment Seven: March 10, 1994 Cartel Meeting In Maui, Hawaii -- Co-Conspirator Explains How End-Of-Year Compensation Scheme Eliminates Incentive To Cheat On Cartel (Transcript at Tab 7)*

J. Budget Meetings

Cartels nearly always have budget meetings. Like division managers getting together to work on a budget for a corporation, here senior executives of would-be competitors meet to work on a budget for the cartel. Budget meetings typically occur among several levels of executives at the firms participating in the cartel; their frequency depends on the level of executives involved. The purpose of the budget meetings is to effectuate the volume-allocation agreement -- first, by agreeing on the volume each of the cartel members will sell, and then periodically comparing actual sales to agreed-upon quotas. Cartel members often use the term “over budget” and “under budget” in comparing sales and allocations. Sales are reported by member firms on a worldwide, regional, and/or country-by-country basis. In our experience, the executives become very proficient at exchanging numbers, making adjustments, and, when necessary, arranging for “compensation.”

The last tape segment that I am going to play will give you a ringside seat at one of the quarterly lysine cartel budget meetings where the members reported their sales on a regional and worldwide basis. The numbers you will hear are monthly and year-end tons of lysine sold by each conspirator firm. As you are watching this video, consider how comfortable the cartel members are with each other and the precision with which this cartel operated.

- *Tape Segment Eight: January 18, 1995 Cartel Meeting In Atlanta, Georgia -- Cartel Members Report End-Of-Year Sales Figures And Find That Sales Volumes Were “Right On Target” (Transcript at Tab 8)*

V. Another “Textbook” Example - The Vitamin Cartel

Implementing a volume allocation agreement to restrict output and to maximize the incentives of the cartel members to sell at or above the agreed-upon price was not unique to the lysine cartel. The same practice was used in the citric acid cartel, the vitamins cartel, and others. As with lysine, graphite electrodes, and other cartels, the vitamin conspiracy was not limited merely to a few products, customers or currencies; rather, the cartel members discussed and agreed upon prices and sales volumes for every major vitamin used for human or animal consumption sold throughout the world.

In order to carry out the vitamin conspiracy, the cartel members stopped competing and, instead, worked together as if they were sales divisions of the same company -- a company that one of the conspirators referred to hypothetically as “Vitamins, Inc.” Once a year, for nearly 10 years, the global marketing heads, the product managers, and the regional managers from each conspiring company would get together for two- to three-day summit meetings. At such meetings, the cartel members would discuss and agree on price increases and sales volumes on a global basis for the upcoming year. The cartel also held annual meetings where the members’ global marketing heads and division presidents met and reviewed the results of the preceding year, taking stock, in particular, of the profitability of the continuing conspiracy to each cartel member. In addition to these meetings, lower-level executives, who were charged with the implementation of the global cartel, met with their counterparts around the world on at least a quarterly basis to ensure that the cartel ran smoothly. And it did. Documents prepared by members of the cartel for various meetings reveal that the cartel, over the course of a full decade, was nearly always successful in coordinating and implementing the agreed-upon or “budgeted” price increases for the many products controlled by the cartel and in adhering to the precisely allocated market shares around the world.

VI. Conclusion

Hopefully, this tape and the accompanying binder will assist you in developing compliance programs that deter executives of your corporate clients from becoming involved in cartel activity in the first place and in detecting that illegal conduct that is not deterred. In today's environment, antitrust compliance is increasingly important to American businesses and consumers and to the corporations that might become involved in illegal conduct.

Contributions

Unclassified

CCNM/GF/COMP/WD(2002)3



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

29-Jan-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM BRAZIL

This contribution is submitted by Brazil as a background material for the second meeting of the Global Forum on Competition to be held on 14 and 15 February 2002.

JT00120074

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)3
Unclassified

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I. THE RECENT BRAZILIAN ECONOMIC DEVELOPMENT: FROM PRICE CONTROL TO REGULATORY RULES AND COMPETITION POLICY¹

Claudio Monteiro Considera²

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1. Introduction

Brazil and Latin America as a whole have a common history of authoritarian interference in all aspects of economic and political life. During the past century, the economic and political market in Latin American countries has functioned on a very restricted way, with the exception of the period of political freedom experienced from the end of World War II through the beginning of the sixties.⁴ During that time, the democratic virtues that defeated Hitler's tyranny weighted in and became examples to be followed. Overall, the Brazilian experience of economic freedom in the marketplace is relatively new and its full implementation only had effect from 1994 on. Therefore, since competition policy and democracy are solely possible in a free market, we might say both are infant institutions in Brazil.

This paper traces the historical background of building a competition law in Brazil linking it with economics and politics.⁵ It highlights that the Brazilian political and economic history is embodied with elements that affect the definition and the enforcement of antitrust law and policy in Brazil. These elements are: a) the ideological climate; b) the expected net effects (costs and benefits) of the lobbying activity by large local groups; c) economic inefficiencies derived from the import substitution (IS) regime; and d) equity demands inherited from the IS regime.

During the recent Brazilian history, the ideological climate (social preferences toward the best state of the world) does not seem to have favoured competition as the rule of the economic game. The private sector did not take it as the core of the economic activity, as an outward orientation or a constitutive part of business strategies. On the contrary, the ideological climate seems to have favoured "negotiation" among firms, state interventionism and an inward orientation (import substitution). "Industrialisation" in a context such as this, was therefore a major national (public) goal and economic policy consistently favoured producers (especially the industrial producer) welfare to the detriment of other social groups (especially consumers).

2. The Post-World War II Industrialisation Period – 1945-1964

2.1 Politics and Economics

Although there have been economic policies toward industrialisation in the past, the first approach to a deliberate development policy came with the emergence of the populist government of Getúlio Vargas, elected president in 1950 with the support of the urban working class. His political campaign was mostly based on a review of his previous effort to implant industrialisation during his 1930-45 period in power.⁶

As a consequence of his heterogeneous political support, his economic policy was ambivalent, although very close to the one formulated by the economists from the United Nations Economic Commission for Latin Americas (UN/ECLAC), known as the *nationalism pro-development* ("nacionalismo desenvolvimentista") economic policy. Both policies advocated a mixed economy where the State's incentives substituted the price mechanism as signals to resource allocation, and where the State again,

through its own enterprises, had to provide the infrastructure of basic services (mainly energy, telecommunications and roads). Foreign capital, although welcomed, had to be carefully controlled and directed by the government.

The result of this declared industrialisation policy was very successful: manufacturing industry grew at a rate of 10.7% per year during 1949-55; at the end of the period, imports became only 15% of the supply of industrial goods compared with the 65% of 1949.⁷

In 1956, Juscelino Kubitschek took office as the new president. He was nominated candidate by the alliance of the Social Democratic and Labour parties and his campaign was based on the appeal to accelerate industrialisation, promising “fifty years of progress in five years of government”. He formulated a wide range of sectorised economic objectives known as the Target Plan (“Plano de Metas”), which represented the most substantial decision deliberately taken on behalf of industrialisation in the economic history of the country.

His *nationalism pro-development* strategy focused in the industrial structure establishing the producer goods industry, managed either to receive support from every socially important group or, at least, not to receive antagonism. The industrialists were not inclined to accept any program that could sacrifice industrialisation; so the proposition of a rapid industrialisation with a growing domestic market, easy credit and the continuance of protection against imports contained in the Target Plan, received prompt support from them.

Unlike Vargas, Kubitschek did not threaten the foreign investors; on the contrary, he made a public appeal to foreign businessmen, inciting them to participate in and to help the Brazilian effort towards development. For that, Kubitschek made some institutional changes to stimulate the inflow of foreign capital. The net inflow (US\$1,194 millions) was more than the double of the previous presidential period. It was invested mainly in transport equipment and energy (37%) and in basic industries (48%) of iron and steel (state industries) and motor vehicles (foreign controlled motor car assembly factories).⁸

During the following five years, most of the targets were reached and even surpassed. To sum up, by 1961 the industry had changed into a very well vertically integrated structure. The manufacturing industry grew at an annual average rate of 11.5%; the capital good industry performed an outstanding rate of 27% annually. The domestic production was now responsible for around 92% of the total supply of industrial goods.⁹

The end of Kubitschek government, and with it the end of the Target Plan, was not matched by any sort of new strategy towards growth. The political and economic crisis led to the removal, after seven months in power, of the new president Jânio Quadros, a representative of a conservative party. The vice-president João Goulart, a labour party representative, was not allowed to take the presidency. After a compromise solution period of fourteen months of a modified parliamentary system, he regained full presidential power through a plebiscite ballot. In April 1964 however, João Goulart was overthrown and a military junta appointed General Castelo Branco as the new president to complete the mandatory period.

2.2 Competition and Antitrust

All along this period, there was not much concern for competition and antitrust in Brazil. Actually, the government became a monopolist in infrastructure services and in strategic industries, either by creating new state firms or by nationalising the existing ones in the area of mining in general and oil refining (state monopolies by law), steel, energy and telecommunication.

At that time, a triple alliance that would be solidified during the military government was being formed: The government stood for the long run mature investments in infrastructure in the monopolies above mentioned; the foreign enterprises stood for the highly capital and technology intensive sectors, which mainly produced durable consumer goods. And, the domestic private capital stood for the derived demand in the non-durable consumer goods.¹⁰

The foreign capital enterprises established in Brazil brought a technological standard based on scale economy appropriate for the mass market of the developed countries. This standard would only fit in the Brazilian market, which at that time was significantly smaller, in a very concentrated way. This was valid not only for the final goods but also for the intermediate goods produced by those industries. Moreover those industries were protected from imports with high tariffs based on the theory of infant industries.

Therefore, the most dynamic industries were installed in Brazil as oligopoly structures, well protected from import challenge. No concerns regarding competition could politically or economically be raised. Nevertheless, the domestic industries of non-durable consumer goods had a domestic competitive structure, despite being technologically well behind the foreign industries due to its low productivity.

Although competition and antitrust were not a concern, there were some issues related to price abuses. Actually, since 1934 the Government started intervening in price formation of the economy, by determining the readjustment index of house rents and electric power tariffs (a private business at the time), through the Decree n°. 24.150 and 'the Water Code. This action was amplified during the fifties by the promulgation of the Laws n°. 1521 and 1522, which regulated the intervening of the State in the economic dominion, and defined as a crime against the economy the transgression of official tables of prices for essential goods and services. It also created the Federal Commission of Provision and Prices (COFAP) to inspect the application of the price control.¹¹

Despite having an enormous power, COFAP was unsuccessful in accomplishing its tasks and was extinguished. It was simultaneously substituted by the National Superintendence of Provision (SUNAB), created according to Delegated Law n°. 5 and its attributions established by Delegated Law n°. 4, both on 26th of September of 1962.

The first signal of some concerns about competition and antitrust, was the creation of the Administrative Council of Economic Law (CADE) through the Law n°. 4.137 of 10th of September of 1962. This law regulated the abuses of economic power, such as disloyal competition, abusive speculation, collusion, agreements with competitors, abusive price increases, etc.

3. The Military Governments – 1964-1984

3.1 Politics and Economics during the 'Miracle'- 1964-74

Inflation was a common fact throughout the Brazilian industrialisation process. During the first period (1939-50), the cost of living rose on average, around 10% a year. During the second period (1950-61), it rose even more at an average rate of 20% a year. Following the economic deceleration and political crisis of 1961, inflation started an explosive path and prices rose at an average rate of 52% yearly, reaching the rate of 87% a year in 1964.

At the time the debate concerning the economic and political crisis was far from purely academic. For inflation, different diagnosis led to completely opposite policies. It was not by accident that the

explanation based on the weakness and mistakes of Goulart government made headway among the military. In April 1964, a coup d'état brought the monetarist school into power. Accordingly, the diagnosis of excess demand, a very orthodox monetary policy of restraining credit, public expenditure and wages was carried out. As a result inflation decreased to a rate of 24% in 1967. The cost however, was low rates of growth, fall in real wages and employment, culminating with a big recession in 1967.¹²

Contrary to the ideas of the new economic team, but probably due to the military dictatorship, a massive state intervention in all areas of the economy was carried out. Many state owned firms were created in the industrial sector to complete the industrial structures. The same happened in the financial sector in order to finance the housing building system, the agriculture sector for export and the durable consumer goods.¹³

The second military government assumed in 1967 and brought into power a less orthodox policy-maker team led by Delfim Netto. He diagnosed inflation as being demand constrained and identified production costs as the main cause of inflation. Consequently, an effort was made to get costs down, by controlling prices, cutting the interest-rate and reducing some public services tariffs. Also, credit expansion was promoted attending firms, consumers and government.

The economy recovered vigorously and grew at an average of 10% yearly from 1967 to 1974. Inflation was controlled and maintained at a rate of 25% a year.¹⁴ The economic picture that emerged in 1974, after seven years of continuously high rate of growth, based on durable consumer goods, was quite similar to the most advanced economies in terms of consumption and production patterns. Nevertheless, many distortions were created or increased: sector and regional unbalances; inequality of income distribution; and the fact that the economy became too dependent on imports of capital and intermediate goods for the new modern industry of durable consumer goods.

The most important fact coming from this policy, with respect to the subject of this paper, was the increased use of price control mechanisms in Brazil, which would last up to 1994 when it finally ceased being adopted.

3.2 Competition and Antitrust during the 'miracle'- 1964-74

3.2.1 Price Control as a Cartel Organiser

An industrialisation policy based on the transfer of modern technology, highly dependant in capital – which was a scarce resource - in a small market such as the Brazilian one at that time, could not have had any concern about competition. In fact there were numerous incentives for concentration of the financial system, for the take over of small Brazilian firms, and for the installation of big foreign firms. Foreign firms became the dynamic poles of the industrialisation. The consequence was a very concentrated industrial structure, since even those foreign firms' smallest plant size had been designed for the big markets of the developed countries. In such an environment of highly concentrated structure, where tariff protection was maintained and overall price control installed, there was no incentive for market competition to function.¹⁵

In order to fight inflation, in addition to all the monetary and fiscal policy implemented after the coup d'Etat of the 1st of April of 1964, the government decided to adopt, on the 23rd of February of 1965 (Inter Ministerial Directive, GB 71), a spontaneous price control system. As compensation it offered fiscal and credit advantages to firms adopting moderate price increases. A National Commission for Price Stabilisation Stimulus (CONEP) was responsible for the implementation of that policy.

This policy had some obvious advantages: its adoption by the firm was spontaneous, representing an exchange of favours with government, and the process of examining the application was very simple. A significant amount of firms adhered to this policy: about 70% of sales value to the domestic market in 1965 were attached to this spontaneous scheme.¹⁶

Nevertheless, the government soon concluded that it would be more efficient to fight inflation through the creation of more rigorous price controls, making its adoption compulsory, rather than spontaneous. The Decree n°. 61.993 was enacted then in 28th of December of 1967 for that purpose, and it was applicable to virtually all the manufacturing industry but the capital goods on order; as well as to part of food industry; to all sectors linked to the wood and leather industry and to the clothing and shoes industry. According to this legislation any price increases intended by the industry became compulsory subject to the analysis and approval of CONEP. Furthermore, the transitory character of price control was replaced by the conviction that price control should prevail until inflation ceases.¹⁷

After an analysis of other countries' experience, with emphasis in the French system¹⁸, the government became aware of the inadequacy of CONEP to administer this new phase of price control. A new council (Conselho Interministerial de Preços) was then established to take care of this task. After that, when firms decided to increase the price of any product, they had to demonstrate beforehand that its costs were raised as well. Average rates of returns on capital for 6 years, for isolated firms or even for industries were established and became part of the price control management. Actually, the control rules were very detailed and complex,¹⁹ representing an intervention in the firms' administration secrets unimagined in a democratic society. When applying for price readjustment, many industrial secrets of the firms had to be disclosed to government officials, with little guarantee that it would not be disclosed to their competitors. In addition to all the market distortions, price control also raised many suspicions of corruption. The main penalty for failing to follow the rules of price control were the cut of credit facilities, applied by the Central Bank.

The new mechanism of price control created by CIP took into account the rate of return of net operational assets of the firm in 4 to 6 years, assuming an 80% of capacity utilisation. If the idle capacity was higher than 20%, the price was fixed according to a comparative exam with other products in the market and the price level of the competitors. In both cases CIP had the purpose of stabilising the market price, which is in fact the objective of any cartel. It is useful to remember that CIP was also responsible for fighting predatory competition, particularly "dumping".

For products already established in the market, the policy was to give price readjustment according to cost increases, guaranteeing the stability of the margin and therefore the crystallisation of a certain relative price structure. Moreover, this rule was reinforced by the low frequency of readjustments and the non-written rule of avoiding substantial divergences in prices of similar products. Therefore, prices tended to be relatively rigid, with every firm maintaining its participation in its market.

Based on the rules for price control above described, Frischtak suggests that:

"...by defining or ratifying the sector leadership and by making institutional the process of price signalling, CIP action reduces the degree of uncertainty of the oligopoly market and organises it contributing to crystallise a certain market structure."²⁰

"Concerning to the identification and ratification of leadership it is made basically through sector agreements which along the time enlarged the number of products and firms being controlled. As having been said in chapter II (p. 89), the CIP defines itself or together with the sector association or trade union, the firms that should priority participate in the agreement, based on their share in production or in sector sales.

By organising such an agreement, the CIP would be just confirming an accepted situation or creating and legitimating a leadership not yet established. And, not the least, by making the cost structure of those firms as representative structures for price readjustment of a group of producers, the CIP establishes a standard behaviour based on the possibilities and necessities of the dominant firm.

An analogous process, although not so explicit, is followed in the absence of sector agreement. In this case, the CIP tends to focus on big firms, presumed leaders, assuming that the other firms would naturally (or under pressure of presumed penalties) follow the price readjustment made for the controlled leader.

The process of controlling prices not only creates or reinforces the role of the leader firm but also makes it institutional.

It is possible that an specific sector already had a certain degree of self co-ordination in order to dispense an institutional signal; nevertheless, given the power of the state regulatory function, the signal became accepted by the sector as a whole."²¹

Therefore, the price control mechanism employed by the CIP was not only competition preventing, through market rigidity. It was much more harmful. Firstly, it promoted concentration. Secondly, it indicated price leadership giving the signal for tacit agreements when the price controlled was exercised individually by the dominant firm. And thirdly, when there was a sector agreement, there was no need for blustering cartels; they were organised with the incentive of the government. The CIP called meetings with associations or trade unions and, together, they talked about costs and fixed prices.

What is the use for CADE or any competition agency in such an environment?²² The public interpretation of the tasks performed by CIP was that it was preventing economic abuses through price controls, even if by doing that it ended up organising cartels. Nowadays, these would probably be called 'nice cartels' by some of the competition law professionals (academic researchers, professors and lawyers) active in Brazil.²³

3.2.2 The New Role of Producers Associations

The practice of CIP in controlling prices by meeting with firms or its associations call attention on the new role of those private firms' organisations.

Much has been written showing the role of those associations, during the industrialisation period, to protect the Brazilian infant industry.²⁴ The very few associations that existed at President Getúlio Vargas' first term of government (1930-45), were all official and benefited from government contributions. These were state federations (one for each state) linked under the National Industry Confederation (CNI). The most important state federations belonged to the main industrial states: São Paulo (FIESP) and Rio de Janeiro (FIRJ – presently FIRJAN). There were also producers' trade-unions (at that time they were around 160 unions), whose main function was to negotiate collective wage agreements with the workers' trade unions at the Ministry of Labour or at the labour courts²⁵.

The Confederation and the state federations acted heavily in order to raise tariffs protection, exchange rate protection and import controls. They also manoeuvred to build an infrastructure industry (metallurgy of iron and steel and cement). The targets of the industrial associations were mainly to protect the domestic market and to promote the domestic private capital.

This interference with the exchange rate policy in order to subsidise the imports of industrial intermediate and capital goods was maintained during President Dutra's government. In fact two industrialists, one from FIRJ and one from FIESP, occupied respectively, the Ministry of Finance and the presidency of the Bank of Brazil, the main Brazilian financial institution, during his administration.

During President Vargas' second term (1950-54), there was a balance of payment crisis, which provoked a transformation of the exchange market: a free exchange market was created, which should co-exist with the official one. The struggle of the federations was then to include as many industries as possible in the list of those to be elected for import goods at the subsidised official rate of exchange. In 1953, the Instruction no. 70 of SUMOC (the Superintendence of Money and Credit of the Bank of Brazil) established the so called multiple exchange rate regime and defined five degrees of essentiality for import goods, applicable to the industries. At the same time, it stimulated the internationalisation of the Brazilian industry by authorising foreign firms investing in Brazil to bring in capital in the form of machines and equipment.

In 1955, the new president Juscelino Kubitscheck launched the Instruction 113 of Sumoc, authorising the entrance of foreign investment through the import of equipment, without the need for exchange coverage. Although this policy benefited mainly the foreign investors (domestic industries could only do the same by financing it with foreign short run capital), it did not receive much criticism from the industrial federations. Since it activated some sectors of the Brazilian economy (construction, transport material, electric and electronic and the motor car industries) it created the possibility of many new businesses. Moreover, this instruction also gave bonus for exports of manufactured goods, which benefited the domestic industry.

Those new measures, conjugated with the Target Plan, broke the old alliance of the Vargas' government. As it was seen before, the new triple alliance makes room for foreign investment in large scale, but without neglecting the domestic capital. Kubitscheck created three executive-groups with the participation of entrepreneurs. The new government structure became more complex and changes occurred in the way the industrialists acted: now they were integrating the executive-groups with government officials, isolated from the previous structure and its traditional political and regional pressures.

At the same time there were changes in the industrial federations and also in the National Confederation (CNI), as a result of leaderships of the Vargas era leaving the scene. Besides the fact that the state federations were now dominated by executives of the new industries of Rio de Janeiro and São Paulo, the parallel associations representing specific sectors of the industry and representing them in the government executive-groups became increasingly important as well.

The end of the Kubitscheck government knows new types of associations either representing foreign firms (American Chamber of Commerce) or political associations such as the Confederation of Producers Classes (Conclap) and the Institute of Research and Social Studies (IPES). This characterised an emergent anti-populist alliance, which together with the militaries of the Superior School of War (ESG) would start the military coupe d'Etat of 1964.

Although Kubitscheck was successful in attracting the industrialists to support his target plan, there were still some conflicts between the government, the official federations and the parallel associations, mostly concerning the exchange market and the presumed benefits to foreign capital created by Instruction 113.

After a period of uncertainty, which goes from the new government of President Jânio Quadros (1960) up to the beginning of the military regime in April 1964, everything changed. The military government intervened in all aspects of Brazilian politics, reducing the importance of the political class

including the political capacity of the corporate structure of the industry to influence the macro economic policy.

The new role performed by the CNI, the industrial state federations and producers' trade unions, and the industrial parallel associations, was micro economic: they were called to discuss wage and price control with the government at the Price Control Council (CIP), as mentioned above. An enormous amount of associations proliferated since then, and became responsible for talking about costs and prices with the government. According to Diniz & Boschi,²⁶ up to 1987, 77% of the existing 227 parallel associations were created after 1964 (the beginning of the military regime).²⁷ They were specialised by the type of good or service being produced and some firms belonged to various associations.

Those authors attributed to the rapid industrialisation of the 1964-78 period the fact that 34% of the associations were created during those years. At the same time, they attributed to the progressive enlargement of the democratisation process of the 1979-87 period, the other 43% of the associations created. It is difficult to accept that this associative process would be the result of both the intense industrialisation without democracy during the first period and of economic depression in the second period during the democratisation process. What really remains for the whole period is wage and price control agreements with decisive participation of the producers' parallel associations. Therefore, it is reasonable to presume that the proliferation phenomenon of parallel associations is linked to the way price control was enforced in the country.

As the previous section has shown, the associations met with government officials at the price control agency to discuss cost increases and to negotiate price readjustment.²⁸ So, the point at the end of this section goes beyond that made by Frischtak and summarised in the previous section. The price control in Brazil not only organised and stabilised the oligopoly prices contributing to reduce inflation, but also organised a structure for cartel functioning by making the Brazilian industrialists used to meet and talk about costs and prices.

According to Adam Smith in the *Wealth of Nations*:

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary”

In Brazil, the producers' associations did not have to go against the Adam Smith advise or even waste their time by talking amenities. The government made room for it: the law of price control and the action to enforce it strengthened and facilitated that meeting and the conversation on costs and prices. It is equally true that they continued to do so even after the end of price control in Brazil.

3.3 Stop and Go' and Recession – 1975-84

3.3.1 Politics and Economics during the 'Stop and Go' and Recession

In 1974 the “miracle age” was finished. The problems inherited from the previous years' policies began to emerge, mainly due to: (i) the new and adverse external conditions caused by the sharp increase of oil prices. This more than doubled the value of imports, and with respect to exports, although it maintained its trend of growth, that was not enough to match the amount necessary to finance it; the result being an increase of foreign indebtedness by 37%; (ii) The external dependence of capital and intermediate goods for the industry due to the imbalance growth; (iii) and to inflation, which more than doubled in comparison to 1973.

After five years of GDP rates of growth not below 9%, the economy entered a phase when there were years of low rates of growth, with low inflation, as well as years of low rates of growth, with inflation speeding. Up to the first half of 1979, inflation was around a yearly rate of 40% and increasing, and the GDP was growing at a yearly rate around 6%. The Ministry of Finance decided then to prepare a very restrictive budget and to start a restricted monetary and credit policy in order to control inflation and the increasing imbalance of the country's external accounts.

Both, the official diagnosis of demand pressure and the intention of a recessive policy that followed, received strong criticism and a public opinion campaign against it, mainly from the industrialists through their associations, federations and the CNI. They succeeded in provoking the substitution of the Minister of Finance Mário Henrique Simonsen for Antônio Delfim Netto. That was their mistake. Delfim Netto opposed this view of excess demand, and according to his diagnosis of cost inflation, there was a lack of supply, which could be fulfilled by activating a presumed idle capacity.

With the support of businessmen and the public opinion, the result was remarkable: GDP grew 8% and the industrial production 11%. However, the general price index grew 102% and the external accounts became totally unbalanced. The only way to escape from a debt-default was to put the country in the worst recession Brazil ever experienced, with inflation reaching an astonishing rate of 200%. The main and good consequence of this economic disaster, led by Delfim Netto, who was previously greeted as the “magi of the economic miracle of the end of the sixties”, was the end of the dictatorship of the military regime.

3.3.2 Competition and Antitrust during the 'Stop and Go' and Recession

There is not much to say about antitrust during this period. Price controls continued to be employed, although not as rigid as in the beginning. The CIP acted in a bureaucratic way, differently from the 1968-74 period, when fighting inflation was a government priority. At that time, the price control policy was successful and price deceleration was obtained. During the 1976/78 period, the empirical evidence shows that CIP was quite generous to the industrial sector. It allowed the plain readjustment of prices according to costs and eventual productivity gains were appropriate by the firms. This conclusion came from the fact that the price readjustments allowed by CIP, for controlled sectors, were quite similar to those not subject to price control.²⁹

Hence, the CIP continued to promote agreements among firms, without however causing any reduction in prices but only making them homogeneously high.

4. The New-Democratic Regime – Years of Uncertainty: 1984-94

4.1 Politics and Economics

The Brazilian experience along the 80's and the beginning of the 90's has been characterised by a general tendency towards stagnation associated with the persistence of deep macroeconomic unbalance — in particular, by high and increasing inflation.³⁰ This old economic disease, has even reached, in the post-80 period, an annual rate above 2,500% (1989), with the average situated around 580%, in contrast to the annual average below 40% of the 70's.

Notwithstanding the localised spells of growth, usually related to the expectation on the future behaviour of inflation, the economy has grown at an average of only 1,25% p.a., between 1980 and 1992. As a result the per capita income dropped 7.6% during the same period. Thus, along those years, a considerable deterioration of the living conditions of a significant share of the population has been verified, without evidence of overcoming the structural problems related to misery and social inequality.

More than simply reflecting the external unbalance (derived from the crisis related to the external debt) and the internal one (associated to the persisting public deficits and the continuation of extremely high inflationary levels), this period is characterised, in fact, by the exhaustion of the post war development strategy. This plan was based on the substitution of imports and on strong state intervention in productive activities and has oriented the Brazilian industrialisation process since the beginning of the 50's. The failure of the several attempts to stabilise the economy along the 80's can therefore be attributed, to a large extent, to the lack of acknowledgement of the need to promote structural changes that would lead to a new pattern of development. This new pattern should be less dependent upon state intervention and commercial protectionism. In addition to that, there was also a complete inability on the government side, to raise the political support required for the accomplishment of the reforms.

The long sequence of frustrated stabilisation plans during the 80's and the beginning of the 90's (five plans from 1986 until 1994) has produced a strong economic instability which led to a continuous tendency of inflationary acceleration. Inflation has failed to acquire an explosive character, such as occurred in other countries, solely due to the characteristics of the Brazilian monetary correction system (to a large extent guaranteed by the government itself). The financial system developed domestic substitutes for the currency (ultimately, also guaranteed by the government), that allowed a less painful coexistence (and, sometimes, an even profitable one) with the inflationary process for those who had access to such innovations. Nevertheless, excluding those moments when speculative behaviour led to the non-sustained growth of the demand (as, for example, along 1989), what is observed is a long run tendency to the increase of unemployment, especially during the second half of the decade. Moreover the investment rates have been reduced all along this period, which contributed to render future growing perspectives even more tenuous.

From 1993 on this picture begins to change. The economy starts to show signs of recovery, although still in the midst of the strong instability generated by still high inflation rates. This recovery was stimulated by a more favourable external situation — with the recovering of capital flows for the emergent markets, in a context of accentuated decreases in the international interest rates. Also contributed the surmounting of the political crisis derived from the president impeachment process. This growth already reflected the changes in the conduction of the economic policies, which characterised the turn of the 90's. In particular, it reflects the progressive removal of the mechanisms of protection against external competition and the steps being taken towards the deregulation and privatisation process. A new economic environment began to be outlined, leading the enterprises to incorporate, with an increasing tendency, the rationalisation of costs and productivity increase in their development strategies.

In February of 1994, the government took the first step for a new stabilisation program, the Real Plan, which would launch a new currency in July of the same year. The perspective was that no stabilisation process could succeed if it did not bear the structural changes that would eliminate the basic causes for the inflationary process. Such causes were generally deeply incorporated not only to the behaviour of the economic agents, but also to the very essence of the previous development model. Under this perspective, structural reforms acquired a crucial dimension for the consolidation of a new phase of sustained development. In the short run, stability should be sustained only through the adequate handling of the instruments of monetary and exchange policies, maintaining the economic growth below its potential.

4.2 Competition and Antitrust

Once again, there is not much to say about antitrust in Brazil during this period. The CIP continued to exist but not really performing its presumed task of controlling prices. What could such a council do, with an inflation rate higher than 500% a year? It was put in action again after 1985 with the first of several stabilisation programs, the “price-freezing” scheme of the so-called Cruzado Plan. All the stabilisation programs from 1985 up to 1994, with a price control scheme rapidly became a failure. It is useless to say anything about the effectiveness of CIP; at that time inflation reached a rate of 3.000%. Obviously, there was no room to talk about competition policies in that environment.

5. Democracy and Economic Reforms – 1994-2001

5.1 Politics and Economics

Brazil has gone through five economic plans to curb inflation during the restoration of democracy, including one where prices were frozen. In 1993, the new President Itamar Franco assumed after the impeachment of President Collor de Mello. Following four successive changes of Finance Ministers, President Itamar Franco appointed Senator Fernando Henrique Cardoso to command the economic policy. His central proposal was to promote an adjustment of public accounts as a pre-requirement for any effort to reduce inflation. In a concrete manner, the implementation of the Programa de Ação Imediata (PAI - Program for Immediate Action) resulted in an ample cut-down of government expenses. At the same time steps were taken for the conclusion of agreements concerning the external debt and the renegotiations of state debts (a process which had already been dragging itself for almost five years). In December of 1993, the government disclosed to the public its stabilisation project. It should follow a sequence of pre-announced measures, where once again stood out the issue of budget equilibrium. This would be achieved through the creation of the Fundo Social de Emergência (FSE - Social Emergency Fund) and of a set of tributary measures. Therefore, this government’s proposal presented a new approach (with respect to Brazil) against inflation, without price freezing or contract breaching.

Two new elements, revealed by the spell of growth observed along 1993, should be emphasised. The first aspect refers to the performance of the external sector, which was for the first time facing liberalisation of imports in a heated up economic conjuncture. Although the full impact of this new situation had not yet entirely been felt (as the most recent external tariff reduction had only occurred in July 1993), the increase of over 20% of imports was absorbed with no major traumas. The exports, even not counting on the exchange policy, were maintained in expansion, (7.6% per year), although at decreasing rates. To this growth had contributed the greater diversification of the destiny markets of our exports, with the increase of flows to the countries of Mercosur, a common market among Brazil, Argentina, Uruguay and Paraguay. The surplus of the commercial balance had reached the end of the year at the comfortable figure of US\$13,1 billion, which represented a decrease of 14.4% as compared to 1992.

The second aspect refers to the average industrial productivity increase. During the 1985/89 period, industrial productivity had remained practically stagnant, increasing at an average rate of 0.3% p.a. During the following four years (between 1990 and 1994), the rate of the productivity annual average growth moved to around 8% p.a., reflecting a reaction to the external openness. It was also reflecting the investments carried out in the rationalisation of the production and new methods of organisation and management. This increase in average productivity allowed the accommodation of real wage increases in the industrial sector; the counterpart, nevertheless, has been a practically null increase of employment along the year.

The introduction of the new currency on July 1, 1994 occurred without great surprises, since all the main measures had already been announced with sufficient anticipation, and were then effectively implemented

The performance of the Brazilian economy in 1995 revealed both progresses achieved and challenges that still had to be surmounted if the purpose was to consolidate stabilisation. In the first category are included *the maintenance of inflation at a reduced rate, the recovering of the monetary policy* as an effective means of achieving stabilisation, and the approval of the reforms related to the state monopoly and foreign capital. Concerning the second category, we may emphasise the fiscal issue, which presented a considerable deterioration along the year, and the difficulties in implementing the reforms which aimed at a permanent fiscal adjustment (tributary, administrative and Social Security reforms), besides the need to further develop the privatisation program.

After reaching its seventh year of existence, the Real Plan was consolidated as the most successful effort at stabilisation of the last thirty-one years. The inflation rates have declined from levels which were close to 50% a month in June 1994, to less than 4,5% a year at the beginning of 1998, without the need for any type of direct control of prices or contract breaching between private agents. After the creation of the URV (a reference unit of value), linked to the exchange rate variations, an adjustment of relative prices was carried out in such a manner as to neutralise the inertial component of inflation and thus recover the confidence in the Brazilian currency. In order to guarantee the initial success of this strategy, the change in the economic environment has been fundamental. An ample commercial liberalisation forced competition with imported goods, restricting the internal price increases. It also impelled the national producers towards obtaining gains in productivity.

Along the first two years of the plan, we had a significant inflation reduction, mainly through the contention of the prices of the so-called tradable goods, that is, those that were more subject to foreign competition. In that period, the price increases of non-tradable goods, such as public tariffs and services, were considerably above the general inflation rates. As of the second semester of 1996, nevertheless, a larger convergence between the price variations of these two categories of goods was verified, a tendency which was intensely strengthened along 1997. Such tendency reflects the end of the old Brazilian rule of linking readjustment of prices (inclusive public goods and wages and other incomes) to the previous general price index.

On the other hand, the fast rhythm of this progress has been strongly directed by the orientation of the exchange policy. At the beginning of the program, there was a nominal valuation of the domestic currency, as a result of the decision of the Central Bank not to intervene directly on the exchange market. After the exchange crisis occurred in Mexico in March 1995, the exchange floating system was introduced within sliding bands established by the Central Bank, who then began to act directly in the exchange market. This resulted, in practice, in a mechanism of exchange devaluation effected with no determination of fixed periods nor link to the inflation rate, but adapted to the evolution of the relation between the internal and external prices and to international capital flows. In fact, since then the exchange policy has

been allowing profits to the exporters, as the devaluation rates have been higher than the increase of wholesale industrial prices.

Another important factor to the success obtained in the struggle against inflation has been the adequate conduction of the monetary policy. Right after the implantation of the Real Plan, there was a considerable increase of the monetary aggregates, with the Central Bank approving the increase for the demand of currency resulting from the abrupt decrease of inflation and from the re-establishment of the credit channels. In October 1994, nevertheless, certain measures were taken towards the contention of credit, with the objective of holding back the consumption increase that could result in a new inflationary explosion, as it was quite above the growing capacity of the production. These contracting measures, after additional restrictions in April 1995, began little by little to be softened as of the middle of that year, being further followed by a declining path of the interest rates until the end of October 1997. The intensification however of the crisis in the Asian Southeast showed the need for a more conservative monetary policy. Nevertheless, the prompt reaction of the economic policy to the external crisis, through the increase of internal interest rates and the announcement of a set of measures aiming at a fiscal adjustment in 1998, have guaranteed the continuation of the international investor's confidence in the success of the stabilisation program. This initiative allowed a return to the declining path of the interest rates as a target of the monetary policy, already as of December 1997.

The behaviour of production along this entire period has followed a path that is typical of a stabilisation program dependent on the exchange rate. After a strong increase of the internal demand and of the GDP, it became necessary to impose restrictions to consumption, which led to an intense deceleration of the activity level during the last three-quarters of 1995. Nevertheless, still at the end of that year, the levels of production and consumption began to show signs of recovery, which was intensified during 1996, pointing to the consolidation of the growth process in 1997, when the Asian crisis occurs. The investment rate at constant prices of 1990 reached the mark of 19.1% of the GDP during last year. For the average of the first four years of the Real, the GDP has grown around 4% per year.

Although still below the potential of the Brazilian economy, this rhythm indicates the need for the creation of more solid conditions, from the point of view of the macroeconomic fundamentals, in order to allow development to return to its historical post-war average rates of growth. Significant steps have been taken in that direction, as for the example, through the constitutional changes which allowed breaking through the state monopoly on sectors such as oil, electrical energy and telecommunications, as well as the elimination of the distinction between national and foreign companies. The consolidation of stability in an environment of sustained development depends on more significant steps towards the control of the public deficit, on a permanent basis. It means the need of implementing additional reforms, such as the administrative reform and of the official system of Social Security. At the same time, the privatisation program requires a reduction in state intervention in the productive activities, which constitutes additional motivation to the resuming of investments in the infrastructure sectors, including through external capital. This way, there will be greater possibilities of more adequately planning the public policies, among them the social policies, within a process of redefinition of the role of the State in the national life.

In any way, the stabilisation process has already produced, along the life period of the Real Plan, significant results on the situation of the less privileged among the population. The most important of them has been the increase in the consumer power of the poorest share, which did not possess means to protect itself against the corroding effects of inflation on their incomes. It is important to notice that, at the beginning of the Real Plan the minimum wage was 30% less than the cost of a cesta básica (basket of basic goods required by a family); nowadays is about 30% higher.

At the same time, after a temporary increase in the unemployment rates in 1995, increases have been registered both in the levels of employment as in those of average real salaries, in the main metropolitan Brazilian regions, along these years.

All along these years the Real Plan has survived from several world crises: starting with the Mexican crisis, followed by the Asian, Russian, Turkish and finally a daily Argentinean crisis. To deal with this situation, the Brazilian economic policy team has employed all the orthodox economic instruments, including high rates of interest, increase fiscal adjustment and the help of the International Monetary Fund. The first time it appeal to the IMF was during the Russian crisis when, in January of 1999, the Real was deeply devaluated – around 50% at the end of the year. The second time was in August of 2001, during the most recent Argentinean crisis when the Real suffered another deep devaluation – 30% up to the end of September. Currently, the situation seems to be under control, aside from the last world crisis due to the terrorist attack to the United States.

5.2 Competition and Antitrust

Competition and Antitrust entered a new phase after the reforms put in practice in 1994. The Real Plan was not only a stabilisation plan; it was actually a plan of reform of the Brazilian economic, social and institutional structures. Stabilisation, economic opening to external competition, privatisation and regulatory agencies made it possible to enforce competition rules. And in 1994 then, the first step was taken with the enactment of the Law 8884. Among the innovations presented by the new diploma, were the control of mergers and the insertion of economics in a subject that was a field for lawyers since its very beginning.

The new competition law issued in June 1994 modified the previous statute in several ways: (i) it created the possibility of imposing performance commitments for the firms; (ii) granted CADE administrative and financial autonomy; (iii) made it impossible to have administrative appeals on CADE decisions; (iv) transformed CADE into the final authority on merger decisions, created the performance commitment; and introduced the concept of dominant position in the market following the European doctrine; (v) instituted the definition of abusive increase of prices, as the increase of prices not justified by cost increases; (vi) defined the role of the Ministry of Finance as responsible for the economic report on mergers procedures and infringing conducts.³¹

According to the new law, The Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance, the Secretariat for Economic Law (SDE) of the Ministry of Justice and the Administrative Council for Economic Defence (CADE), an independent body administratively linked to the Ministry of Justice, constitute the Brazilian antitrust authorities. The SEAE and SDE have analytical and investigative functions, while CADE is an administrative tribunal. CADE's decisions can only be reviewed by the courts.

Since then, there have been other changes both in the way those institutions used to act and in the law itself. In 1999 the SEAE/MF disclosed (Directive 39) a Guide for Economic Analysis of Mergers; in 2001 this Guide was modified and adapted to serve to SEAE/MF and SDE/MJ analysis (Joint-Directive 50 of SEAE and SDE). The Guide informs, in a clear and transparent way, procedures to be followed by both secretaries when analysing horizontal concentrations submitted to the antitrust authorities. In 1999, two other important directives were issued: the first one granting SEAE the authority to institute fines for firms which deny, omit or delay the delivery of documents necessary to the analysis of cases (Directive SEAE no. 45); and the other one (Directive MF no. 305) enlarging the investigative power of SEAE in cases of illegal conducts.³²

The most recent initiative of anti-cartel enforcement in Brazil focuses on the implementation of a leniency program designed to encourage parties involved in antitrust conspiracies to co-operate with the authorities, providing them with evidence of illegal activities. In December 2000 then, the Federal Law 10.149 was enacted to give the Brazilian authorities the power to grant administrative amnesty associated with full, automatic criminal immunity for conspirators co-operating with antitrust investigations.³³ This is a particularly important point, since the law in Brazil considers cartel activities both an administrative infringement of the economic order and a crime.

The leniency program together with the new powers of investigation, also introduced by the new law, has given Brazil's antitrust authorities additional tools to increase the detection and successful prosecution of illegal agreements among competitors.

The new statute establishes that SDE, on behalf of the Federative Republic of Brazil, may sign agreements giving full amnesty or reducing by one or two-thirds the penalty applicable to individuals or corporations that have 'infringed the economic order' and that choose to collaborate with the investigations. Such 'leniency agreements', as described by the Brazilian law, can only be signed if the SDE does not already have enough evidence to secure the conviction of the corporation or individual at the time the agreement is proposed. Thus, even if the antitrust authority is aware of the infringement of the economic order, a party may qualify for the leniency program provided the authority did not have sufficient evidence to secure a conviction.

Federal Law 10.149 establishes that one of the investigative agencies, the SDE, may enter into a leniency agreements with the offender without the need for prior approval by CADE. That provides participants in the leniency program with further legal certainty, since once the agreement is signed the antitrust authority must honour it. Therefore, there is no need for a recommendation of amnesty, which would be subject to a revision by CADE.

Another important point is that CADE is nevertheless responsible for formally declaring the final act of the leniency agreement: the reduction of the applicable penalty imposed on the offender (which might be up to 100 per cent, i.e. full amnesty). It is important to note that full amnesty is automatically granted when the antitrust authorities were previously unaware of the reported infringement to the economic order. Under other circumstances, the applicable penalty is reduced from one to two-thirds of the original penalty. The exact amount of reduction takes into consideration the effectiveness of the collaboration and the good faith of the offender in complying with the agreement.

In October 1999, Brazil and the United States signed the Mutual Legal Assistance Treaty to facilitate co-operation among their antitrust officials. This agreement was a significant innovation and was ratified in December 2000 by the Brazilian Parliament. Similarly, Brazil was also the first non-member country to confirm its association with the OECD's Recommendation of the Council Concerning Effective Action Against Hard Core Cartels.

Since early 1999, however, SEAE and SDE started approximately 10 hard-core cartel investigations. Recent investigations have related to important industries, such as civil aviation, orange juice production, maritime transportation, aluminium and petrol stations. Investigations also focused on the effects of international hard core cartels, such as the lysine and vitamins conspiracies. Most of the success in finishing the investigations in order to send them to CADE has been due to the new investigative power introduced by Law 10.149. Up to now though there has been no application for the leniency program.

It is important to call attention to the new way of action of official and parallel producers' associations. With the end of the industrialisation directed by the State and the restoration of democracy in Brazil, the legislative became the central focus of the political process. Therefore and mainly after the

Constitutional Congress elected in 1986, the entrepreneurs as such other relevant participants in the conflict of interests turned their focus to the National Congress.³⁴

Although, there has still been some lobbying at the executive level, their main focus of intervention became the National Congress. The entrepreneurs' participation was diversified from the usual action through lobbies and other forms of influencing the congressman to include also direct representation in Congress. According to Diniz and Boschi the businesspeople increased their participation from around 25% to 36% of chairs in Congress. Furthermore, the participation of entrepreneurs' entities authorised to act in Congress increased from 44% in the beginning the eighties to 67% in the beginning of the nineties'. During the 1993-95 period, 50% of the 120 new entities labelled to act in Congress were entrepreneurial entities.³⁵

These entities influence these subject-commissions, through participating in the discussion of specific issues. Concerning antitrust law they act mainly at the Commission of Constitution and Justice (CCJ); the Commission of Consumer Defence, Environment and Minorities (CDCMM); and the Commission of Economy, Industry and Commerce (CEIC) in the House of Representatives and the Commission of Economic Subjects (CAE) in the Senate and also at some Congressional Commissions of Investigation (CPI).

These conflict of interests have been impacting the antitrust policy enforcement. Some examples are:

1. The deposition of antitrust authorities before the CCJ and CAE concerning the AMBEV merger. This was provoked by associations of beer distributors and by Kaiser, an AMBEV competitor.
2. The three depositions of the antitrust authorities before the CPI of the pharmaceutical industry concerning allegations of cartel formation and abusive price increases in the industry. It also investigates an alleged lack of law enforcement of the antitrust authorities.
3. Several depositions of antitrust authorities before CAE and CCJ concerning price abuses and anti-dumping policies.
4. Several depositions of antitrust authorities before CDCMM concerning abuses against consumers.
5. The CCJ is investigating the exclusivity agreement between Microsoft and its commercial representative in the city of Brasília, TBA Informatica LTDA. This case has been under investigation by antitrust authorities since one of TBA's competitors filed a complaint with the Brazilian System for Competition Defence.
6. There is a request to open a CPI to investigate the orange cultivator sector's accusation of a cartel among the orange juice producers. The association of orange producers has provoked this.

The AMBEV case is a typical example of the clash of conflicting interests in antitrust enforcement. The antitrust investigative authorities called for a structural measure – the selling of important actives in order to prevent AMBEV from becoming a monopolist in beer production. Most of the pressure for the approval of the merger, alleged the importance of having a large Brazilian brewery to compete in the foreign market and capable of exporting guaraná (a typical Brazilian soft drink). The dispute went on for several months as a political matter rather than an economic one. In the end, CADE imposed a very soft decision – the divestiture of an unimportant brand of beer (with less than 5% of market share) and some behavioural remedies concerning employment and distribution. Only the ordered divestiture was really followed and AMBEV is now a profitable monopolist in beer production, while their competitors are experiencing losses in their accounts.

Another example is the pharmaceutical industry. After the CPI pressed by Congress the government decided to reintroduce the price control of drugs. This decision was against the antitrust authority position. SEAE, mainly, has been advocating a regulatory enforcement for this sector similar to those of many other countries. The State should have access to a drugs program for the very poor (people who are assisted by the government health care system), reimbursement of medicine through private health care plans (optional) and the generic drugs program supported by the government. The result would be a free market for this industry, encouraging investment and competition. Up to now price control has caused only economic damages. The production decreased around 10%, about 20% of employees at the industry have been fired, and some new plants, announced to be installed in Brazil, have been directed to another Latin American country.

Apparently, the economic difficulties Brazil has been fighting, has made the Brazilian people forget many lessons from its recent past. Populism and nationalism seem to be back threatening many institutional, economic and social progresses already reached.

6. Political Economy Aspects of Competition Law and Policy in Brazil

The Brazilian political and economic history is embodied with elements that affect the definition and the enforcement of antitrust law and policy in the country. These elements are: a) the prevailing ideological climate; b) the expected net effects (costs and benefits) of the lobbying activity by large local groups; c) the existence of economic inefficiencies derived from the import substitution (IS) regime; and d) equity demands inherited from the import substitution (IS) regime.

During the recent Brazilian history, the ideological climate (social preferences towards the best state of the world) does not seem to have favoured competition as the rule of the economic game; the private sector did not take it as the core of the economic activity nor as an outward orientation or a constitutive part of business strategies. On the contrary, the ideological climate seems to have favoured “negotiation” among firms, state interventionism and an inward orientation. The strategy of *nationalism pro-development* turned “industrialisation” into a major national (public) goal, made import substitution the strategy to achieve it and protective tariffs, control of entry and subsidies among other economic policies oriented to foster it (the IS regime). Not surprisingly, until the end of the 80’s, economic policy had basically favoured producer (especially industrial producer) welfare to the detriment of other social groups (specially consumers).

For several reasons, the expected net return of lobbying against competition enforcement tends to be high in Brazil for large local groups. First, economic policy has reduced transaction costs of organising producer interest groups. Price control policy, which lasted up to 1994 – in particular – not only helped to bring together producers but – by proposing price formulas and institutionalising the role of the leader firm in oligopolistic markets – helped to unify producer’s interests as well. As transaction costs of agreeing to submit a petition to the government is low, interest groups’ incentive to support competition are less than the potential gains from seeking rents through political action.³⁶

Second, economic policy has facilitated the access of producer groups in the structure of government. As it is usually the executive branch – and not the legislative branch – the source of regulatory measures and therefore the target of lobbying in Brazil, economic policy reduced the costs of lobbying.³⁷ Third, measures controlling entry – specially those implemented by the Council of Industrial Development (*Conselho de Desenvolvimento Industrial*) – reduced the number of firms in many industrial sectors, generating smaller producer interest groups and, therefore, lower lobbying costs. Also, in smaller producer interest groups, each member gets a greater fraction of the benefit from reduced antitrust enforcement, increasing the return of the lobbying activity. Fourth, the ideological climate has traditionally

disfavoured competition and consumer welfare, which increases the probability of success of lobbying and therefore its expected return. Finally, lobbying against competition policy will be protecting existing rents in a (transition) environment where other rents are supposed to vanish. As transition to a market economy reduces other sources of privileges, the “value” of this “residual” rents to large local groups tend to be higher than before, increasing the expected return of the lobbying activity.

Among several economic inefficiencies derived from the IS regime, at least two are more relevant for our analysis here. The first is that the relative high expected net return of the lobbying activity constitutes a disincentive to invest in alternative productive activities (even more when we compute LDC’s traditional market failures that reduce the expected net return of productive investments, such as labour and financial market failures), which disfavours competition. A second consequence is inefficient entry, since domestic markets were insulated from foreign competition. Inefficient entry implies restructuring during the transition period, which increases the costs of competition and turns demand for “bigness” by large groups theoretically acceptable for the competition authority.

As political and economic power have been concentrated, equity demands also seem to be high: not only for social objectives, such as employment (during IS regime labour-intensive sectors were disfavoured), but also for “fair” outcomes of the economic activity. Fairness is sometimes a tricky concept. For small business, whose interests were historically under-represented by economic policies toward IS, it will appear as a right to participate in the market. For consumers, as much of the costs of IS development strategy was born by this interest group (in the form of low quality- high price products), the transition to a market economy creates the expectation of “fairer” market outcomes (which is not equivalent to better product at lower prices). Groups representing equity demands may sometimes be easier to organise – such as the preservation of employment – than those who favour competition and consumer welfare .

Considering the ideological climate; the high expected net effects of the lobbying activity by large local groups; the economic inefficiencies derived from the IS regime; and the equity demands inherited from the import substitution (IS) regime, it seems unlikely that competition policy would ever prevail over other economic and social objectives when the trade-off is incorporated in the antitrust law. In fact this has been more or less so even when antitrust law did not give much room for objectives other than competition and consumer welfare. It does not mean that we believe that competition or consumer welfare has always to be the most important objective of the societies. Of course not. Social cohesion in many circumstances may require some lenient approach towards competition. But at least when the institutional characteristics are as those discussed above, the choice between efficiency (or consumer welfare) and other economic or social objective should not be made by the antitrust authority: It should be made by some other institution say, for instance, Congress.

Congressional decisions may have many advantages in this case, as it increases the lobbying costs; the decision-makers are submitted to permanent evaluation (better accountability) and they are usually more transparent (as Congress is usually better monitored by civil society than antitrust agencies). This may be particularly important in Latin American countries where, by many standards, policy making tend to be less visible, more closed and centralised; dominated by high level administrators in the executive branch, many of them not facing electoral review and with indeterminate tenure in office.³⁸

7. Concluding Remarks

In the past two years, at the request of President Fernando Henrique Cardoso, a working group prepared a draft-bill with a new structure for the Brazilian System for Competition Defense. Among other important changes, the new model gathers SEAE, SDE and CADE into the National Agency for Competition. This agency will be an independent body linked to either the Ministry of Finance or to the

Ministry of Justice, and CADE, although within the same structure, will keep its financial independence and will be the final authority, unless one of the parties appeals to the courts. The director of the agency will have a four-year renewable mandate, while the counsellors of CADE will have a five-year non-renewable mandate instead of a two-year renewable one, as it is now.

At the same time, an amendment of the Competition Law is being prepared to adapt to the new conformation of the system and make it more agile and efficient. This introduces also new important features to the law, mainly: pre-merger notification system, early termination for simple cases, the participation of prosecutors in the trial representing consumers' interests and the definition of cartel as a per se injury.

The draft-bill was open for public consultation and after most of the modifications were incorporated it was sent back to the Civil Cabinet, from where it should be dispatched to Congress. Currently it is uncertain when, if ever, that will happen. However, whether or not the agency is created and the amendments to the Law are adopted, will in the end determine the future of Competition Law in Brazil.

NOTES

- 1 This paper was prepared for the February 2002 meeting of OECD Global Forum. It is substantially based on a previous version presented at the Fordham Conference on Competition Policy, NY, October 2001. The views presented here are the authors' own and should not be attributed to the Brazilian Government. The authors thank Mariana Tavares de Araujo for her helpful comments.
- 2 Professor of economics at the Fluminense Federal University and Brazilian Institute of Financial Markets - IBMEC and Secretary for Economic Monitoring of the Ministry of Finance - Brazil
- 3 Professor of economics at IBMEC and at Universidade Cândido Mendes, and Deputy-Secretary for Economic Monitoring of the Ministry of Finance - Brazil
- 4 It is worth noticing that, according to José Murilo de Carvalho in **Cidadania no Brasil** (Rio de Janeiro: Civilização Brasileira, 2001), when President Fernando Henrique Cardoso leaves office in 2003, he will be the second civilian president democratically elected, that in 75 years of the Brazilian republican history, will have delivered its post to another civilian president also democratically elected. The other one was President Juscelino Kubitschek in 1960.
- 5 Unless quoted, most of the political and economic facts and interpretation comes: (1) up to 1980, from Claudio M. Considera, "Pricing and Functional Income Distribution in Brazilian Manufacturing Industry", 1959-80 (Oxford University, D.Phil. dissertation, 1982); (2) after 1980, from Claudio M. Considera, "The Brazilian Economy – 1980/97: from hyper inflation to stabilisation" (Economic Research Institute of the Economic Planning Agency from the Government of Japan, Tokyo, Working Papers Series, March 1998).
- 6 The politics of this section is mostly based on Thomas E. Skidmore, **Brasil: de Getúlio Vargas a Castelo Branco –1930-1964** (Rio de Janeiro, SAGA, 1969).
- 7 Data from Joel Bergsman, **Brazil – Industrialisation and Trade Policies** (Oxford, Oxford University Press, 1970), p. 92.
- 8 UN/ECLAC, **External Financing in Latin America** (New York, UN, 1965)
- 9 Carlos Lessa, "Fifteen Years of Economic Policy in Brazil", in **UN/ECLA Economic Bulletin for Latin America**, XI (Dec.1964).
- 10 Cf. Maria da Conceição Tavares & José Serra, "Além da Estagnação", in M. C. Tavares, **Da Substituição de Importações ao Capitalismo Financeiro** (Rio de Janeiro, Zahar, 1972), pp. 153-208. This division of labour is well documented in Fernando Fajnzylber, **Sistema Industrial e Exportação de Manufaturados** (Rio de Janeiro, IPEA/INPES, 1972).
- 11 Most of the information on price control measures is based on Milton da Mata, "Controles de preços na economia brasileira: aspectos institucionais e resultados," in **Pesquisa e Planejamento Econômico** vol. 10 no. 3 Dez 1980, pp.911-54.
- 12 For an analysis of the stabilisation policy during the 1964-71 period see A. Fishlow, "Some Reflections of Post-1964 Brazilian Economic Policy", in ^a Stepan, Ed., **Authoritarian Brazil** (New Haven, Yale University Press, 1973), pp. 69-118. V. also A. C. Sochaczewski, "Financial and Economics Development of Brazil, 1952-1968" (The London School of Economics and Political Science, Ph.D. dissertation, 1980).
- 13 In 1991, when the privatisation started, the government owned more than 800 firms in all sectors of the economy; the large majority of them created or incorporated during the military government.
- 14 At that time there were many disagreements concerning the rate of inflation: the official figures were lower than this and the labour unions calculate a much higher figure; we choose to adopt the rate employed by Roberto Campos, the former Ministry of Planning, in an article published in a newspaper.

- 15 Cf. Maria da Conceição Tavares, Luiz Otávio Façanha and Mário Luiz Possas, “Estrutura Industrial e Empresas Líderes” (Rio de Janeiro, FINEP, 1978), mimeo.
- 16 Cf. Dionísio D. Carneiro Neto, “Política de Controle de Preços Industriais – Perspectiva Teórica e Análise Institucional da Experiência Brasileira”, in **Aspectos da Participação do Governo na Economia**, Série Monográfica (Rio de Janeiro, IPEA/INPES, 1976), no. 26, pp. 135-74, quoted by Milton da Mata, **op.cit.** p.919
- 17 The irony of history is that most of the price control system would be abandoned in 1992 just because it was distorting relative prices during inflation acceleration.
- 18 Cf. report by J.F. Pécora to the Ministry of Finance in 13th of November of 1967, quoted by M. da Mata, **op.cit.**, p.920
- 19 For a comprehensive analysis of the price control policy implemented by CIP see Claudio R. Frischtak, “Regulação Estatal de Preços Industriais no Brasil: a experiência do Conselho Interministerial de Preços”, (DEPE/IFCH, Universidade de Campinas, Master Thesis, 1980)
- 20 C. R. Frischtak, **op.cit.** p.176.
- 21 Claudio Frischtak, **op.cit.**, pp. 176-77.
- 22 Cf. Milton da Mata, **op.cit.** p. 917, according to the press, only four firms were punished by CADE for abuse of economic power.
- 23 This is not a joke. During a seminar organised by IBRAC (Brazilian Institute for Competition Advocacy) in Campos do Jordão, in December 2000, during a round table, there were allegations by some participants against some government officials’ intention of making cartel a crime *per se* in the reform of the competition law. According to these allegations, there could be ‘nice cartels’ and therefore it should be subject to a rule of reason analysis; we could have asked them ‘nice to whom?’.
- 24 A seminal book in this area is that of Maria Antonieta P. Leopoldi, **Política e Interesses na Industrialização Brasileira – as associações industriais, a política econômica e o Estado** (Rio de Janeiro: Paz e Terra, 1980). Unless quoted most of this section came from this book.
- 25 Eli Diniz and Renato Boschi, “Globalização, herança corporativa e a representação dos interesses empresariais; novas configurações no cenário pós-reformas”, In Renato Boschi, Eli Diniz and Fabiano Santos, **Elites Políticas e Econômicas no Brasil Contemporâneo** (Fundação Konrad Adenauer, São Paulo, 2000)
- 26 **op.cit.**, p. 29-30
- 27 According to data from the National Confederation of Industry, there are at least 300 important parallel associations. Amore detailed research would be necessary to investigate the total number of them, since many of them are not registered (there is no need for that) either in their state federation or in the national confederation.
- 28 It is important to remember that the enforcement of wage control was only possible by the co-operation of industrial association mainly during the time of the miracle period when some shortage of skilled labour force was reported.
- 29 Cf. Milton da Mata, **op. cit.** p. 948.
- 30 The eighties are usually called in Brazil as a ‘wasted decade’.

- 31 These changes were described in Lúcia Helena Salgado, **A Economia Política da Ação Antitruste** (São Paulo, Ed. Singular, 1997), pp. 175-85.
- 32 For a full description of Directives no. 39, no. 45 and no. 305 see Claudio Monteiro Considera and Paulo Guilherme Corrêa, “Desenvolvimento econômico e política antitruste: razões para a adoção das portarias no. 39 e 45 da Seae e no. 305 do Ministério da Fazenda”, SEAE, Working Paper, 3, November 1999.
- 33 For a full description of the Law see Claudio Considera, Paulo Corrêa and Frederico Guanais, “Building a leniency and amnesty policy: the Brazilian experience” in *Global Competition Review, The International Journal of Competition Policy and Regulation*, London, June/July 2001, pp. 44-46.
- 34 This change is well documented in Eli Diniz and Renato Boschi, op. cit., pp.49-81.
- 35 Cf. Eli Diniz and Renato Boschi, op. cit., pp. 64-65.
- 36 William Glade, *Privatisation in Rent Seeking Societies*, 17 *World Development* 673, 680 (1989).
- 37 In fact, officials that were responsible for enforcing price controls in CIP for the last two decades mainly composed SEAE, until recently. And this is not so uncommon: a great part of Clicac officials – the Panamanian antitrust agency – come from the previous *Oficina de Precios*. For examples on the mechanism used by interest groups to obtain private benefits in Venezuela see Ana Julia Jatar, *Competencia o Componenda*, *Economia Hoy*, Oct. 5, 1993 at 6, and Peter Schuck and Robert E. Litan, *Regulatory Reform in Peru*, Reg. Jan-Feb 1987, at 36, for the Peruvian case.
- 38 Merilee S. Grindle, *The New Political Economy*, World Bank Working Paper, No. 304, 1989.

II. PERSPECTIVES FOR BRAZIL-OECD TECHNICAL COOPERATION IN COMPETITION ISSUES¹

1. Introduction

Brazil has had an antitrust law since 1962. However, like other developing countries, this law remained unused for many years due to some well known reasons (e.g. from the early thirties to the late eighties, Brazilian economic growth was based on import substitution industrialization). This implied a protectionist environment in which there was no room for competition policy issues on the public agenda. In 1994, a new competition law substituted the previous statute in a context of broad economic reforms, such as trade liberalization, regulatory reform, and macroeconomic stabilization.

Although the Brazilian domestic economy is still the basis for its economic growth, the country has received a substantial amount of foreign investment since the adjustment reforms in the last decade. Foreign capital has played a significant and diversified role in fields such as mining, metallurgy, telecommunications, computers, chemicals and petrochemicals, pharmaceuticals, capital goods and vehicles; and in the year 2000 Foreign Direct Investment in Brazil amounted to US\$32.7 billion. Currently, four of Brazil's top ten corporations are foreign-based, and twelve of the twenty-five biggest companies are multinationals.

Brazil has controlled inflation since 1994 and has made significant progress in containing fiscal deficits and in order to ensure long term growth. A brief prepared for President George W. Bush in the beginning of his term last year indicated that Brazil has over half of South America GDP and population. Regarding the size of its economy, it was estimated that it is approximately twice the size of Russia and India and is comparable to China's economy. Furthermore, Brazil is the second largest market in the world for executive jets, helicopters, cellular telephones and fax machines; fourth for refrigerators; fifth for compact discs; and ranks third for soft drinks. Moreover, in 2001, Brazil became the fifth country in the world with purchase power parity of over U.S. \$ 1 trillion

The Brazilian System for Competition Defense is composed by the Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance; the Secretariat for Economic Law (SDE) of the Ministry of Justice; and the Administrative Council for Economic Defense (CADE), an independent body administratively linked to the Ministry of Justice. SEAE and SDE have analytical and investigative functions while CADE is an administrative tribunal. CADE's decisions can only be reviewed by the courts.

The Secretariat for Economic Monitoring is divided into five general departments – general-co-ordinations, four of which reflect the major divisions of the economy: The General-Co-ordination for Industrial Products (COGPI); the General-Co-ordination for Agricultural and Agro-industrial Products (COGPA); the General-Co-ordination for Public Services and Infrastructure (COGSI) and the General-Co-ordination for Commerce and Services Affairs (COGSE). The fifth one, created during the reform of the Secretariat in 2000, is the Department for Competition Defense (COGDC), which is responsible for the investigation of

¹ Paper prepared by Cleveland Prates Teixeira (General Coordinator for Anti-Cartel Enforcement), Marcelo de Matos Ramos (General Coordinator for Commerce and Services Affairs), Luís Henrique D'Andrea (Coordinator for Information Technology), Mariana Tavares de Araújo (Advisor at Seae) and Kélvia Albuquerque (Advisor at Seae).

cartels. COGDC has a particular structure within the agency to better perform its attributions; it is decentralized into three sub-divisions in Brasília, Rio de Janeiro and São Paulo.

SEAE's antitrust staff is predominantly comprised by economists (45); there are also six engineers; four attorneys; four professionals with degrees in agriculture, three in international relations; two with major in business; and seven from different academic backgrounds.

With the enactment of the new competition law in 1994, a strong emphasis was given to merger control, to capacity building and to the diffusion of competition values throughout the society. However, repression to anti-competitive conducts, and anti-cartel enforcement, in particular, was relatively neglected. Since 1999, important initiatives taken by antitrust authorities were related to anti-cartel enforcement. Efforts were also made to increase efficiency and to improve transparency of economic analysis. Measures to reduce budgetary limits were also introduced.

In the present economic context, the repression against anticompetitive practices is the main challenge faced by the Brazilian antitrust authorities. As so, priority has been dedicated to hard core cartel cases, either national or international. In this last case, the main task is to identify how collusion among multinationals affected the Brazilian economy and consumers. Generally accepted as the most egregious antitrust violation, hard core cartels tend to be one of the main obstacles to economic development in developing countries and, therefore, can not be tolerated.

In order to prioritize anti-cartel enforcement, among all the anticompetitive practices, SEAE has brought out many legal improvements during 1999. The first initiative taken by SEAE was the adoption of legal measures that increased its capacity and powers to search firms and to require private documents during the enforcement of the Brazilian Antitrust Law (Law N° 8884/94). The second important initiative was an institutional restructuring that released resources for the creation of three new units, in Brasília, Rio de Janeiro and São Paulo, as mentioned above, entirely devoted to anti-cartel investigation.

2. Possibilities of international cooperation between Brazil and the OECD

Brazil and OECD (or OECD member countries) have not yet fully explored their potential for international cooperation in antitrust.

Among the main initiatives of the ongoing OECD-Brazil cooperation program, it is worth mentioning Mr. John Clark's visit in 1999, to discuss specific competition issues with the staff of SEAE, SDE and CADE, which resulted in his report "Competition Policy and Regulatory Reform in Brazil"; a second visit in the following year to advise on the legal framework of the draft-bill proposing a new structure for the Brazilian System for Competition Defense and several amendments to the current law; the organization in 2001 of two international seminars; the first in May, in collaboration with SEAE, SDE and CADE on the topic "Enhancing Competition Policy in Brazil: New Legislation and Policies"; and a second one in December of the same year, on Merger Analysis for the staff of the three agencies. In addition, since the beginning of 2001, SEAE has been granted access to the exclusive OLISNet/OECD data bank, which allows SEAE's personnel to research restricted technical documents. Moreover, through the OECD, SEAE has developed a very close relationship with US authorities both from the Federal Trade Commission and the Department of Justice. These antitrust authorities have frequently shared their views on specific issues, and members of the staff of both US agencies have been to Brazil on several occasions as invited speakers in seminars held in the country.

Brazil's long experience both in bilateral and in multilateral international cooperation has shown that, more often than not, previous informal exchanges pave the way for a solid formal relationship

between cooperating parties. It is clear that acting in such a way authorities of both sides are able to discuss their strategies and fine-tune their ideas, drawing more realistic guidelines that lead to successful medium and long term international cooperation projects. Hence, although various exchanges with OECD personnel during the last three years have been highly regarded by SEAE as a first step to build a sustainable plan for cooperation, it may be the time to consolidate formal experiences in activities that can be better planned, periodically assessed and reevaluated.

After consulting its five departments, SEAE prepared the following preliminary list proposing a number of topics that could be supported by an international cooperation agreement, either through seminars, conferences, foreign advisors or other programs:

a) Regulated Markets

- Open-access in regulated markets (oil, electricity, telecom etc.);
- Competition in regulated sectors;
- Regulatory models for sewage services that would create incentives for competition in the sector;
- Efficient regulatory models for the energy sector that would create incentives for the firms to invest;
- Proposed models for integration of the transportation sector which could result on a more efficient market and lower tariffs.

b) New Economy Markets

- The interface of antitrust and intellectual property;
- Impact of digital convergence in antitrust analysis.

c) Retail Markets

- Logistics and conditions of entry;
- Identification of Geographic Relevant Markets.

d) Topics in Merger Control

- Appropriate techniques to analyze conglomerate mergers;
- Alternative forms to identify market-power;
- The use of econometric models on the definition of relevant markets;
- Design of Remedies.

e) Antitrust in the Financial Services

- Prudential Regulation vs. Antitrust;
- Relevant Market Identification in Financial Services.

f) Anti-cartel Enforcement

- Advise on interrogation procedures;
- Training on methods for search and seizure of documents during raids;
- Suggested measures to guarantee effectiveness of leniency programs.

III. BRAZILIAN ACTUAL EXPERIENCES IN INTERNATIONAL COOPERATION IN CARTEL CASES¹

1. Introduction

Brazilian experience in international cooperation in cartel cases is relatively recent. Two basic reasons, intrinsically linked, explain this fact. stipulate

First, it should be mentioned that only after 1994 an effective antitrust policy has been possible in Brazil. The implementation of the "Real Plan", in this year, yielded inflation control through the functioning of free market forces, gradual opening of the economy and privatization of state owned assets. These set of reforms actually made competition enforcement possible, eliminating the scenario of price control, trade barriers, and government enterprises, which hindered its effective application in the past. A new competition law was also enacted, law n.º 8.884, which converted the Administrative Council for Economic Defense (CADE), the Brazilian administrative antitrust Tribunal, into an independent agency², substantially enhancing Brazilian Competition System's³ effectiveness thereafter.

The second reason is that the opening of the Brazilian economy, a relatively recent phenomenon, launched in the 1990's, elucidated the need of international antitrust cooperation. The development of international commercial operations increased the impacts of foreign antitrust illegal conducts on Brazilian consumers. This actually resulted from the whole process of globalization. Nowadays, with world-wide transactions of firms, eventual collusive practices tend also to have global impacts.

On the other hand, within the context of market globalization, the constant improvement of investigation techniques in foreign agencies, with its consequent effects on antitrust enforcement, also represented an important factor of cooperation development recently observed. When an agency in one part of the world sues one specific firm, other foreign agencies are indirectly warned of possible impacts in their jurisdictions. This is what happened in the vitamins and lysine cartel case, as will be further described. Less developed antitrust agencies benefit from prosecutions undertaken by more developed agencies. This mechanism actually corresponds to a self inducing antitrust enhancement process where one prosecution increases the probability of further ones, rising, consequently, the cost of cartel agreements.

As a result of the above mentioned aspects, only at the end of the 1990's cartel cooperation initiatives were undertaken in Brazil. We can separate these initiatives into two basic categories: the formal ones and the informal ones. We classified formal cooperation initiatives as those derived from agreements

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² Competition enforcement in Brazil was inaugurated in 1962 (with the creation of the Administrative Council for Economic Defense - CADE).

³ The Brazilian Competition System is composed by three institutions: the Secretariat for Economic Monitoring (Seae), the Secretary for Economic Law (SDE), and the Administrative Council for Economic Defense (CADE). The first agency is administratively linked to the Ministry of Finance while the other ones are subordinated to the Ministry of Justice. Cartel cases are brought upon SDE, which, jointly with Seae, conducts the investigations. SDE concludes its technical opinion enforcing legal aspects, while Seae conducts its technical opinion stressing economic issues. Seae's advice with respect to cartels is not mandatory. CADE, an administrative tribunal, renders the judgment on the cases after analyzing the technical opinions of the other agencies.

signed between Brazil and other countries. Informal cooperation, defined by exclusion, were considered any other kind of technical support.

2. Formal International Cooperation

The most important existing formal agreement regarding cooperation between competition authorities in Brazil was signed in October 1999 with the Government of the United States of America. This agreement aims at facilitating the exchange of information among antitrust officials in both countries. Nevertheless, it still has not been ratified by the Brazilian Congress. Consequently, all the technical assistance between Brazil and the United States in anti-cartel enforcement still remains informal.

The agreement specifies certain requirements to be followed by both national antitrust authorities⁴ as well as a number of possibilities regarding technical cooperation and enforcement activities, such as:

1. prompt notification to the other party with respect to the enforcement activities that: (a) are relevant to enforcement activities of the other Party; (b) involve anticompetitive practices, other than mergers or acquisitions, carried out in whole or in substantial part in the territory of the other Party; (c) involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to a transaction, is a company incorporated or organized under the laws of the other Party or of one of its states; (d) involve conduct believed to have been required, encouraged, or approved by the other Party; (e) involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in the territory of the other Party; or (f) involve the seeking of information located in the territory of the other Party.
2. The consideration of coordination of enforcement activities with regard to related matters,
3. the possibility of requesting consultations regarding any matter related to the agreement,
4. the option to require, after prior consultation, the other party's competition authorities to initiate appropriate enforcement activities whenever a party believes that anticompetitive practices carried out in the territory of the other adversely affects its important interests.
5. The following technical cooperation activities, within the competitions' agencies reasonably available resources: exchanges of information to the extent compatible with their respective laws and important interests; exchanges of competition agency personnel for training purposes at each other's competition agencies; participation of competition agency personnel as lecturers or consultants at training courses on competition law and policy organized or sponsored by each other's competition authorities; and such other forms of technical cooperation as the Parties' competition authorities agree are appropriate.

It should be finally pointed out that eventhough the agreement has not yet entered into force, its simple existence and expectation of future validity has already proved to be profitable. All the informal exchange

⁴ (i) for Brazil, the Administrative Council for Economic Defense (CADE) and the Secretariat for Economic Law Enforcement (SDE) in the Ministry of Justice; the Secretariat for Economic Monitoring (SEAE) in the Ministry of Finance; (ii) for the United States of America, the United States Department of Justice and the Federal Trade Commission;

of informations and technical assistance between Brazil and the United States is actually facilitated by the fact that competition authorities have already agreed upon common standards of cooperation. Brazilian authorities believe that Congress endorsement will occur in the near future.

3. Informal International Cooperation

Despite the signature of the international agreement between Brazilian and North American Antitrust authorities, the most valuable source of international cooperation continues being informal. Particularly in three important recent cartel cases, this type of technical assistance proved to be essential.

The first one is the Lysine International Cartel. Two months before the signature of the above mentioned agreement, in September 1999, in the International Cartel Workshop in Washington - DC, the U.S. Department of Justice presented in detail their work in the Lysine International Cartel Case. After the case went to trial, the available material became public, what allowed the disclosure of relevant information to Brazilian antitrust officials.

Transcripts of Lysine Cartel meetings sent to Brazilian authorities showed that Latin America and Brazil were included in the world market division set by the international cartel. Once the national industry did not produce lysine, Brazilian consumers became subjugated to the exporters' decisions, as there were no available choices. Consequently, prices in Brazil became artificially higher. Brazilian subsidiaries of Lysine producers are being prosecuted at the present moment. The case is in SDE and will be further sent to CADE for judgement.

The second case, the Vitamins International Cartel Case, was also discovered by the U.S. Department of Justice. Seae decided to initiate its own investigations after press releases announced the prosecution of this cartel in the United States. Notwithstanding, Seae's lack of expertise in hard core cartel investigations hindered further developments in this case. Market data studies didn't allow any substantial conclusion about the cartel in Brazil. The fact of being a relatively small market in terms of international vitamins trade (approximately 2%) hampered the detection of the cartel by simple market information. In addition, vitamins buyers heard by Brazilian authorities revealed a great amount of skepticism about the international cartel effects in the country.

Furthermore, the fact that the case had not gone to trial in the United States unabled the share of documents because of confidentiality restraints. Hence, all the cooperation remained informal.

Nevertheless, some important hints provided by North American authorities were essential for the analysis of Brazilian officials. One important information received by Seae was that the Vitamins Cartel operated very similarly to the Lysine Cartel. This led to the conclusion that there was a budget that allocated quantities to be sold for each group of products that could be sold by each company in different regions of the world.

The second important hint was provided by an oral statement of a former director of a large vitamin producer. The director revealed that Latin American operations of the major vitamins companies were centralized in Brazil and helped Brazilian authorities to detect the whereabouts of former Latin American regional managers.

Only after an interview of one former regional manager a relationship between illegal business practices in the United States and the ones in Brazil was established. Some executives of the main vitamin companies ordered their Latin American colleagues to organize quarterly meetings with competitors in São Paulo to exchange information about prices and sales quantities of vitamins A and E. Latin American

executives were instructed to produce meticulous reports of the regional market which would contain informations such as competitors' selling amounts.

Sales managers, nevertheless, argued that they completely ignored collusive directives established by the international headquarters. One local manager expressed his astonishment when he received direct complaints of the Latin American Manager after having sold more than what had been previously planned. He informed that this fact repeatedly occurred whenever sales surpassed the stipulated amount, what clearly denotes the enforcement cartel practice in Brazil.

After gathering these informations, Seae sent a presentment to SDE which opened an Administrative Process. The case is being analyzed at the present moment by SDE, who will send it to be judged by CADE.

The third case analyzed in Brazil that received international informal technical assistance was the Airline Companies Case.

In August 1999, the presidents of the four major Brazilian airlines met in a luxury hotel in São Paulo. Five days later, the prices of the flights between central airports of Rio de Janeiro and São Paulo had gone up, in the four airlines whose presidents had met, by 10%. The price increase affected the most lucrative market in Brazilian air transportation, connecting the two major cities in the country and carrying thousands of business travelers on a daily basis. The four companies, moreover, had 100% of the market share for regular air transportation services in that route.

The airlines where required by Seae to explain the reasons for the same price increase on that specific day. In response, the companies gave unspecific answers not mentioning competitor's price increase or any matching policy. No explanation about the choice of the date was provided. After discarding alternative rational economic explanations for the price increase, Seae's conclusion was that a price parallelism with a plus factor had occurred. A presentment was sent to SDE for the opening of an Administrative Process.

For the elaboration of Seae's presentment, informal technical contacts with North American officials in DOJ was very helpful. They contributed with their expertise giving substantial advice on the case, as well as providing Brazilian officials with the latest developments in price parallelism cases in the U.S.

While presenting their defense the companies changed their line of argumentation. They claimed that what had happened was price leadership. The airlines said that the leader company had increased its prices and the rivals just matched the price increase. The main tool for that was the computerized system of the Airline Tariff Publishing Company (ATPCO). The companies claimed that the leading airline published on ATPCO a price increase on August 6th to happen only on August 9th. The competitors just matched the price change.

At this point, the informal cooperation with the U.S. DOJ became essential since ATPCO had signed a consent decree with the U.S. government in which they had agreed to change their system in a way that competing airlines in the United States would not be able to visualize their rival's price increases before their sale availability⁵. This change, however, remained restricted to the United States and Canada, since it had been made to comply to their laws. Services offered by ATPCO remained the same elsewhere.

⁵ This change would no longer permit airlines to benefit from privileged information that the ATPCO system gave them.

In other words, in the rest of the world, competing airlines can still announce future price increases in the ATPCO system that may not occur.

This is exactly what had occurred in Brazil. The leading airline published its prices on the 6th of August immediately providing this information to other airlines through a specific command in the ATPCO system but holding this information from the computer reservation systems until the 9th. Consequently, from the 6th to the 9th of August only competing airlines knew that the leader was planning to increase its prices. Customers and travel agents completely ignored this information. If the competitors had not matched the price increase, the leading airline could have cancelled it and the customers and travel agents would never had known.

Brazilian Antitrust authorities maintained close contact with DOJ officials which helped on the gathering of documents related to the North American ATPCO case as well as on the elucidation of several doubts and misunderstandings related to the North American prosecution.

In addition, some DOJ specialists visited Seae's office where a closer explanation regarding the case permitted a greater number of suggestions related to the investigations.

4. Final Remarks

Two basic conclusions derive from the lines above. First, all international anti-cartel cooperation between Brazil and other countries remain informal. Second, this cooperation is, until now, almost totally related to the United States.

Informal cooperation is surely desirable as it can be expeditious, direct and can sometimes reveal hidden aspects, clues or hints not always present or possible in formal mechanisms of technical exchange. Nevertheless, this sort of cooperation has the disadvantage of being excessively based on personal contacts. In this sense, informal contacts can be a close substitute of formal ones in the short term, but not in the long term. Persons come and go, institutions remain. Two international government entities have the need of establishing formal contacts with the constant change of information, otherwise, a periodic cooperation can disappear in the future.

In the case of the informal assistance between Brazilian and North American cartel authorities, it surely is the result of the personal close contacts of its members. This is a very positive aspect. However, formal paths need to be further used and developed, not only with the United States but with other jurisdictions.

Brazilian competition authorities surely have the interest in developing cooperation agreements and contacts with other countries. As was previously said, the effective detection of anticompetitive practices can substantially be enhanced through the sharing of information between agencies and the better understanding of each other's laws and enforcement policies and activities. In this context, the greatest challenge of Brazilian competition authorities is to widen its international cooperation in two directions: 1) to other countries and 2) to the establishment of formal sources of technical assistance.

**ANSWERS TO OECD QUESTIONNAIRE ON INTERNATIONAL CO-OPERATION
IN CARTEL AND MERGER INVESTIGATIONS**

ANNEX A

This questionnaire covers the period from 1st January 2000 to the present.

1. Provide a copy of each formal co-operation agreement between your country or your competition agency and a foreign country or competition agency relating to competition investigations or cases.

See files available on Internet : <http://www.oecd.org/daf/competition>

2. Describe your country's laws or regulations that relate to or affect your agency's ability to exchange information or co-operate with a foreign competition agency.

Brazilian antitrust law n° 8.884/94 (also on Internet) does not impose any significant restriction on our ability to cooperate.

Cartels

3. If your agency issued one or more formal requests to a foreign competition agency for information or assistance in an investigation or case involving a hardcore cartel, please provide the following information about such requests (you need not identify specific cases):

- a) the number of such requests;

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- b) the requested country or countries;

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- c) descriptions of the requests, such as the type of information or assistance required;

The Brazilian antitrust agencies: Secretariat of Economic Monitoring and Secretariat of Economic Law have requested officially certified copies of some documents related to the lysine, vitamins and graphite electrode cartels.

- d) the number of requests that were granted, and for those that were not, the reason(s) given, if any, by the requested country for the refusal; and

The requested documents mentioned above were provided.

- e) for the requests that were granted, your assessment of the usefulness and importance of the information or assistance received, and for those that were not granted, your assessment of the impact of the refusal on the investigation or case.

The official copies of the documents have allowed us to avoid legal problems with respect to the certification of the documents used in their investigations.

4. If your agency received one or more formal requests from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

We haven't received any formal request from a foreign competition agency for information or assistance in an investigation or case involving hardcore cartels.

5. Please describe any other instances of co-operation with a foreign competition agency in a hard core cartel investigation or case not described above, such as meetings, telephone or email communications, including, if possible, the co-operating country or countries, the nature of the co-operation and the importance or significance of the co-operation to your agency.

The use of such instruments of co-operation has been very useful in cartel cases investigation that demands prompt responses from the antitrust authorities. (see also separate contribution on "Brazilian experience in international co-operation in Cartel Cases).

6. State the number of instances in which a hard core cartel investigation or case could have benefited from information or co-operation from a foreign competition agency but your agency did not request such assistance because you knew that it could not or would not be granted. Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement effort.

Some kind of situations could make the co-operational effort ineffective mainly if it concerns less developed countries. For example whether the requested country doesn't have antitrust law enforcement, the absence of formal exchange of information could seriously harm the investigation procedures. The entry in some anticompetitive behavior also could be stimulated in these countries, among others negative effects that could threaten some enforcement efforts.

Mergers

The great amount of co-operation measures between Brazilian and foreign antitrust authorities apply to hardcore cartels cases, so the questions regarding co-operation in mergers cases present in this section does not necessary apply. However, to provide you a background, some kind of information has been extremely useful for us, such as ones concerning the relevant market's definition, impacts of mergers on the market, the remedies adopted which could also correct the anticompetitive behavior's outside the original jurisdiction, among others.

Unclassified

CCNM/GF/COMP/WD(2002)4



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

03-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM BULGARIA

This note is submitted by Bulgaria as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120257

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)4
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THE REPUBLIC OF BULGARIA
COMMISSION ON PROTECTION OF COMPETITION

1. Actual experiences in international co-operation in cartel and/or merger cases

The Law on protection of competition that entered into force on April 29th 1998 retains the effect doctrine. Its article 2/1/ is based on the effect principle and provides that the Law shall be applicable to all undertakings, which carry on their activities within or out of Bulgaria if they distort or may distort competition on the territory of the Republic of Bulgaria.

The Commission on Protection of Competition of the Republic of Bulgaria is highly interested in developing international co-operation with other competition authorities. It considers that closer cooperation is needed to deal effectively with restrictive business practices of enterprises from different countries when they affect the interests of one or more other countries and have harmful effect on international trade.

To overcome problems due to national differences in the investigation procedures, the conflicting views related to the jurisdiction of competition laws when applied to conduct or parties outside the national territory, Bulgaria has concluded a number of international agreements for co-operation.

2. International agreements

The Europe Agreement establishing an association between the European Communities and their Member states of one part, and the Republic of Bulgaria, on the other part contains the main substantive competition rules, which apply where trade between the EC and the Republic of Bulgaria is affected. The following are deemed to be incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and the Republic of Bulgaria:

1. all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
2. an abuse by one or more undertakings of a dominant position on the territories of the Community of or Bulgaria as a whole or in a substantial part thereof;
3. any public aid which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods.

The Europe Agreement makes it clear that these rules and prohibited practices are to be interpreted in accordance with the criteria arising from the application of Articles 81, 82 and 86 of the EC Treaty. The decisions of the Commission and the case law of the Court of Justice are also relevant.

As far as merger control is concerned mergers are not directly referred to in the Europe Agreement.

3. The Implementing Rules

According to the Europe Agreement, the Association Council had to adopt the necessary rules for the implementation of the above – outlined competition provisions within three years of the entry into force of the Agreements.

With its Decision 2 from 7.10.1997 the Association Council adopted the Rules for the application of the competition rules applicable to undertakings.

According to these Implementing Rules, cases of mutual interest to Bulgaria and the EU, on behalf of the EU, are dealt with by the European Commission, and on behalf of Bulgaria - by the Commission on Protection of Competition. The competencies of the European Commission and the Commission on Protection of Competition derive from the existing legislation respectively in the EC and the Republic of Bulgaria. Both authorities consider cases in accordance with their own substantive rules.

The Implementing Rules for undertakings contain procedures for cooperation between the Commission and the Commission on Protection of Competition, procedures for notification of cases to the other Party and for consultation.

According to art. 4 whenever the competition authority becomes aware of the fact that a case, falling also or only under the competence of the other authority, appears to affect important interests of the first Party, it may request information about this case from the competent authority.

When addressed with such request, the competent authority shall give sufficient information to the extent possible and at a sufficiently early stage before the adoption of a decision or before the settlement of the case to allow the due consideration of the requesting authority's views. Neither competition authority is bound to provide information if disclosure of that information to the requesting authority is prohibited by the statute of the institution disposing of it, or would interfere with important interests of the Party whose authority is in possession of the information. Each competition body agrees to observe, to the fullest extent possible, confidentiality of the information it has acquired by the other authority.

As far as merger control is concerned, Article 7 of the Implementing rules entitles the Commission on protection of Competition to express its view in the course of the procedure under the EC Merger Regulation, where the merger will have a significant impact on the economy of Bulgaria. The European Commission will give due consideration to that view.

After consultation within the framework of the Association Council, where a particular practice is considered incompatible with the competition rules of the Europe Agreement and inadequately dealt with under the implementing rules and if such practice causes or threatens to cause serious prejudice to the interest of the other contracting Party or material injury to its domestic industry, the Community or Bulgaria may take appropriate measures to solve the problem.

4. Free trade agreements

Bulgaria has entered into bilateral Free trade agreements with Lithuania, Estonia, Israel, Turkey, Macedonia and Croatia.

Perfectly in accordance with Articles 81(1) and 82 of the EC Treaty, these agreements provide that restrictive business practices constitute a violation of the agreements if they affect trade between Bulgaria and the respective country. Free trade agreements contain competition rules that prohibit agreements that restrict competition and abuse of a dominant position.

All of those agreements also provide for a solution to competition rules violation. Although the above-mentioned competition clauses have never been applied, they express the common assessment of parties to the danger of restrictive business practices, seek to facilitate cooperation with the respective competition authority and to eliminate the negative effect of restrictive practices on bilateral trade.

For the application of the free trade agreements no special implementing rules were adopted, but the solution of problems could be sought through direct consultations between competition authorities or through Joint Committees supervising the implementation of the agreements in question.

5. Programs for cooperation

Another important tool are the bilateral Programs for cooperation signed between the Commission on Protection of Competition and the competition authorities of Russia, Macedonia and Romania.

These bilateral programs envisage exchange of information on cases involving investigation of restrictive trade practices performed by economic operators with a nationality of the contracting parties. Such cooperation is possible when violations affect the interests of both parties.

Another provision concerns exchange of information on restrictive practices by operators of a third country and aims at avoiding such anti competitive behavior on the territory of the contracting parties.

6. Informal cooperation

Very good is the experience of the Commission on Protection of Competition has established fruitful informal cooperation with the competition authorities of Germany, Macedonia, Romania.

7. Technical assistance

Technical assistance is another important tool for cooperation in the field of competition. The Commission on Protection of Competition has obtained assistance from EC, OECD, ABA, USAID, JICA.

The officials of the CPC have been on visits and internships to the European Commission - Directorate General for Competition, Anti trust Division and the FTC, many of them have participated in conferences, workshops and seminars, organized by the European Commission, OECD, UNCTAD, as well by the competition authorities of different countries.

The Commission on Protection of Competition is well aware that cooperation between competition authorities can be very useful and rewarding for the sound law enforcement.

We believe that the Global Competition Network and this Global Competition Forum can serve as a vehicle for strengthening cooperation between antitrust agencies worldwide.

Unclassified

CCNM/GF/COMP/WD(2002)14



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

30-Jan-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM CHILE

This note is submitted by Chile as a background material for the second meeting of the Global Forum on Competition to be held on 14 and 15 February 2002.

JT00120134

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)14
Unclassified

English text only

I. - EXPERIENCES OF AND NEEDS FOR CAPACITY BUILDING OR TECHNICAL ASSISTANCE

To address this issue we will follow the questionnaire sent by the OECD, and will try to provide as much information in the clearest way possible.

1. Topics addressed in technical assistance and general aspects

In our experience, we have not found any topics that could be qualified as not useful for building our technical capacity. Although some topics are more interesting, considering that they could be under present investigation and there is immediate concern over them, all topics, approaches and analyses are considered useful for the FNE's objectives.

For example, participating in the case-study based seminars organised by the OECD has been an excellent opportunity to realise that many issues and cases are very similar in different countries and have raised the same concerns when they are addressed by the competition agency. Regardless of the fact that some topics have already been seen by the agency, the opportunity to explain our procedures, analyses and outcomes generates a kind of "peer" scrutiny that results in impartial opinions which evaluate the agency's work.

For the other part, analysing issues that have not been addressed before by our agency, provides us with tools and overviews that help us gain knowledge for future cases that will probably have to be addressed.

Nevertheless, it is very important to consider the level of development of each countries' competition policies, in order to provide consistent and useful assistance in technical matters. Many countries in Latin American have still not enacted competition laws; others have years of enforcement, and there are countries that are implementing their new statues and structuring their antitrust institutions.

In this line of thought, there are some topics that are limited to problems that new agencies or countries who do not have agencies or legislation need to address. In these topics, countries like Chile can have an important opinion and can provide technical assistance on these matters.

It is important to explain that the FNE is organised as a specialised agency that deals exclusively with antitrust enforcement. Our law came to force in October 1973, but we have antitrust statutes since late 1950's. We do not enforce consumer protection statues like many Latin American authorities.

2. Forms of assistance

We had the chance to participate in case-study seminars and conferences throughout the years 1999 to 2001.

The case study system has been a great experience, and stands upon a recognised high level of capacity, expertise and understanding of the OECD officials and experts who develop these programs. The study of real cases seen by other agencies, that may be in course of investigation or terminated with final judgements, provide us with excellent tools for analyses. This system generates an active participation and new relevant questions are put forward by participants.

Regarding internships, our experience is as providers of technical assistance. Officials from Costa Rica have visited the FNE for short terms and completed a program that included presentations by our experts and the analysis of current cases. Our objective is to provide an outlook of our law, the procedures involved and the ways to approach different anticompetitive activities.

Our experience is that case-study based seminars are more useful if many countries participate with their own views. The discussions that arise and the different standpoints provide key elements that help the participants gain technical experience.

Considering our last experiences in short internships, single country participation provides a unique opportunity for officers of both parties to interact and discuss everyday concerns and also to deal with complex inquiries. These programs have been an excellent experience for both parties and we will try to develop others. We are in preliminary talks with competition authorities from Panama in this matter.

3. Skills of the assistance provider

From our view, as recipients of assistance, the expertise of the providers is of great importance. The ability to analyse cases that are presented summarily and to give certain key elements to the resolution of the problems is of great importance.

Nevertheless, and from a point of view of assistance providers, for us the sole presence of officials or experts from a foreign agency or other country, which interact with the personnel, provides an opportunity to exchange viewpoints and to express freely opinions between peers. This instance is of great importance for it helps reach a global view of the work done by the agency.

Chile is participating in the Free Trade Agreement of the Americas negotiations (FTAA-ALCA). In that forum, the delegations have established in almost all rounds of negotiations a session for technical assistance, although it is not part of the formal negotiations.

This has been a great experience, specially for countries that do not have competition laws, and has proved that not necessarily great expertise is needed to provide assistance and generate case-based discussions.

4. Our needs for technical assistance.

Our agency has powers to enforce competition law in many fields, including regulated markets that were part of the privatisation process in Chile. This reflects the vast areas that are addressed in our investigations.

The FNE has an experience of nearly 30 years in competition enforcement. It is a prestigious government institution with a clear technical profile. Our Antitrust Commissions, which are independent bodies, also have a great tradition of enforcement and its decisions have positively influenced many markets and established many "bright lines" for competitors to guide their activities.

Nevertheless, competition issues become every day more complex. New markets and businesses arise and international trade creates continuous upheavals in the marketplace.

The analysis of activities that constitute new forms of abuse of dominant position is a topic that is important for us to address. Our institutional structure does not consider mandatory or compulsory merger

control nor the review of acquisitions and take over operations, but we've conducted investigations that analysed concentration processes.

It is important for us to enhance our technical capacities to investigate the activities developed by firms which hold a high market share and may engage in abuses of its position.

Also, due to the fact that some mergers and acquisitions are investigated, our agency needs to learn from the different approaches to merger analysis.

There is another aspect that is very important for us. It is necessary to gain knowledge through technical assistance of the different law statues that deal with the criminal enforcement of certain conducts. Our agency finds an important issue to address the possible limitations or the eventual substitution of criminal measures or sanctions, which are contemplated in our law, with other measures. It is important to take account of the benefits and the negative effects of these changes.

In that sense, comparative studies on competition law, presented or provided as technical assistance activities, is a field that the FNE finds very useful in order to acquire knowledge of foreign experiences and improve our institutions.

ANNEX A

**QUESTIONNAIRE TO INVITEES ON INTERNATIONAL CO-OPERATION
IN CARTEL AND MERGER INVESTIGATIONS**

This questionnaire covers the period from 1 January 2000 to the present.

If you are unable to provide all of the information requested, either because it would impose too great a burden or because of confidentiality constraints, please provide as much as reasonably possible.

1. Provide a copy of each formal co-operation agreement between your country or your competition agency and a foreign country or competition agency relating to competition investigations or cases.

A: We are attaching copy of the Memorandum of Understanding between the Fiscalía Nacional Económica and the Competition Bureau of Canada, signed on the 17th of December, 2001.

2. Describe your country's laws or regulations that relate to or affect your agency's ability to exchange information or co-operate with a foreign competition agency.

A: The Decree Law 211 (DL 211) does not consider any prescription regarding this matter. The Head of the FNE, the National Economic Prosecutor has the faculty to conduct independently his duties and in that sense, is able to sign agreements and other commitments regarding international co-operation and exchange of information.

Regarding the exchange of information: The FNE can declare, by virtue of its own powers or due to a request of a party, the confidentiality of certain documents and information. This will affect the possibility to exchange confidential information.

Nevertheless, our investigations are public and the parties have full access to them, unless they are declared reserved. The President of the Competition Tribunal must be notified of the confidentiality given to the procedure; and if it also implies that the affected party is not notified of the procedure, then an explicit authorisation by the Tribunal is needed. (arts. 27, letter a), and 30 A, DL 211)

Cartels

3. If your agency issued one or more formal requests to a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

A: Our agency has not requested information in this respect. Nevertheless, in one case involving operations overseas, not related with cartels, we requested information but the agency (non competition agency) although agreed to sending the data, also warned us that it could only be provided through formal co-operation procedures between competition agencies, making an exemption in this case.

4. If your agency received one or more formal requests from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

A: Our agency has not received request in this sense.

5. Please describe any other instances of co-operation with a foreign competition agency in a hard core cartel investigation or case not described above, such as meetings, telephone or email communications, including, if possible, the co-operating country or countries, the nature of the co-operation and the importance or significance of the co-operation to your agency.

A: Our agency has not been involved in these kinds of co-operation activities.

Nevertheless, regarding non-cartel investigations, during meetings with officials of foreign agencies had to opportunity to request and also provides information regarding the conduction of certain cases and their results. This has also been done by telephone. This information has been of great importance for our enforcement work.

6. State the number of instances in which a hard core cartel investigation or case could have benefited from information or co-operation from a foreign competition agency but your agency did not request such assistance because you knew that it could not or would not be granted. Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement effort.

A: Our agency does not have information regarding this matter.

Mergers

7. Identify each merger that your agency reviewed that, to your knowledge, was also reviewed by the competition agency of another country.

A:

- **The Coca Cola Company and Cadbury Schweppes (brand name acquisition)**
- **Central Hispano S.A. – Santander S.A. (local effects in financial markets)**
- **Nestle – Fonterra (strategic alliance)**

8. For each investigation or proceeding involving a merger in which there was communication between your competition agency and the competition agency of another country during the course of the investigation or proceeding, please state or describe:

A: Our agency does not have experience on this matter.

We do not have a mandatory or compulsory merger control mechanism. Our merger investigations are initiated in specific cases in which the FNE or the Commissions consider that the operations may affect competition.

9. Describe any instances in a merger case or investigation

a. in which your agency sought the assistance of a foreign competition agency but it was denied;
A: Our agency does not have any experience in this matter.

b. in which your agency sought a waiver of confidentiality restraint from one or more of the merging parties but it was denied.

A: In a merger case, our Commissions, not the FNE, requested confidential information from parties, and they complied, but the confidentiality was preserved throughout the procedure with respect to third parties.

In general terms, parties reveal information to the FNE and the confidentiality is kept with respect to third parties. In only very few cases have parties sought relief from the Competition Tribunal in order to deny the FNE access to data (special recourse or remedy – art. 27, letter h), DL 211). All these cases were rejected by the Tribunal and the FNE was authorised to obtain the information.

10. Describe any investigation or proceeding involving a merger that would have benefited from co-operation with a foreign competition agency but your agency did not pursue such co-operation because you knew that it would not be possible. Describe the type of co-operation that would have been useful and the impact of its unavailability on your enforcement effort.

A: Our agency has no experience in this matter.

Unclassified

CCNM/GF/COMP/WD(2002)5



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

05-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM ESTONIA

This note is submitted by Estonia as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120336

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)5
Unclassified

English text only

EXPERIENCES OF AND NEEDS FOR CAPACITY BUILDING

Mrs. Aini Proos
Deputy Director General, Estonian Competition Board

Activities conflicting with good trade practices and customs were prohibited by a law on fighting against unfair competition in Estonia in 1931. However, the application of the law ended together with the disappearance of the State of Estonia as a result of World War II.

In 1988, after the will to restore the independence of Estonia had been declared, restoration of market economy started. A new Price Act, passed already in 1989, became a basis for liberalisation of prices. In 1990 a Price Board was established. The main task of the new Board was to analyse and coordinate the price setting, set the prices and to supervise that the undertakings conformed to those. Thus the work performed was more of a character of consumer protection. At the same time, the Board was engaged, together with relevant ministries, lawyers and economists, in drafting legislative acts necessary for liberalisation of prices.

In 1991 the first draft of Competition Act was drawn up, that included provisions on prohibition of restriction of competition by means of agreements, abuse of dominant position and unfair competition. However, as this draft was not approved and as, at that time, we did not have well educated specialists in the field, knowledgeable of basic principles of market economy, the subsequent drafts of legal acts relating to prices and competition issues were drawn up by officials exercising the supervision of the Price Act together with ministerial officials, all of them possessing a degree in law or economics that was obtained at so called Soviet time.

To create something so totally new for the country, in such conditions - it was a job involving great responsibility, but a very interesting one. I was fortunate enough to work in both working groups, in the one that drafted the Competition Act, as well as, in the other that drafted the Consumer Protection Act.

In 1993 the Competition Act and in 1994 the Consumer Protection Act entered into force in Estonia. In 1993 the Price Board was renamed to Estonian Competition Board (ECB) and a duty of supervising the compliance with the Competition Act, as well as, a duty of supervising the prices were imposed on the new agency. There were 47 working places at the ECB at that time.

After the process of liberalisation of prices came to an end, there was no more need for monitoring the price setting in Estonia. Therefore, in 1995 the relevant agencies were reorganised so that Consumer Protection Board employed the officials exercising supervision in respect of prices and there remained 29 officials in ECB.

Since 1999 we have working places for 47 officials again and this time for exercising supervision in respect of competition matters only, in order to be able to carry out more efficient supervision.

In 2001 our scope of work broadened, as the supervision in respect of credit institutions, securities brokers and insurance companies, as well as, total merger control were added to our duties. At the same time we ceased to exercise supervision in respect of unfair competition matters.

Besides the ECB, separate agencies-regulators were established for exercising supervision over activities of natural monopolies, in such sectors as energy, railway transport and communications, namely

Energy Market Inspectorate, Railway Administration and Communications Board. In matters concerning state aid, the Ministry of Finance exercises the supervision. All Boards belong to an administrative field of a Minister: the ECB - Minister of Finance, Energy Market Inspectorate - Minister of Economic Affairs, Railway Administration and Communications Board - Minister of Roads and Communications. It is arranged so that the budgetary questions and appointment of the Director General fall into the scope of activities of the relevant Minister, but the supervision in respect of compliance with the laws is carried out independently by the agencies.

During the past years, all the mentioned agencies, including the ECB, have been engaged in training new and absolutely new employees in the process of actual supervision, as there are no specialists available that have special education obtained at some educational institution. In case some employees leave, we must start training new people again. We have been fortunate to receive assistance in the form of training from those countries, where the supervision in respect of competition matters has been exercised for many decades already. However, I would like to mention here, that it is not enough to train only the officials, as it has appeared, also to be necessary to train the judges as well, as they also lack preliminary knowledge of market economy and free competition that enables market economy to function properly. We have used every available possibility to offer to the judges interesting lectures and seminars, co-operating with specialists in the respective fields from other countries.

For many years, most of the employees of the ECB have been economists; fewer people have had a degree in law or in other fields. From this have arisen problems concerned with legal correctness of proceeding of cases and of decision making, as well as, with defending the cases in court.

However, we do not have any reason to believe that this situation will change, as the top lawyers' - advocates' offices charge for 3 hours the same amount of money that a medium employee will receive as salary in one month. Thus the top lawyers are not interested to work in a government agency, but prefer to defend those who are in position to buy their services. The government agencies are not likely to use their services too often. In 2001 the budget of the ECB was not enough even for handling one case in a court. We were forced to ask for additional financing from the Ministry, and we were fortunate to receive it this time. In all other cases we had to manage with the lawyers employed by the ECB itself.

At present, the ECB does not have the authority to prosecute; therefore, the probability of discovering cartels is small. For taking measures in order to prohibit the cartels, it would be necessary to obtain evidence. For obtaining evidence, it would be necessary for the officials to have the authority to confiscate all documentation immediately, to have immediate access to all rooms, to listen (secretly) to all meetings. At the same time, the fines must be sufficiently high in order to force the undertakings to act fairly and the supervision procedure together with court hearings should not take years. Such extension of the process is very beneficial to the offender, as it will be possible for such an undertaking, during the whole proceeding period, to force unfair conditions on the customers, as well as, on competitors in the goods market, the results of which cannot be remedied later, regardless of the amount of a fine imposed on the undertaking.

Understanding the necessity of such measures, that would restrict the activities of undertakings, takes some time on all levels in a young country. So shortly after a fall of a totalitarian regime nobody wishes to impose strict measures. As a result, the undertakings in dominant position in the market or those entering into cartel agreements, take use of the general liberalisation of economy in their own interests and become more and more fearless.

Considering the above-mentioned, we can draw a single conclusion here, that possessing only those resources that we do today, it is not possible to exercise efficient competition supervision, i.e. to prevent the ruling of cartels and monopolies.

I would like to suggest some measures that might change the situation:

- For using legal assistance in proceeding of cases and in courts, for that is necessary to rearrange the budget of the Board this way that by reducing the number of employees, we shall have resources for retaining legal assistance. At the same time, it is important that those resources should not be reducible as the so-called "household expenses" are, but that the relation between the salary fund and legal assistance remains unchanged.
- Allocation of competition cases for proceeding to private entrepreneurs - the advocates' offices, via public calls for tender, payment for their services at a court's decision from the sums payable by the offender or in proportion with a fine imposed by a court. At the same time, minimal use of resources of state budget must be foreseen, in case an offence is not established.
- Amending legislation thus as to give authorisation for prosecution for the purpose of exercising supervision in respect compliance with the Competition Act, for which every time a decision made by a judge would be necessary.
- To provide that a claim for damages caused to the competitors or customers be made after the court's decision takes effect, regardless of the length of time that has passed since the offence was committed.
- To provide a possibility to agree upon an arbitrator, in order to quicken the decision making, or formation of a special court (competition or market court), the decisions of which may be appealed further only to the Supreme Court, instead of the present three court levels.

To conclude, let me say that building up of a competition authority does not involve only creation of working places, but also continuous training of the competition officials, as well as, of the judges. The laws must be continuously amended, too, in order to ensure that there are no gaps in legislation and to prevent, thus, from making use of them. This way it would be possible to ensure the existence of legal and economic facilities for exercising efficient supervision in a country.

ANNEX A

Questionnaire to invitees on international co-operation in cartel and merger investigations

CARTELS

The questionnaire covers the period from 1 January 2000 to the present.

The ECB has had assistance within the following projects:

- Assistance to the Estonian Competition Board (ES 9803.03.02.003) – Mr. Eugene Stuart
- Strengthening of the Estonian Competition Board (ES/98/IB/FI/01) – Mr. Philippe Riou
- Co-operation project between the Finnish Competition Authority and the Estonian Competition Board – Ms. Leena Eerola

Within these projects the ECB has asked for assistance in the following cartel cases:

- Case 25/99 Agreement between milk producers
- Case 5/00 Milk processors and wholesalers
- Case 22/99 Hawaii Express (resale price maintaining)
- Case 22/00 The agreement between the members of Viljandi County Tradesmen Union
- Case 13/99 Agreement between the taxi drivers of Pärnu city
- Case 32/99 Agreement between the taxi drivers of Tartu city

We have had meetings and discussions about abovementioned cases. The assistance has always been very useful and practical and has helped to solve the cases.

The ECB has made formal requests to foreign competition agencies in a case started in 1998 concerning a boycott in the Port of Helsinki of vessels operated by the Estonian Shipping Company (ESCO). The ECB sent out 3 requests to Finnish, Swedish and Danish Competition Authorities. Their answer was that the issue of boycott of Estonian ships in the ports of these countries does not belong to the competence of competition authorities for reason that according to their competition laws, they are not dealing with the questions related to the labour market. ESCO submitted an application to the European Commission in the same matter against Finnish company Finlines. ESCO complained that Finlines had abused its dominant position in the port of Helsinki and that the rules of the Federation of Finnish Master Stevedores, to which Finlines belongs, provide that a member must seek permission from the Board when it wishes to establish itself in a new port, which, in ESCO's view, constitutes a market-sharing agreement in breach of Article 81 of the EC Treaty. The ECB offered assistance to the European Commission DG IV in the process of investigation in this case. The European Commission founded in its decision of 17

January 2001 that the Finnish Competition Authority is the best placed to investigate and decide upon ESCO's complaint.

CONTROL OF CONCENTRATIONS

1. On October 1st, 2001 a new Competition Act was put into effect, where important amendments were made in the chapter of control of concentrations:
 - Possibility to prohibit the concentration which creates or strengthens a dominant position as a result of which the competition would be significantly impeded in market for goods;
 - The definition of control was amended;
 - Acquisition of joint control and acquisition of control over one part of another undertaking were added;
 - Market share threshold was abandoned. Turnover thresholds were enhanced. Additional threshold was added, requiring that business activities of at least one of the merging undertakings or of the undertaking of which control is acquired, are carried out in Estonia;
 - Amendments in submission and proceeding of notifications.

In order to clarify the issues of control of concentrations the ECB prepared the drafts and the Minister of Finance established the guidelines for submission of notices of concentration and for calculation of turnover of parties to concentration.

2. Since October 1, 2001 to December 31, 2001 ten concentrations were notified to the ECB. Two of them did not fall within the scope of the Competition Act. One did not reach the turnover thresholds and the other fell within the exemption for credit institutions.
 - In seven cases one undertaking acquired control over the whole of another undertaking and in one case the control was acquired over a part of another undertaking;
 - In four cases the control was acquired over a foreign undertaking that carried out business activities in Estonia. In four cases the control was acquired over whole or part of Estonian undertakings. In one case where the control was acquired over a part of an Estonian undertaking, the acquirer of control was an Estonian undertaking.
 - The notified concentrations involved information services, telecommunications, forest industry, district heat supply, soft drinks and insurance markets.
3. Some problems have appeared during the proceedings of notified concentrations.
 - 3.1 Notification threshold concerning business activities in Estonia capture some insignificant concentration. The ECB considers that in the case of a foreign undertaking the fact that the business activities are carried out in Estonia means, that the undertaking has a subsidiary or branch in Estonia. Sometimes the subsidiary or branch of foreign undertaking has very little importance in Estonian markets and if there is no horizontal overlaps and vertical connection, the

concentration does not raise competition concerns. It may be necessary to establish a turnover threshold for business activities carried out in Estonia in future.

- 3.2 According to the Competition Act the concentration shall be notified to the ECB within one week as of acquisition of control or joint control. Such a wording has caused some problems in defining the moment for notification. Especially in case of acquisition of control based on written agreement, which conclusion and enforcement dates are different. If the notification date is the second one, it is not pre-concentration notification anymore. Therefore the ECB has strongly suggested obliged parties to submit the notification within one week from conclusion of agreement, but not later than one week after it is put into effect.
- 3.3 According to the Competition Act the parties to concentration shall not perform any acts directed at giving effect to the concentration before adoption of a decision by the ECB. No exemptions are allowed from this rule. It has appeared that in some cases under certain conditions the exemptions from this rule are necessary.
4. Cooperation with competition authorities from other states

In the process of preparing the amendments to the Competition Act, the ECB was supported by experts from Swedish and French competition authorities. Also the officials of the ECB had a possibility to study the proceeding of concentrations in the Finnish Competition Authority.

Another aspect of co-operation is that several cases are notified to the ECB and to the competition authorities in other states. As the proceedings and decisions of competition authorities may be different, it may cause problems to parties to the concentration.

According to the knowledge of the ECB at least four transactions were notified to the ECB and to the Finnish Competition Authority on the same time.

In one case the ECB had co-operated with Finnish Competition Authority in the form of exchanging information in order to clarify the actual acquirer and relevant market issues. Because of the confidentiality restraints it was possible to exchange the public information only.

Unclassified

CCNM/GF/COMP/WD(2002)15



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

30-Jan-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP/WD(2002)15
Unclassified

OECD Global Forum on Competition

CONTRIBUTION FROM ISRAEL

This note is submitted by Israel as a background material for the second meeting of the Global Forum on Competition to be held on 14 and 15 February 2002.

JT00120133

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

English text only

ISRAEL ANTITRUST AUTHORITY

I. - EXPERIENCES IN CAPACITY BUILDING AND TECHNICAL ASSISTANCE

Israel Antitrust Authority (IAA) has limited experience in the fields of Capacity Building and Technical Assistance, most of which was gained from specific initiatives for short internship periods of its employees at foreign competition agencies and a private consulting firm.

In the fall of 2000, IAA sent 4 employees for a two-month internship with the U.S. Federal antitrust agencies. During this internship, these employees gained comprehensive acquaintance with the experience, jurisprudence and personnel of the U.S. agencies. Based on the internship experience, these employees drafted (and circulated to their peers) extensive documents summarizing what they learned about the views and experience of the U.S. agencies in specific industries and scenarios. These documents have proved extremely useful for IAA work because they provide case handlers with insights on various competition considerations that arise in the course of their work. Furthermore, the internships were helpful because they allowed the IAA to learn the detailed structure of these agencies (and create personal ties with some of its staff). These benefits facilitate future cooperation between the agencies.

IAA has found these exchanges a useful instrument for building up professional capacities.

IAA looks forward to participating in similar exchange activities in the future with other foreign antitrust agencies.

It should also be noted that this month the Authority has sent one of its economists for a 2-month internship with a U.S. private consulting firm. It expects this experience to be fruitful and beneficial specifically in strengthening the expertise of its economic staff.

II. - ACTUAL EXPERIENCE IN INTERNATIONAL COOPERATION IN CARTEL AND MERGER CASES

In general, Israel Antitrust Authority (IAA) has had a very good experience of cooperation with foreign competition agencies. It has found most of its counterpart agencies commendably inclined to assist it by providing input such as their past decisions, market and industry studies, court decisions, experience with remedies and other documents. Perhaps this record of success in bilateral cooperation can be attributed to the fact that the assistance sought was either on a broad policy level or referred to past decisions and public documents, hence confidentiality concerns have rarely been an obstacle.

ANNEX - A

Answers to Questionnaire to Invitees and Observers on International Co-Operation in Cartel and Merger Investigations

1. A copy of the U.S.-Israel competition cooperation agreement (signed March 1999) is enclosed herewith.
2. The capacity of the IAA to exchange information and cooperate with foreign competition agencies is derived from two sources:
 - (a) The broad 'derivative authority' administrative law principle (known in Latin as "*ubi aliquid conceditur, conceditur etiam id sine quo res ipsa non esse potest*"). Under the derivative authority principle, that is established in article 17 of the Interpretation Statute (5741-1981), an authorization to perform a certain task shall be interpreted as implied authorization to take reasonable measures necessary for carrying out the main task. Hence, the IAA's authority under the Israeli Trade Restrictions Law (5748-1988) encompasses a broad authority to exchange information and cooperate with foreign competition authorities to the extent deemed necessary for carrying out the IAA's statutory tasks.
 - (b) Specific antitrust co-operation agreements, such as the U.S.-Israel Antitrust Cooperation Agreement that was signed in 1999 (see above). The Israeli government has the capacity to sign similar bilateral cooperation agreements.

The International Legal Assistance Law (5758-1998) is also noteworthy in this context. The statute arranges for extensive legal assistance between the State of Israel and other States and organizations. Cooperation according to the statute extends over both civil and criminal matters, and does *not* require the State seeking cooperation to be a party to any specific cooperation treaty. Areas of cooperation regulated by the statute include service of documents, collection of evidence, search and seizure actions, investigative activities, transfer of information, verification of documents, confiscation of property and any other legal action. The statute designates the Minister of Justice in charge of evaluation of international legal assistance applications. Applications must be made on behalf of the designated authority for international legal assistance in the requesting State.

Cartels

3. One formal request was made to a foreign competition agency; it was directed to the United States Department of Justice. The request was for information regarding a case that was simultaneously investigated in the United States and in Israel, of a non-competition and market allocation agreement involving Israeli companies. The IAA asked mainly for information about the status of the investigation and other proceedings conducted by the U.S. Authority, the nature of the activities under investigation, the legal provisions concerned as well as the remedies considered against the anti-competitive activities. The request was granted, and the US advised the IAA as to developments in the proceedings against the involved companies. On the basis of the communication with the US Department of Justice, the IAA has taken the view that if the enforcement activity undertaken by the U.S. Authority results in the termination of the agreements, such result is likely to limit the need for further

action on its own behalf, and that the outcome of the proceedings in the United States may well affect the enforcement measures it chooses. The IAA has suspended accordingly the proceedings against the companies in Israel.

4. None.
5. Other Forms of Cooperation: IAA staff regularly contacts foreign antitrust agencies informally where it is aware that the foreign agency has dealt with similar cases in similar industries. The information gathered in this manner is invaluable for the development of Israel's competition law. The advice sought is usually on a general or public level, namely policy considerations in specific industries, copies of final decisions, public reports published on the issue, guidelines etc. Therefore it is rare that confidentiality becomes an obstacle to these consultations. The following case highlights specific instance of such co-operation:

Request regarding practices employed by major food retail chains. The request for assistance was addressed to 31 foreign competition agencies as follows: Argentina, Australia, Belgium, Brazil, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, India, Ireland, Italy, Japan, Mexico, Netherlands, New Zealand, Norway, Panama, Peru, Portugal, Russia, Slovakia, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela. The request sought to benefit from the experience of different competition agencies in dealing with practices similar to the investigated practices. It asked for copies of any decisions in similar cases, as well as any form of memoranda, market analysis, guidelines, or legal documents that may have been drafted by the agencies in similar contexts. It also inquired whether the type of conduct investigated was prohibited under the competition legislation applied by the different agencies.

The IAA received 21 responses from the 31 foreign agencies it contacted. The replies included valuable information that proved extremely useful for the IAA's investigation and its understanding of the relevant market. Helpful input included: reference to similar decisions already taken by the foreign agency or courts; information of similar investigations that ended in a finding of no antitrust violation; reference to market research reports conducted on the subject; indication on the legal status of the investigated conduct under the competition statute of the agencies and legislative solutions that were passed to solve similar issues. Two of the 21 responses were unable to provide full information at that time for reasons of confidentiality of a similar ongoing investigation (noting that the confidentiality obstacle shall be resolved upon conclusion of their respective investigations).

6. None.

Mergers

7. Within the relevant time period IAA reviewed the following 19 mergers that were also reviewed, to the best of knowledge, by foreign competition agencies
 - Nestle S.A. / Ralston Purina Corp.
 - Sanmina Corp. / SCI Systems (Israel)
 - True North Communications / Interpublic Inc.
 - The Dow Chemical Company / Rohm & Haas
 - De Beers / LVMS Moet - Hennessy Louis Vuitton S.A.

- General Electric / Honeywell
 - Swissair Ltd. / N.S. Sabena S.A.
 - Polycom Inc. / Accod Networks Ltd.
 - Attecs Mannesmann / Siemens / Robert Bosch
 - Bombardier Inc. / Daimler Chrysler Rail Systems
 - The Dow Chemical Company / Gurit Essex
 - Daimler Chrysler / Mitsubishi Motors Corp.
 - El Fi SA / Moulinex
 - Tyco International / Mallinckrodt Inc.
 - American Airlines/TWA
 - Glaxo Wellcome / Smith Kline Beecham
 - Unilever N.V. / Ben & Jerry's
 - The Dow Chemical Company / Union Carbide Corp.
 - Aerospatiale Matra / Daimler Chrysler / Aerospace
 - Tyco International / Siemens Electromechanical Components
8. In the merger case between The Dow Chemical Company and Union Carbide, IAA sought assistance from the U.S. and E.U. competition agencies that were reviewing the same merger at the time. The request was made by way of correspondence addressed to staff level employees at the agencies' international affairs unit. The inquiry was of a general nature. It focused on the foreign agencies' policy considerations in the case, and their views as to potential anti-competitive effects of the proposed merger. Responses to the request were made by e-mail, and provided useful market information and materials that were all prepared from public sources.
9. None.
10. None.

Unclassified

CCNM/GF/COMP/WD(2002)18



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

07-Feb-2002

English - Or. French

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM IVORY COAST

This note is submitted by Ivory Coast as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120508

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)18
Unclassified

English - Or. French

I. - CONTRIBUTION BY COTE D'IVOIRE

During the two years 2000 and 2001, the activities of Côte d'Ivoire's competition authorities diminished significantly because of the social and political situation in the country.

This situation led to Côte d'Ivoire's cooperation with a number of international economic institutions being put on hold.

As a result, we were not able to properly complete the questionnaire on international cooperation in investigations into cartels or mergers.

In any case, even in the previous period, Côte d'Ivoire did not sign any formal cooperation agreements with other countries in respect of cartels or mergers.

However, Côte d'Ivoire is a member of several sub-regional integration organisations, notably the West African Economic and Monetary Union (WAEMU) and the Economic Community of West African States (ECOWAS), some of whose States have competition law.

With the resumption or normalisation of cooperation relations with international organisations, and consolidation of competition arrangements in the member countries of sub-regional organisations, it is likely that cooperation in the area of mergers and cartels will intensify in the coming years.

Côte d'Ivoire, it should be emphasised, opted for economic liberalisation back in the 1960s. However, it was not until 1978 that the first legislation on competition appeared.

In 1991, under pressure from donors, the Competition Act was passed, Law No. 91-999 of 27 December 1991.

This Act was amended by Law No. 97-10 of 6 January 1997 to extend powers of prosecution to private companies.

In Côte d'Ivoire, there are two bodies responsible for implementing competition policy:

- the Competition Commission, created by the Act of 27 December 1991; and
- the Department of Competition created by decree of the Council of Ministers.

The Competition Commission's responsibilities mainly involve supervision, regulation of procurement to prevent anti-competitive practices (illegal cartels, abuse of dominant position, excessive economic concentrations).

The Department of Competition specialises in cases involving individual restrictive practices and their suppression.

Following its creation in December 1991, the Competition Commission only became operational in January 1994. It has undertaken 24 prosecutions and issued 21 opinions, 7 of them advisory and 14 in litigation. Several prosecutions are currently in progress.

Every year, the Commission prepares a report of its work which is published in the Official Journal of the Republic of Côte d'Ivoire.

The combined actions of the Competition Commission and Department have had a significant impact on the national economy, which can be seen at several levels:

- The fall in the price of major consumer goods despite the devaluation of the CFA franc in 1994;
- The restoration of a climate of confidence reflected in the disappearance among economic operators of the fear of being crushed by the strongest;
- The creation of an environment favourable to investment promotion, which encouraged the Government to set up the Centre for the Promotion of Investment in Côte d'Ivoire (CEPICI) for better coordination of investment policies.
- The birth of consumer movements.

Unfortunately, the military coup of 24 December 1999 brought this progress to a halt.

With the establishment of a civilian government after the October 2002 elections, new staff were appointed to revitalise the competition bodies in Côte d'Ivoire.

In practice, however, the need for training of these staff has become apparent, hence the need for Côte d'Ivoire to seek assistance.

1. TECHNICAL ASSISTANCE NEEDS

As with the questionnaire on international cooperation concerning cartels and mergers, it should be noted that Côte d'Ivoire did not receive any assistance in 2000 and 2001.

In the years before that, especially with the launch of the Competition Commission in 1993-1994, it received assistance in training for its staff, a number of courses run by the French Competition Board, and missions to the Belgian competition authority and UNCTAD.

With the provision of new staff, other training issues arise.

Any form of assistance is worthwhile, but our current preference for our institution is:

- Upgrading of newly-appointed reporters;
- Retraining of existing staff and the Secretary-General of the Commission

Rather than conferences and seminars, we think courses more useful because they are longer and the training can cover several aspects.

As for advisers providing in-house training, their presence may allow the acquisition of knowledge on specific issues and up-to-date techniques. It is regrettable, however, that their arrival does not always coincide with the time when they are requested.

2. AREAS WHERE OUR NEEDS ARE URGENT

- Upgrading of new reporters;
- Retraining of existing staff including the Secretary-General of the Competition Commission;
- Provision of computers and vehicles;
- Assistance with subscriptions to journals, studies and other publications to provide documentation on competition law and policy;
- Training of trainers to meet on-going training needs, given the high staff turnover in government departments.

It should be noted, however, that Côte d'Ivoire has already made approaches to UNCTAD in this connection.

II. - NOTE

This note covers three topics:

- International cooperation in cases of mergers and cartels;
- Concerns relating to competition policy and economic development;
- Technical assistance in competition policy.

1. INTERNATIONAL COOPERATION IN CASES OF MERGERS AND CARTELS

This note relates to Annex A of the questionnaire on international cooperation in investigations into cartels and mergers.

This questionnaire, as mentioned in the annex, covers the two years 2000 and 2001.

During the two years 2000 and 2001, the activities of Côte d'Ivoire's competition authorities diminished significantly because of the social and political situation in the country.

This situation led to Côte d'Ivoire's cooperation with a number of international economic institutions being put on hold.

As a result, we were not able to properly complete the questionnaire on international cooperation in investigations into cartels or mergers. The same goes for specific experiences of international cooperation in cases of mergers and cartels, since Côte d'Ivoire has not signed any formal cooperation agreements with other countries in respect of cartels or mergers, even prior to these two years.

It should be remembered, however, that Côte d'Ivoire is a member of several sub-regional integration organisations, notably the West African Economic and Monetary Union (WAEMU) and the Economic Community of West African States (ECOWAS), some of whose States have competition law.

With the resumption or normalisation of cooperation relations with international organisations, and consolidation of competition arrangements in the member countries of sub-regional organisations, it is likely that cooperation in the area of mergers and cartels will intensify in the coming years.

2 CONCERNS RELATING TO COMPETITION POLICY AND ECONOMIC DEVELOPMENT

Côte d'Ivoire opted for economic liberalisation back in the 1960s.

However, it was not until 1978 that the first legislation on competition appeared.

The decision to go for a policy of open markets meant establishing bodies whose task was to ensure that economic sectors functioned properly.

This led to the creation of:

- the Competition Commission, under the Competition Act, Law No. 91-999 of 27 December 1991; and
- the Department of Competition by decree of the Council of Ministers.

The Competition Commission's responsibilities mainly involve supervision, regulation of procurement to prevent anti-competitive practices (illegal cartels, abuse of dominant position, excessive economic concentrations).

The Department of Competition specialises in cases involving individual restrictive practices and their suppression.

Following its creation in 1991, the Competition Commission only became operational in January 1994.

It has undertaken 24 prosecutions and issued 21 opinions, 14 of them in litigation and 7 advisory.

The results of these eight years of operation may be seen as rather poor, even if the years 2000 and 2001 are regarded as like crossing a desert.

The poor results can be explained by obstacles to the performance of the tasks of the Competition Commission, which are mainly of two kinds:

- sociological burdens;
- the institution's lack of independent decision-making powers.

With regard to the sociological burdens, the Competition Commission, in the eyes of economic operators, is a body mandated by the government authorities to "judge" and punish those among them guilty of breaches of the rules on free competition.

Thus a company that is the victim of an anti-competitive practice would hesitate to complain to the Commission for fear of reprisals, paradoxically seeking to protect the cause of its misfortune.

This state of affairs shows that Côte d'Ivoire is one of those economies with competition law still in a transitional stage. The country retains the features of a strict centrally planned regime. One can see the marks on a monopolistic structure in which there are very few competitors in the same sector and where complaints of horizontal anti-competitive practices are rare.

With regard to the lack of independent decision-making powers, it should be pointed out that the Ivorian Competition Commission is only an advisory body to the Government. The power of decision belongs exclusively to its parent body, the Ministry for Trade, and the Commission can only issue opinions following each prosecution.

The problem is that the Minister's decision often comes late or even not at all.

This prevents the parties from exercising any recourse.

These weaknesses are such as to discourage complaints to the competition authorities. They undoubtedly remain one of the reasons for the scarcity of prosecutions, despite the amendments to the 27

December 1991 Act introduced by the Act of 6 January 1997 extending the power of prosecution to private companies and associations of companies.

Unfair competition is the area where cases are most numerous and complaints most common, but these are a matter for the ordinary courts.

Despite the difficulties in performing their tasks, the law and policies applied by the competition authorities have noticeably affected the transition and have had a perceptible impact on economic development at several levels:

- the fall in the price of imported capital goods and the injunction to retailers to ensure that prices are systematically displayed;
- the birth of consumer movements;
- the implementation of the main privatisation projects;
- the establishment of a climate of confidence reflected in the disappearance among economic operators of the fear of being crushed by the strongest;
- the creation of an environment favourable to investment promotion.

The main difficulty lies in the intensification of advocacy measures aimed at economic operators. Assistance in this area is a necessity.

3. TECHNICAL ASSISTANCE IN COMPETITION POLICY

As with the questionnaire on international cooperation relating to cartels and mergers, it should be noted that Côte d'Ivoire did not receive any assistance in 2000 and 2001.

In the absence of any experience in this area, we are unable to reply to the questionnaire in annex B.

With respect to 2002, requests for assistance are in hand, primarily for:

- training of the staff of the competition authorities;
- training of trainers;
- equipment (computers, vehicles);
- subscriptions for documentation

The areas in which our economy has the greatest needs for assistance in competition law and policy are:

- intensification of advocacy measures in the form of seminars for economic operators;
- adequate training for public relations staff in the competition authorities.

In conclusion, it should be stressed that it is more necessary than ever for the competition authorities in Côte d'Ivoire to raise their profile among economic operators. Events to publicise the existence of these bodies and the importance of their role are a must.

The granting of decision-making powers to the Commission is crucial to the institution's credibility.

The extension of the Commission's powers to the area of unfair competition is crucial for the future of this body.

Appropriate training of competition authority officers, with a guaranteed career structure are essential tools for the performance of the tasks assigned to these institutions.

Unclassified

CCNM/GF/COMP/WD(2002)7



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

05-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM KENYA

This note is submitted by Kenya as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120337

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

**CCNM/GF/COMP/WD(2002)7
Unclassified**

English text only

KENYA'S EXPERIENCE OF AND NEEDS FOR CAPACITY BUILDING/TECHNICAL ASSISTANCE IN COMPETITION LAW AND POLICY

1. Introduction

Kenya's change from a controlled economy to a free economy was officially articulated for the first time in the Sessional Paper No. 1 of 1986 on "Economic Management for Renewed Growth", which stated on page 24 paragraph 2.53 that the "Government will established the market-based incentives and regulatory structures that will channel private activity into areas of greatest benefit for all Kenyans. In doing so, Government will rely less on instruments of direct control and increasingly on competitive elements in the economy". At paragraph 6.31, page 100, the Sessional Paper also noted that, "At present, Kenya has no comprehensive legislation making restrictive practices illegal and "Government will propose legislation prohibiting restrictive trade practices and establishing an administrative mechanism to enforce it". This commitment by the Government resulted in the enactment of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504 of the Laws of Kenya in 1988 and the Act was published in Kenya Gazette of Friday, 23rd December 1988 after receiving Presidential Assent on 19th December 1988. Thereafter, the then Minister for Finance signed the necessary Legal Notice on 30th December 1988 appointing 1st February 1989 as the day on which the Act would come into operation.

2. Objectives of Kenya's Competition Law and Policy

The principal objective of Kenya's Competition Law is to encourage competition in the domestic market by prohibiting restrictive trade practices, controlling monopolies, concentrations of unwarranted economic power and prices.

The second objective of the Kenyan Law is to set up the necessary institutional framework for effective administration and enforcement of Kenya's Competition Law and Policy. The institutional framework is made up of the Legislature (Parliament), Office of the minister in-charge of Finance (MOF), the Office of the Commissioner for Monopolies & Prices (MPC), the Restrictive Trade Practices Tribunal (RTPT) and the High Court of Kenya.

3. Enforcement of Competition Law

The overall responsibility for competition Policy in Kenya is in the hands of the Minister for Finance. Section (3)(2) of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504 of the Laws of Kenya subjects the Commissioner for Monopolies and Prices to the control of the Minister and the Commissioner obtains compliance with his professional prescriptions for the market through Ministerial orders. The Minister relies heavily on the professional advice of the Commissioner for Monopolies and Prices, who, with a team of economists, financial analysis, lawyers and other necessary market analysts is the principal custodian of Kenya's Competition Policy. The Commissioner, whose appointment is mandated under section 3(1) acts as a watchdog, keeping an eye on commerce as a whole, carrying out initial enquiries and ordering in-depth investigations whenever situations demand. The Commissioner has the primary responsibility for conducting investigations into all possible situations of anti-competitive practices such as restrictive trade practices, abuse of dominant market power, mergers and take-overs. In practical terms, such investigations are carried out by the Commissioner's staff in the

Monopolies and Prices Commission. The work involves responding to complaints by a company's competitors or customers, and carrying out research into markets where competition problems are thought or alleged to be present.

The Commissioner for Monopolies and Prices is appointed in pursuant to the provisions of Section 3(1) of Kenya's Competition law and he, in turn, directly and indirectly controls, manages and influences competition in exercise of the powers conferred upon him by the Law and such limitations as the Minister may think fit. The Law does not provide the authority that is responsible for the appointment of the Commissioner for Monopolies and Prices. However, once the Commissioner is appointed he is independent and has a range of statutory duties and responsibilities. He heads the Monopolies and Prices Commission Department of the Treasury and has responsibilities for efficient administration and enforcement of Competition Law. He has also responsibilities in the consumer protection field. He seeks to maximise consumer welfare in the long term, and to protect the interests of vulnerable consumers by:

- empowering consumers through information and redress.
- Protecting them by preventing abuse.
- Promoting competitive and responsible supply.

It must however be understood that the Commissioner has no powers to help individual consumers in their private disputes with traders. However, he may be able to suggest who would be in the best position to help.

Notwithstanding the above, the efficacy of Kenya's Competition Law has been veritably constrained and it requires to be reviewed or even overhauled for the following reasons:-

1. The Kenyan law has convoluted provisions which require simplification and focussed articulation as concerns specific areas of the national economy.
2. There are inherent and sometimes fatal weaknesses in the enforcement provisions contained in the existing law. For example, under section 24, the Minister may order disposal of inimical interests. There are no follow-up provisions to ensure that the Minister's orders are complied with. Another example relates to the non-existence of provisions spelling how MPC should relate with the Attorney General and the Police Department in criminal prosecutions.
3. There is need for the MPC to be granted prosecutorial powers under the law. This should be akin to the position obtaining in local authorities which have been granted prosecution powers under the Local Government Act, Cap. 265 of the Laws of Kenya.
4. There is need to grant Kenya's Competition Agency operational and financial autonomy.
5. There is need to grant Kenya's Competition Agency legal authority for consumer welfare enforcement and surveillance.
6. There is need to grant the Restrictive Trade Practices Tribunal requisite autonomy.
7. There is need to vest Kenya's Competition Authority with legal powers to handle extra-territorial Mergers and acquisitions.

8. There is need to harmonise Cap. 504 with sectoral laws whose provisions make enforcement of competition law difficult.
9. There is need to grant Kenya's Competition Authority concurrent jurisdiction with Sector regulators in all matters germane to competition policy and law.
10. There is need to grant Kenya's Competition Authority legal authority to delve into the areas of Advocacy, Education and Publicity.
11. There is a palpable need for granting Kenya's Competition Authority legal powers to conduct dawn raids. This is in keeping with international practice in this area.
12. There is need to review the law so that the Small and Micro Enterprises Sector is fully brought on board. More specifically, there is need to amend Cap. 504 to give SME's special treatment in the form of block exceptions in order to facilitate them to access their respective markets.

4. Experiences in Technical Assistance

Kenya has not received any multi-year programme assistance in the field of Competition Law and Policy upto date. In the recent past, UNCTAD has been the most useful agency in the provision of technical assistance to Kenya's competition agency. In this regard UNCTAD provided trainers for two regional training workshops hosted by Kenya in February 1998 and March 2001. UNCTAD has also assisted Kenya with sponsorship for Kenya's competition officials to attend seminars and conferences and two week's attachment for two officials at the Federal Trade Commission of U.S.A.

Other technical assistance providers to MPC have been:

1. Japanese International Co-operation Agency sponsorship for the attendance at the Anti-monopoly course in Japan.
2. OECD sponsorship to attend OECD Global Competition Forum in 2001 and 2002.
3. WTO/DFID sponsorship to attend Africa Regional Seminar, Cape Town, South Africa, February 2001.

5. Technical Assistance Needs

To redress the shortcomings demonstrated above, and in order to manage the dynamic process of globalisation, trade liberalisation, de-regulation and protection of consumer welfare, requisite capacity needs to be developed. The economies of the countries which form the East and Southern African region, have in the recent past, been reeling from the effects of poor economic performance attributable to diverse factors. These range, inter alia, from drought and other vagaries of the weather, collapse of commodity prices in world markets vis-à-vis prices of imported manufactured goods, Civil wars to unfair competition in the world market.

In most of the countries of the region, the sustenance of the national budgets invariably requires the support of donor aid. In any case, national priorities gravitate towards more veritably mundane sectors such as health, poverty alleviation and education. The region is, therefore, financially and technically

constrained in matters relating to institutional Capacity Building. Apriori, Competition Authorities in the region are not spared the vicissitudes and the resultant effects of these constraints.

Assistance in capacity building and technical matters for Kenya should take into account the level of development in Competition Law and Policy. Kenya has had a Competition Law and a Department in charge of Competition Law and Policy for the last twelve (12) years. However, the department has been constrained by lack of resources in its efforts to create a culture of competition in the economy. The department therefore needs assistance to enable it implement the following programmes/activities:-

Train competition officials for investigations and enforcement.

1. Draft a suitable law.
2. Procure office equipment for market research, case analysis, exchange of information and sharing of experiences with peers regionally and internationally.
3. Competition advocacy and education.
4. Consultancy Services.
5. Establishment of a data bank.

ANNEX B.

**A BRIEF COMMENTARY ON KENYA'S EXPERIENCE IN INTERNATIONAL
CO-OPERATION IN CARTEL AND / OR MERGER CASES**

As a department of the Ministry of Finance & Planning, Kenya's Competition Agency is only competent to enter into binding agreements through the parent Ministry. The Permanent Secretary, Ministry of Finance & Planning and the Attorney-General are the only authorised officials who may commit the department through an agreement.

Notwithstanding the fact that the Monopolies and Prices Commission of Kenya has no formal Cooperation agreement with any other Competition agency, the Commission has Cooperated with the Competition Commission of Zambia in the handling of the merger of two beer making companies in 1999 and the Zimbabwe Trade and Industry Competition Commission in the investigation of interest rates setting by banks in January 2001. In these two cases, formal and informal exchange of information took place between the heads of respective competition agencies.

Unclassified

CCNM/GF/COMP/WD(2002)17



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

05-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM LATVIA

This note is submitted by Latvia as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120345

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)17
Unclassified

English text only

NOTE BY LATVIA

1. Introduction

The realisation of competition policy in Latvia is based on direct prohibitions applied to enterprises and regulations of actions included these prohibitions and regulations in competition protection legislation and international agreements. Latvian competition policy is based also on state policy in competition protection development and promotion spheres. This competition policy includes opening traditional monopoly sectors for free competition, reduction of restrictions for providing commercial and entrepreneurial activities and abolishing administrative barriers. These two directions of competition policy provided by state ensure increasing of competitiveness of national economy and efficiency growth in certain sectors of economy. However provision of active policy marks also a number of by-effects. The negative expression of these by-effects in short term period moves forward several substantial problems. These problems in long term period discussing theoretically different economic models are solved by provision the effectiveness increase of relevant sector of economics and the most effective resources' exploitation.

2. Concerns regarding competition policy and economic development

Looking closely one of competition surveillance instruments - merger control, it is possible to identify several problems, characteristic to rapid growing economies. The capacity of Latvian internal market is relatively small - the joint capacity of market is 2.4 million inhabitants. Market structure established after privatisation do not correspond to these economic processes taking place in developed markets. Privatisation of state property is resulted into property transformation but is in minimal extent connected with market re-division. Analysing in medium term period financial and competitiveness showings of enterprises and evaluating long term period development perspectives conclusion can be drawn that competitiveness of enterprises will be more dependent on ability of enterprises to comply with globalisation processes by means of resources' concentration to production of goods of definite specialisation. One of most important qualification criteria of competitiveness - effect of amount - is a key factor for reaching a definite level of competitiveness. However from the point of view of competition surveillance expressions of consolidation and specialisation linked with consolidation must be evaluated in much smaller scale and in fact in case of definition many relevant markets these expressions can be reduced to domestic market of Latvia. In the result of merger in Latvian market where relatively high market concentration is characteristic because of relatively small market capacity growing of market concentration in short term period can considerably diminish the pressure of competition on prices and on amount of goods and services thereby reaching critical level for customers. Depending on branch specifics in medium term period the negative character of this high market concentration compensates by liberal regimes of trade and entrepreneurial activities what limits opportunities of enterprises of gaining monopoly profit in long term period.

Realisation of competition policy in sphere of merger of enterprises is not directly linked with tasks of employment policy. Treatment of particular issues of employment policy was been part of privatisation processes providing in short term period employment obligations' realisation in privatisation transactions with administrative methods. Rules of Latvian competition legislation do not allow to set up conditions regarding employment or to take into account other aspects of social policy in case of merger of enterprises.

The task of institutions of competition surveillance in this process realising control of merger surveillance is to balance together needs of enterprises achieving in long term period growing of competitiveness with interests of consumers to get in short term period goods and services in effective structure of market, where possibilities of gaining monopoly profit are diminished.

Compensating internal contradictions of merger surveillance process Latvian competition surveillance authority moves forward an aim to follow expressions of merger market excluding possible abuse of dominant position in activities of market participants. We have to acknowledge it is an activity connected with market effects. However previous experience of activities testifies that level of market's availability is a determinant factor what in medium term period limits activities of dominant enterprise in the market and provides effective and consumer-friendly market structure.

3. Competition policy in monopoly sectors

There we are coming to the question - what is the most important for a period of market economy development in competition policy realisation and can not only substantially affect level of competition in certain relevant markets but is also linked with creation of more effective market structures and more effective exploitation of resources in monopoly sectors. The amount, quality and price of services provided by these sectors is an essential precondition for state competitiveness.

In Latvia we have reached an essential progress in sphere of liberalisation of monopoly sectors. A goal-directed creation of sectoral policy in such sectors as telecommunications, energy supply, transportation, has marked first results for opening these sectors for free competition and has given a clear signal about full availability of these sectors to competition under certain periods of time. Technological solutions even on the current legislative basis that in big scale determine the exclusive character of provided services with larger interpretation of competition legalisation provide access for customers to substitutable additional services what in direct and indirect way creates quite effective competition pressure both on prices determined by provider of public services and on amount of these services.

4. Role of international co-operation

Market capacity and liberal trade regimes are preconditions for definition relevant markets in much wider scale as only the inside territory of state. Thus in certain sectors a relevant geographical market is defined as Baltic states' market where existing and potential competition situation is similar enough for all market participants. Consequence of application such cross-border laws is necessity to strengthen by legal means instruments for obtaining evidences and influence in wider territory as state administrative territory. Latvia has concluded free trade agreements with its main trade partners with provisions included prohibiting anti-competitive actions in international trade. However the judicial weight is not sufficient for provision effective investigation procedures and subsequent preclusion of possible violations. For reaching maximum effect of application cross-border competition surveillance rules it is necessary to widen or delegate powers of institutions and to implement mechanisms for effective application of sanctions for non-residents. However in Latvian case analysing application of bilateral agreements in sphere of competition surveillance in long term period their effect is minimal. Therefore Latvian competition surveillance authority in future see prospects for multilateral competition surveillance instruments what reacting to consolidation processes and their effects in markets would create corresponding legal and institutional environment for restriction anti-competitive actions.

5. The role of technical assistance for competition policy strengthening

International co-operation in sphere of technical assistance is a determinant impulse for creation and strengthening competition surveillance institutions in period of implementation market economy. Successful realisation of competition policy in large scale depends on ability to apply laws successfully on ability to promote understanding in society about aims and instruments for reaching these aims. Technical support provided in Latvia by different OECD member-states, international organisations as well as support provided in frameworks of very precisely positioned Baltic regional co-operation project has furnished knowledge on competition legislation application practice and in its connection with other policies of economical development for very wide audience. The range of assistance is very large but the most important input during last years is made exactly in surveillance institution employees' knowledge improvement. Support in staff's training is gradually removing from separate examples' and practice analysing to acquisition knowledge and experience for creation long-term competition policy. The dissemination of knowledge on competition legislation in different state institutions has stimulated reaching of economic reform' aims in more rapid terms. In this aspect it would be useful to involve other state institutions in technical assistance projects to competition surveillance sphere especially these institutions responsible for economical policy realisation. Thus possibly attraction of additional resources would be promoted for competition surveillance sector from national budgets what is very critical especially in markets of rapidly growing states.

Unclassified

CCNM/GF/COMP/WD(2002)8



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

29-Jan-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM LITHUANIA

This contribution is submitted by Lithuania as a background material for the second meeting of the Global Forum on Competition to be held on 14 and 15 February 2002.

JT00120066

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)8
Unclassified

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COMPETITION COUNCIL OF THE REPUBLIC OF LITHUANIA

I. EXPERIENCES OF AND NEEDS FOR CAPACITY BUILDING OR TECHNICAL ASSISTANCE

1. General overview

Like in previous years, in 2000 – 2001 the Lithuanian Competition Council received very extensive technical assistance in both anti-trust and state aid fields (see the attached table).

During the reporting period, the main needs for capacity building and technical assistance in antitrust field were directly related to the implementation of the Law on Competition, adopted by the Seimas in March 1999, in particular the necessity to reinforce the Competition Council, to issue a number of accompanying regulations and to establish operational procedures and rules in order to transparently promote and regulate fair competition. Another very important area for technical assistance was state aid, which is identified by the European Commission as one of the fields, which has to be reinforced by extending institutional capacity and investing relevant resources

The needs for technical assistance were highly prompted by Lithuania's obligations under the Association Agreement to comply with the Community rules on competition. In doing so, the Lithuanian Competition Council had to adopt a set of resolutions setting out the principal policy lines compatible with the EC legislation.

As regards administrative capacity, the enforcement practice of the Competition Council had also to be developed. The aim of the Lithuanian Competition Council was to concentrate on the removal of the most serious restrictions on competition, and increase proceedings directed against more powerful undertakings.

To implement the above-mentioned tasks technical assistance was vitally needed. The Competition Council tried to get technical assistance through all possible sources. Requests for technical assistance were submitted to all relevant institutions dealing with technical assistance far in advance. The draft terms of reference for the main technical assistance project (the Phare Twinning project) has been prepared and submitted to the Ministry of Foreign Affairs already in 1998.

The most valuable and useful for the Competition Council was technical assistance provided under special programs and projects funded by PHARE and other donors. The programs were designed and adjusted to the specific needs of the Competition Council and covered areas which badly needed outside assistance.

Until mid 2000, the Competition Council received technical assistance through the Phare SEIL (Support to European Integration in Lithuania) project (LI 9701-02), which served mainly to support activities to the adoption of the new Law on Competition of 1999. The assistance covered drafting of Statute and Working Regulations for the new Competition Council and its Administration, training and information activities. The assistance provided under this project was also a valuable support to the Competition Council in drafting the Law on Monitoring of State Aid to Undertakings and the order of application of procedures for assessment of State aid. The main outputs of the project were: two reports related to the development and reorganisation of the former State Competition and Consumer Protection Office into the Competition Council; seminar on comparative competition structures; draft regulations of the Competition Council;

draft Law on Monitoring of State Aid to Undertakings (adopted on 18 May 2000); and two seminars on state aid. The trainees at the seminars were experts from the Competition Council, representatives of the relevant ministries, local authorities and science institutions.

In December 2000, the un-going Phare Twinning project “Strengthening Enforcement of Competition Policy” (LI 99-IB-FI-02) was launched. The Twinning project was built on the activities under the Phare SEIL project, and continues the work started by the SEIL project. The partners of the Twinning project were Lithuania represented by the Competition Council and Germany represented by the Federal Ministry of Economics and Technology in co-operation with Sweden represented by the Swedish Competition Authority. The initial duration of the project was 12 months, but in November 2001 it was prolonged and will terminate on May 31, 2002 instead of November 30, 2001. The project was being implemented according to the Decentralized Implementation System (DIS). The overall co-ordination with other bilateral and multilateral donors was being ensured by the Lithuanian Ministry of Foreign Affairs. All missions of experts and matters related to the project were being coordinated by a Pre-Accession Adviser (PAA) who took up permanent residence for the initial duration of one year of the Twinning project. The beneficiary, the Lithuanian Competition Council, provided the team of experts with necessary facilities and counter-part support for implementation of the project.

The fundamental objective of the Twinning project is the strengthening of the administrative capacity of the Competition Council to implement and enforce the Law on Competition and the Law on Monitoring of State Aid to Undertakings by improving structures and procedures and by organizing an extensive staff-training program with the assistance of German and Swedish experts, as well as to raise awareness of competition policy within business community and administrative bodies. The twinning operation supports drafting and adoption of secondary legislation necessary for full compliance with the *acquis communautaire*, translations into English and Lithuanian languages, investigations of individual cases, and education of key targeted audiences in the public sector, judiciary and business society. The staff-training program includes seminars, training “on the job” in Lithuania, and training “on the job” and study visits to corresponding administrations in Germany and Sweden.

In the year 2001, the project experts provided assistance in drafting and adoption of regulations concerning granting of exemptions for certain categories of restrictive agreements, including agreements in transport, insurance, agriculture sectors, technology transfer agreements and horizontal specialization agreements. Written proposals and reports on the experience in Germany and other countries were very useful for the Competition Council in order to take its decisions regarding these sectors.

On the request of members of the Competition Council and its staff the experts and the PAA provided consultations and advice in individual cases carried out in the area of anti-trust and state aid, gave recommendations on possible improvements of the investigation procedures and the rules for attributing fines. Training activities “on the job” involving the participation of project experts in the discussion of current cases before the Competition Council have been recognized as very useful for the staff of the Competition Council. Experts information and advice helped the staff of the Competition Council to concentrate on the most important restrictions of competition, to initiate inquiries and to conduct proper proceedings in conformity with Community standards.

There were three seminars organized in both anti-trust and state aid fields. The anti-trust seminar was held in Vilnius on September 26, 2001. The topics included vertical restraints, abuse of dominance in energy distribution network and general overview of main anti-trust developments in the EU. The agenda attracted more than 60 persons, including participants from law firms, regulatory authorities, business firms and ministries. Two other seminars were organized on state aid rules. One of the seminars was held for judges in connection with a presentation by the Lithuanian Ministry of Economics of the new

Lithuanian laws on restructuring and bankruptcy. This seminar was organized in cooperation with the Lithuanian Training Centre for Judges.

According to the Working Program a senior expert of the Legal Division of the Competition Council received a three-month enforcement practice in the Bundeskartellamt, three members of the Competition Council spent one week in Bonn, visiting the Bundeskartellamt, the Ministry for Economy and Technology, the Regulator for Post and Telecommunications and the Monopolies Commission. The press officer of the Competition Council and two senior experts of the Competition Council participated for one week in the work of the Swedish Competition Authority in Stockholm. Six representatives of the Competition Council took part in a two-week training and information program in Potsdam at the Ministry of Economy of the state of Brandenburg. The training focused on decisional practice in the field of state aid.

Swedish experts provided valuable information about the experience of the Swedish Competition Authority with programs designed to raise public awareness of competition legislation and about the information and administration system of the Swedish Competition Authority.

State aid experts participated in editing of a booklet on State aid legislation for more convenient use for administration and interested parties. Some texts were provided in English as well as in Lithuanian.

Although the Twinning project has progressed successfully, its Working Program was not completed during the initial period of the project. The main reason of the delay was related to the planned visits by short and medium-term experts. They have remained below schedule because many experts have experienced difficulties in getting the necessary leave from their home administrations. It is expected that the extension of the project will allow to further implement the Working Program. The future activities under the project will mainly concentrate in on-the-job training by involving Member States experts in the discussion of new cases on the request of members of the Competition Council.

In terms of developing skills and pursuing regulatory reforms, especially valuable was the assistance received from the OECD under the special program for the Baltic region states (Baltic Regional Program), which was launched in 1998. The main objective of the BRP was to assist the Baltic competition authorities in implementing law enforcement and advocacy activities. The program provided each Baltic competition authority with annual written evaluations of selected issues, seminars that combined elements of the CLP's policy dialogue and peer review with capacity-building activities that targeted topics identified by the evaluations. The first program activity was the OECD's 1999 book on Competition Law and Policy in the Baltic Countries. It helped the Lithuanian Competition Council to meet "best practice" standards and provided information on existing practice to the EU, national governments and the business community. Thereafter, the OECD prepared an assessment of the Baltic authorities' policies and cases against hard-core cartels, abuse of dominance and merger control. The reports on these activities were discussed at the three-day seminars held in Vilnius (10-12 October 2000) and in Tallinn (24-26 October 2001). The BRP workshops on competition policy issues were very well designed. They provided best opportunities to concentrate the efforts on the enforcement process in order to adopt the OECD standards in competition area. The importance of the OECD assistance is significant also in the context of the EU enlargement, since the OECD program complements EU programs by focusing on policy issues and fields that are not part of the *acquis communautaire*.

The Lithuanian Competition Council highly values the visiting expert programme designed for a Lithuanian competition expert at the OECD Secretariat under the Baltic Regional Program. The expert from the Competition Council worked in the OECD for a three-month period in September – November 2001. The experience gained by the Lithuanian competition expert has proved a strong need and usefulness of such type of activities. It provided a unique opportunity to get experience and closer acquaintance with

the functions of the OECD Competition Law and Policy Division, the Competition Committee and its working groups, as well as contributed to the establishment of both personal and official contacts between OECD and Lithuanian officials. Taking into consideration the successful experience of the first visiting expert and significance of the acquired knowledge for further intensification of bilateral relations, the Competition Council would like to have more such trainee assignments.

The decision of the OECD Council to grant an observer status to Lithuania in the OECD Competition Committee provided the Lithuanian representatives with the additional opportunity to participate in the OECD subsidiary bodies and to obtain substantial mutual benefits by increasing effective competition law enforcement through application of the OECD practice.

Since 1999, a valuable bilateral assistance to the Competition Council has been providing by the Danish Ministry of Foreign Affairs under the FEU programme. The main aim of the programme was to support the process of transposing EC legislation into the national legislation. In 2000, the Danish experts assisted in drafting the Resolution of the Competition Council on block exemption to agreements between transport undertakings in certain transport sectors. The Danish experts not only consulted the Competition Council on this issue but also even provided the Competition Council with a completed draft Resolution. It is expected that later this year the similar assistance will be provided for drafting the following: guidelines for the existing Lithuanian block exemption on vertical restraints; Lithuanian block exemption on specialization agreements; Lithuanian block exemption on research and development agreements; and guidelines for the intended Lithuanian block exemptions on specialization, research and development agreements.

Significant support in arranging training for the staff of the Competition Council was provided by the DG Competition of the European Commission and the TAIEX Office.

The Lithuanian Competition Council highly valued the annual OECD competition policy activities held at the Joint Vienna Institute. Regular participation of Lithuanian experts at these events helped to improve the administrative capacities of the Lithuanian Competition Council, particularly those regarding the implementation of competition policy recommendations in the field of the actions against hard core cartels and in the case of abuse of dominance.

During the reporting period, representatives of the Competition Council were active participants of many international seminars and conferences, organized by the European Commission, OECD (Organization for Economic Co-operation and Development), UNCTAD (United Nations Conference on Trade and Development), various international organizations and competition institutions of other countries. Worthy of notice are the annual conferences of the European Commission in Tallinn and Lubljana, a conference in Stockholm "Struggle against cartels, - why and how", the European Commission conference in Brussels "Merger control", the competition conference and the European competition day in Lisbon, an international seminar on cartels in Brighton.

Besides, in the year 2001 certain national training programme designed for the staff of the CC was elaborated in close co-operation with the Lithuanian Institute of Public Administration. This training programme consisted of a number of lectures by in-house and outside experts, and covered more general topics on administration and law. According to this programme experts from the CC had an opportunity to take part in the said training.

The mentioned and other measures of technical assistance presented a good opportunity for the experts of the Competition Council to broaden their horizons and deepen their knowledge in the area of competition policy and law, implementation of the Law on Competition and conducting of investigations, exchange of information with officials of foreign competition institutions.

ACTUAL EXPERIENCE IN INTERNATIONAL CO-OPERATION IN CARTEL AND MERGER CASES

1. General overview

The Competition Council of the Republic of Lithuania (hereinafter – the Competition Council) is the core institution in the implementation of competition policy seeking to ensure conditions facilitating fair competition, efficient market operation, and the growth of economy. The Law on Competition of the Republic of Lithuania (hereinafter – the Law on Competition), adopted by the Seimas in March 1999, empowers the Competition Council to investigate, consider and end unlawful cartels, to perform control of concentration.

Very high emphasis in the activity of the Competition Council is placed upon potential cartel agreements, which are extremely prejudicial to competition and detrimental to consumers.

The experience of the European Union, for instance in the well-known international cartel cases, such as graphite electrodes, vitamins, showed the importance and significance of international co-operation in investigation of cartel cases. It is evident that cartel agreements disclosed by other countries can affect Lithuanian market as well. The recent investigation of the European Commission on the vitamin cartels, the quantity of discovered infringements induced the Lithuanian Competition Council to show an interest and to examine whether the resembling activities did not take place in Lithuanian market. In doing so, the Competition Council brought attention to the activities of the pharmacy companies participating in the market-sharing and price-fixing affecting vitamins products in the Lithuanian market. With that end in view the Ministry of Health of the Republic of Lithuania was requested for information on the import into Lithuania of the synthetic substances which belong to the certain groups of vitamins and are closely related products. At the moment the started investigation is continuing.

The international co-operation is a highly prioritised area of activity of the Competition Council. Each year leads to the further development of relations and formal and informal contacts between the Competition Council, the European Commission, the Organisation for Economic Co-operation and Development (OECD), other international organisations, and numerous competition institutions of the European countries and countries from other continents.

The Competition Council of the Republic of Lithuania has an interest in co-operation with competition authorities of all countries. The most productive and successful co-operation is possible between countries entered into co-operation agreements. At the moment the Competition Council has several co-operation agreements concluded with neighbouring Baltic States: Latvia, Estonia, Poland and Ukraine:

The Agreement on Co-operation between State Competition and Consumer Protection Office of the Lithuanian Republic and Antimonopoly Committee of Ukraine of 18 February 1996.

The Agreement of Co-operation between the State competition and consumer Protection Office of the Republic of Lithuania and the Antimonopoly Office of the Republic of Poland of 1 March 1996.

Memorandum of Understanding between the Competition Authorities of the Republic of Estonia, Republic of Latvia and Republic of Lithuania of 11 April 1996.

The Agreement of Co-operation between the competition Authorities of the Republic of Latvia and Republic of Lithuania of 11 April 1996.

The copies of said co-operation agreements are enclosed.

Very important legal background of co-operation was the Decision No 4/99 of the Association Council between the European Communities and their Members States, of one part, and the Republic of Lithuania, of the other part, of adopting the necessary rules for the implementation of Article 64(1)(i), (1)(ii) and (2) of the European Agreement establishing an association between European Communities and their Members States, of one part, and the Republic of Lithuania, of the other part of 26 May 1999.

2. General principles of the rules of co-operation agreements

Notification

The competition authorities shall notify each other in cases when it becomes aware that their enforcement activity may affect important interests of the other party. The notification is necessary in cases which involve investigation of the anticompetitive activities carried out by the economic entity having its residence in the other Party's territory or involve investigation required by the other Party or are relevant to enforcement activities of the other competition authority or involve remedies that would require or prohibit conduct in the other Party's territory.

Notification shall include sufficient information to permit an initial evaluation by the recipient party of any effect on its interests. Notification shall be made in advance, as soon as possible and at the stage of investigation still far enough in advance to adopt of a settlement or decision, so as to facilitate comments or consultations and to enable the proceeding authority to take into account the other authority's views.

Consultation and Comity

Whenever the Competition Authority consider that anti-competitive activities carried out on the territory of the other authority are substantially affecting important interests of the respective party, it may request consultation with the other authority, or it may request that the other authority initiate any appropriate procedure with a view to taking remedial action under its legislation on anti-competitive activities.

Finding of an understanding

The Competition Authority shall give full consideration to such views and factual materials as may be provided by the requesting authority and, in particular, to the nature of the anti-competitive activities in question, the enterprises involved and the alleged harmful effects on the important interests of the requesting party.

Request for information

Parties shall realise mutual exchange of information about legal acts and their amendments. The proceeding authority shall give sufficient information to the extent possible and a stage of its proceedings for enough in advance of the adoption of a decision or settlement to enable the requesting authority's views to be taken into account, otherwise it shall inform the requesting party indicating reasons of being unable to provide information.

Secrecy and confidentiality of information

Information shall be provided if it does not violate the laws of the providing Party, particularly if it concerns the secrecy of enterprise.

Each authority agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other authority.

3. Co-operation in cartel investigation

In the recent years, the Competition Council of the Republic of Lithuania had several cases of international co-operation in cartels investigation.

On 9 June 1999, the Competition Council of the Republic of Latvia provided a formal request for co-operation on the investigation of potential cartel agreement between the Association of Egg Producers of Latvia and the Association of Poultry Farming of Lithuania on full discontinuation of eggs export and import. Due to potential impact of the presumptive cartel agreement on the Lithuanian market, the Competition Council carried out the investigation in the Association of Poultry Farming of Lithuania. During the investigation co-operative parties shared the information and opinions in informal way - by telephone and email communications. The exchange of information let parties to reach consent on the investigation.

Another instance of co-operation in cartel investigation was also related to our neighbouring country Latvia. In 1998, the efforts of the Competition Council have been successful in identifying the first international agreement concluded between the competitors.

The aim of the investigation was to establish the compliance of the activities undertaken by Lithuanian, Icelandic and Swedish *Ilsanta* Closed Stock Company (Lithuania) and *Grindex* Company (Latvia) with the provisions of the Law on Competition. While being the competitors in Lithuanian intra-venous solution markets, the aforementioned companies have agreed among themselves to share the intra-venous solution markets following the territorial division principle. The competing companies concluded several agreements involving certain considerations on the supply of intra-venous solutions to the Baltic market. The competitors agreed that starting from the year of 1996 *Grindex* would terminate the supply of such solution to Lithuania either directly or via distributors. Also, the agreements involved the statement that only *Ilsanta* would be responsible for the supply of the aforementioned intra-venous solutions to Lithuania, in this way eliminating from the Lithuanian intra-venous solution market *Grindex* - one of *Ilsanta* Closed Stock company competitors. Before signing the agreements, the prices quoted for such solutions by *Grindex* were lower than those of *Ilsanta*.

For violation of the law fine of 20,000 litas was imposed by the Competition Council on *Ilsanta* Closed Stock Company.

According to the Agreement of Co-operation between the competition Authorities of the Republic of Latvia and Republic of Lithuania of 11 April 1996, the decision of the Council was communicated to the Latvian Competition Council.

The informal way of international co-operation may be illustrated by the following example.

In November 2001, the authorised officer of the Lithuanian Competition Council was invited to the informal meeting, arranged by the Danish Competition Authority, to discuss how competition was performed in the Scandinavian ferry market. Among participants of the meeting were representatives from competition authorities of Norway, Sweden, Denmark, Lithuania and the European Commission.

The participants shared information on the situation in harbours of representative countries, agreed that the situation in the market for transportation by ferries in the Baltic Sea was characterised by a limited number of operators, some of which were co-operating in different ways. Furthermore, the number could even decrease in the process of consolidation during the last 12 months. Free access to harbours for ferry operators and forthcoming liberalisation of harbour services was also discussed and it was agreed that access on a non-discriminatory and open conditions and a strengthening of competition in the harbour was vitally important.

ANNEX A

**QUESTIONNAIRE TO INVITEES AND OBSERVERS
ON INTERNATIONAL CO-OPERATION
IN CARTEL AND MERGER INVESTIGATIONS**

Most answers to the questionnaire can be found in the “General overview”, which is provided separately. Short answers to the specific questions are also provided below.

This questionnaire covers the period from 1 January 2000 to the present.

- 1. Provide a copy of each formal co-operation agreement between your country or your competition agency and a foreign country or competition agency relating to competition investigations or cases.**

The copies of co-operation agreements between the Competition Council of the Republic of Lithuania and foreign countries are enclosed.

- 2. Describe your country’s laws or regulations that relate to or affect your agency’s ability to exchange information or co-operate with a foreign competition agency.**

See the “General overview”.

Cartels

- 3. If your agency issued one or more formal requests to a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):**

During the reporting period the Competition Council did not issue any formal request to a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel.

- 4. If your agency received one or more formal requests from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):**

During the reporting period the Competition Council did not receive any formal request from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel.

- 5. Please describe any other instances of co-operation with a foreign competition agency in a hard core cartel investigation or case not described above, such as meetings, telephone or email communications, including, if possible, the co-operating country or countries, the nature of the co-operation and the importance or significance of the co-operation to your agency.**

See the “General overview”.

6. **State the number of instances in which a hard core cartel investigation or case could have benefited from information or co-operation from a foreign competition agency but your agency did not request such assistance because you knew that it could not or would not be granted. Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement effort.**

During the reporting period the Competition Council did not have needs for international co-operation in cartel investigation.

Mergers

7. **Identify each merger that your agency reviewed that, to your knowledge, was also reviewed by the competition agency of another country.**

The Competition Council of the Republic of Lithuania examined the following merger cases, which, to our knowledge, was also reviewed by the competition agency of Sweden, Finland, Denmark, Norway and the European Commission:

1. Metsa-Serla Corporation – Modo Paper AB (Sweden, Finland, the European Union)

The Competition Council was aware of companies before concentration because of their subsidiaries acting in Lithuania. That is why there was no communication between Competition Council and the competition agencies of Sweden and Finland.

2. Kemira OYJ-ALCO-Beckers AB (Finland, Sweden, the European Union)

During the investigation there was no co-operation. In Lithuania Kemira OYJ has been acting in fertiliser and plants protection market, ALCO-Beckers AB – in colour market.

3. Sampo Bank PLC – Leonia Bank PLC (Finland)

Actions of the economic entities under concentration did not introduce significant changes in the market structure of certain goods. In view of this fact, the Competition Council did not communicate with the competition authority of Finland.

4. Calsberg A/S – Orkla (Finland, Sweden, Denmark, Norway and other countries)

During the investigation there was co-operation with the Swedish competition authority through the Swedish experts, consulting in Lithuania under PHARE (Twining) technical assistance project “Strengthening Enforcement of the Competition Policy”.

5. Förenings Sparbanken – SEB (Sweden, The European Union, Latvia, Estonia)

During the investigation there was co-operation with the Swedish competition authority through the Swedish experts, consulting in Lithuania under PHARE (Twining) technical assistance project, also with the representatives of the Directorate Competition of the European Commission.

8. For each investigation or proceeding involving a merger in which there was communication between your competition agency and the competition agency of another country during the course of the investigation or proceeding, please state or describe:

- a) the identity of the merging parties;
- b) the foreign competition agency or agencies with whom there was communication;
- c) the nature of the communications, including the means of communication, the parties to the communications, the subject matter of the communications and the type of information exchanged, if any;
- d) whether the merging parties agreed to a waiver of confidentiality restraints, permitting the exchange of information directly between your agency and a foreign agency, and if there was such a waiver, its terms and the type of information that was exchanged;
- e) the effect of the communications on your investigation or proceeding.

1. Calsberg A/S – Orkla (Finland, Sweden, Denmark, Norway and other countries)

During the investigation there was co-operation with the Swedish competition authority through the Swedish experts, consulting in Lithuania under PHARE (Twining) technical assistance project “Strengthening Enforcement of the Competition Policy”. The officials shared only general information: determination of the product market, term of the investigation, possible ways of decision avoiding a competition restriction. However deeper co-operation was limited by the rules of confidentiality.

The competition laws of both countries provide different terms for merger case investigation. In Lithuania notification must be examined and resolution must be adopted within 4 months, at the latest. The investigation term in other countries is longer. Therefore the Competition Council of the Republic of Lithuania, taking into consideration the decisions of other competition agencies, obligated parties to sell an unspecified beer enterprise involved in the concentration within the prescribed time limit, in order to avoid a dominance in the beer market.

2. Förenings Sparbanken – SEB (Sweden, The European Union, Latvia, Estonia)

During the investigation there was co-operation with the Swedish competition authority through the Swedish experts, consulting in Lithuania under PHARE (Twining) technical assistance project, also with the representatives of the Directorate Competition of the European Commission.

The co-operation was conducted in both ways – directly and by correspondence. But in the essence parties exchanged only information of general nature (determination of the product market, terms of the investigation, possible ways of decision avoiding competition restriction). The main obstacle for more extensive co-operation was the restriction of confidentiality.

Under the informal communication the Competition Council reached an agreement with participants of concentration to avoid restriction of competition in the banking service market, if there would be obtained permission for the aforesaid concentration. The co-operation with officials of the European Commission could have influence on the decision to be taken by the European Commission. In consequence of that, Förenings Sparbanken and SEB abandoned merger intentions.

9. Describe any instances in a merger case or investigation

- a. in which your agency sought the assistance of a foreign competition agency but it was denied;**
- b. in which your agency sought a waiver of confidentiality restraint from one or more of the merging parties but it was denied.**

The co-operation under the PHARE (Twining) project “Strengthening Enforcement of the Competition Policy” was with competition agencies of Germany and Sweden on investigation of similar cases. However, due to restraints on confidentiality principally only information and experience of general nature have been exchanged.

10. Describe any investigation or proceeding involving a merger that would have benefited from co-operation with a foreign competition agency but your agency did not pursue such co-operation because you knew that it would not be possible. Describe the type of co-operation that would have been useful and the impact of its unavailability on your enforcement effort.

The Co-operation with foreign agency would be useful in every more complicated merger case at least for these reasons: the decision would be reached in the shorter term, exchange of information could help to avoid certain mistakes, it would allow to take into account efficiency and consequences of similar decisions. Possibility to obtain all files (not only fragments or resolutions of the cases) would be very valuable and useful.

ANNEX B

Questionnaire on Technical Assistance Experiences and Needs

Most answers to the questionnaire can be found in the “General overview”, which is provided separately. Short answers to the specific questions are also provided below.

1. **It would be useful if you could provide as much as reasonably possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issues raised below.**

See the general overview and the attached table.

2. **Based on your experiences:**

What topics have been most and least useful, and why?

All topics described in the general overview were very useful.

What kinds of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

It is impossible to distinguish one or another seminar, conference or some other event. All events were well organised and provided by highly experienced experts.

What are the advantages and disadvantages of single-country and regional events? Does the answer depend on the topic being covered? Please explain.

As regards single-country and regional events, they both are very useful and important. The single-country events allow participants to concentrate more on the country’s specific topic and satisfy its internal need. Usually such kind of events helps the competition authority to get relevant answers and to solve existing problems. Topics of the regional events are usually more of general character, but these events are also very important. They allow to get more information about competition policy and its implementation in neighbouring countries, to share experience and to establish and keep contacts with relevant officials from other competition institutions. Thus, both kinds of these events are highly needed.

Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?

1. Experience working in a competition authority.
2. Detailed knowledge of your actual legal, institutional, and economic systems.
3. Experience in providing assistance to transition or developing economies?
4. Knowledge of competition law and policy systems in different parts of the world?

What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

Assistance provided by the current competition officials is the most effective and valuable. In addition to their working experience within the relevant competition authority, currently working competition officials usually possess much more updated information and knowledge of the competition law and policy developments both in their country and different parts of the world. The only one disadvantage in receiving assistance from current competition officials is that they usually experience difficulties in getting the necessary leave from their home administration and very often are not able to provide more extensive assistance.

As regards private consultants, the effectiveness of their assistance very much depends on the topic being covered. Private consultants, especially professors, usually are much better in dealing with the topics either of a very general or of a very specific character. The topics that need practical experience (e.g. investigation procedures in cartel cases) should be presented by current competition officials.

Approximately what share of the assistance you receive consists of multiyear programs, and what share consists of one-off events?

Multiyear programmes - 70 %, one-off events - 30%.

Approximately what share of the assistance you receive takes place in your economy, and what share is abroad?

In Lithuania – 40 %, abroad – 60 %.

Approximately what share of your assistance are seminars and conferences, and what share are resident advisors or internships in other economies?

Seminars and conferences - 50 %, resident advisors - 40 %, internships in other economies - 10%.

3. **Have there been instances when an apparent lack of co-ordination among providers has been a problem for you? Please explain. Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?**

In Lithuania the overall co-ordination of technical assistance programs has been ensured by the Ministry of Foreign Affairs, and practically the lack of co-ordination has not been a problem. The main advantage of greater international co-ordination is that the co-ordination allows to avoid the overlapping of technical assistance among different providers. The main disadvantage is that it slows down the project implementation.

4. **What do you currently consider your economy's greatest need in terms of competition law and policy assistance?**

The greatest needs in terms of competition law and policy assistance are related to the implementation of a competition law, especially against cartels and anticompetitive mergers. Most valuable assistance would include all kinds of staff training, in particular ensuring that

investigation, enforcement and reporting methodologies are based on the best worldwide practice and are in compliance with the EC rules.

The assistance for implementation of the awareness-raising campaign, including wider public sector and judiciary would also be very valuable.

Some technical assistance is also needed for drafting of secondary legislation/regulations and explanations, especially in the field of block exemptions.

Unclassified

CCNM/GF/COMP/WD(2002)29



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM MALAYSIA

This note is submitted by Malaysia for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120647

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)29
Unclassified

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**MINISTRY OF DOMESTIC TRADE AND
CONSUMER AFFAIRS,
MALAYSIA**

**CONCERNS REGARDING COMPETITION POLICY
AND ECONOMIC DEVELOPMENT IN MALAYSIA**

At the moment the crux of policy decision making on competition is whether a developing country like Malaysia should conform with the competition policy and laws of advanced countries and WTO principles or whether we should enact a competition policy /law analogous of the norm, but which nevertheless fulfils our socio-economic and developmental needs. It is significant to consider that even among advanced countries, there are major differences in the policies which they pursue, including aspects such as the underlying philosophy, various legislative practices and modes of policy interpretation.

At the moment, Malaysia does not have a comprehensive competition policy/law. However piece meal competition legislation does exist in the form of guidelines for the telecommunications sector by the Communications and Multimedia Commission (CMC) and in the Guidelines for Regulations of Acquisition of Assets, Mergers and Take-overs and also in the Malaysian Code of Take-overs and Mergers 1998. All three are under the jurisdiction of separate authorities. Further the CMC (which was set up by virtue of the Communications and Multimedia Act, 1998) has come up with two guidelines, firstly on Substantial Lessening on Competition and secondly on Dominant Position in a Communications Market.

During a recent forum discussing the draft policy framework on the proposed Fair Trade Act of Malaysia, several important aspects were discussed. In general terms, it was agreed that further extensive research on the subject matter needs to be carried out before a Fair Trade Act which is suitable to and workable with the socio-economic needs of the country could be formulated, without compromising Malaysia's international commitments. There is an urgent need on extensive research on several subject matters, namely :-

1. Mergers and Acquisitions, (M&A);
2. Restrictive Business Practices (RBP's);
3. Extensive sectoral regulatory framework; and
4. Exemptions/authorisations.

The dichotomy between domestic and market power needs to be addressed. Malaysia is of the opinion that dominance per se is acceptable, however abuse of that position is the aspect which should be focused on. The important question is regarding the level of acceptability of market share. Determining the right threshold level of market share in each industry for each country is not an easy task. For a developing country like Malaysia, foreign investment in the domestic market is of utmost importance, therefore the M&As aspect in the Malaysian competition law/policy needs to be formulated in such a way to be able to delicately balance between ensuring the continuance of FDIs in the economy and creating a competitive environment in the domestic market.

The main issues regarding RBP's and other types of anti-competitive market conduct lies in identifying those RBP's which are most damaging to a country like Malaysia and deciding upon which RBP's to be per se prohibited, as opposed to a rule of reason approach.

The existing sectoral legislations are not economic regulators and therefore do not take into account competitive or anti-competitive conduct when issuing or regulating licences. Also there is a question of converging existing piece meal legislation with the main overall or broad-based competition legislation.

Malaysia feels that our developmental and socio-economic growth needs can be addressed by providing adequate exemptions in the competition policy/law. It is felt that this temporary measure is necessary until certain domestic industries are better equipped to cope with international level competitiveness. Thereafter, such exemptions/ authorisations would be reviewed based on the needs of the country at that time.

Given the above scenario and current on-going competition policy/law advocacy in the WTO, APEC, UNCTAD and other fora, it is both urgent and important for developing countries like Malaysia to appraise the main issues which are relevant for our development and social welfare. More importantly, we should instil those values in our own "tailor-made" competition policy/law before we can address the issues being raised at the WTO debate. Specifically, in considering competition policy from a development perspective, the following elements have to be considered :

- emphasis shall be placed on dynamic rather than static efficiency as the main objective of the competition policy for Malaysia;
- there shall be a concept of workable or sustainable competition (rather than maximum competition) to promote long term growth of productivity;
- there shall be a related concept of optimal combination of competition and co-operation between firms so that we can achieve fast long term economic growth;
- the critical need to maintain the private sectors propensity to invest at high levels requires a steady growth of profits. For this to occur there is a need for the government's continued co-ordination of investment decision which in turn requires close co-operation between government and business; and
- There shall be recognition of the importance for developing countries' industrial policies and hence the need for coherence between industrial and competition policy.

While Malaysia recognises the urgency to conduct market and market conduct studies in order to ascertain the competition dynamics in Malaysia, nevertheless we are unable to identify any one, person or entity locally who is able to conduct a broad-based competition study. Furthermore, there are also financial constraints for such a study to be conducted. Therefore, technical assistance in the form of financing and the capacity to conduct such studies is required, especially since current instances of abuse of market power in Malaysia are merely anecdotal and not empirical in nature.

VIEWS ON TECHNICAL ASSISTANCE EXPERIENCES AND NEEDS

- a) Conferences and seminars have been able to provide insight into problems and issues faced by countries with competition policy and law as well as into issues which countries without a policy and law have faced.
- b) Single country events are able to address domestic issues in depth and more participants have the advantage to attend such programs. Regional events give a better perspective of like minded problems and issues faced as well as discussing the possibility of getting co-operation in the event that it is needed. The networking provides useful contacts in the event of a need.
- c) An assistance provider would need to understand the socio economic culture of the country as well as a detailed knowledge of the legal, institutional and economic system of the country. An experience of similar systems in other developing countries would be beneficial.
- d) Assistance from different sources depends very much on the topic covered. In the case of Malaysia, we would prefer to receive assistance from established competition authorities who have had hands on experience. We would also like to receive assistance from countries who had recently formulated competition polices. Private consultants who have had hands on experience in formulating competition policy and law are just as useful. Such consultants must however be able to translate our policy into the law taking into account our socio economic conditions.
- e) Most of the assistance received so far (about 80%) is from abroad in the form of seminars, conferences. We would like to conduct more seminars and workshops in our own country with the help of consultants from OECD, UNCTAD or established competition authorities.

Malaysia's current need

- Immediate assistance is needed to help draft the policy and law
- We also need to map out all economic and market regulators
- We also need help to identify secondary legislation/regulations/guidelines
- A resident advisor is urgently needed
- Attachment programs to established competition authorities as well as institutions advocating competition policy

Unclassified

CCNM/GF/COMP/WD(2002)21



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

06-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM PERU

This note is submitted by Peru as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120420

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)21
Unclassified

English text only

CONTRIBUTIONS FROM PERU

Actual experiences in international co-operation in cartel and/or merger cases

Related the actual experience about international co-operation in cartel or merger we have just development the answer in the questionnaire. But in generally In jurisprudence and activities carried by the Free-Competition Commission, there is not so much experience on international co-operation about the control of international cartels neither about subjects on concerted actions.

About the competition policy in Peru

Before 1990, in Peru the State had a regulating and managing (owner) role carrying out a protection policy to the local industry with a model of import substitution and export subsidies. After 1990, the State assumes the role of market arbiter on the basis of rules of the game and free participation of the stakeholders: businessmen, consumers and the State itself. That is, since that year the components of a free-market economy were applied. The State arbitrates in problems between businessmen and consumers and also looks after and watches over free competition, giving this task to the Free Competition Commission of INDECOPI. The purpose of this policy is to preserve and protect the free-market system and the consumer.

For this reason, the Constitution in force protects this model: market social economy, the freedom to private initiative and the business freedom are guaranteed: free access to market.

Free Competition Commission

The Free Competition Commission is an organisation with technical and administrative autonomy which is part of the National Institute of Defence of Competition and Protection of Intellectual Property (INDECOPI), created in 1991.

The task of the Commission is to watch over the observance of the competition defence regulations contained in Legislative Decree N° 701, as well as those referred to the control of business concentrations in the Electrical Sector, contained in Law N° 26876. This Commission has also an active role in wide spreading the benefits of the establishment of a culture of competition in Peru, being empowered to carry out studies and preparing reports on the subjects that may be deemed necessary.

Legislative Decree N° 701, Law of elimination of monopoly, control and restrictive practices of free competition establishes the prohibition of abusive practices of a dominant position as well as the restrictive practices of competition which involve the concerted action of two or more competitors in the market. The Commission is in charge of looking after this regulation. The investigations carried out by the Commission may be requested by one of the parties and by means of formal complaints submitted by the agents, or by the investigations started officially by the Commission.

With respect of the abusive practices of a dominant position, the punishable practices include: the unjustified negative to contract, the application of unequal conditions to equal services on commercial relations, the tied sales and any other practice of similar effects.

The previous authorisation forms of concentrations in the electrical sector are carried out under Law N° 26876 which demands an analysis on the effects of concentration in competition in the electrical sector for those cases involving a concentration above 5% of the market (measured in terms of revenues) in the case of vertical concentration and 15% in the case of horizontal concentration. Concentration is understood as merges, acquisition of shares and/or assets, joint ventures, etc.

Furthermore, since April 2001, the Commission is in charge of evaluating the business activities of the State, on the basis of a methodology fully developed by INDECOPI and in response to a demand of the National Financing Fund of the State Business Activity (FONAFE). The studies conducted by the Commission are oriented to evaluate the legality and the subsidiary nature of the companies kept by the Peruvian State. Up until now, the Commission expressed its opinion about State-owned companies in different sectors, such as: commercial airlines, post, naval construction and repairation, editorial, real estate and coca leaf trading.

Nevertheless, it is important to point out that the Commission is not empowered to set prices, grant compensations, apply a control of mergers in markets other than the electric sector, and apply the rules concerning abuse of dominant position and concerted practices to companies operating within the telecommunication sector, as this is the task of the Supervisor Organisation of Private Investment in the field of Telecommunications (OSIPTEL).

From the jurisprudence of the Commission we can point out the investigation officially conducted in 1997 against poultry companies and the Peruvian Aviculture Association because of the concerted fixing in the price of frozen chicken imposing fines to all the involved parties. Likewise, in 2001 the Commission prepared a report assessing the effects on the market of the acquisition of the Electroandes S.A., a State-owned electric company, on behalf of the company PSEG Global Inc. which hold assets in electrical distribution in the Peruvian market.

Needs of Technical Assistance

The most important needs of technical assistance that may be offered by OECD to the Commission are those referred to the personnel training of the Technical Department of the Commission studying in depth the assessment techniques of cases related to abusive practices of dominant positions and restrictive practices of free competition.

Such training could be received through the participation in conferences or seminars organised by the OECD as well as by means of documents referred to this analysis.

The Commission must also publish the guidelines corresponding to the assessment criteria of abusive practices of dominant positions and restrictive practices of free-competition in order to make more predictable the work of the Commission to their users. In this respect, preparing these documents, the OECD could serve as source of advising through the above-mentioned methods or other more direct methods.

ANNEX A

PAIS: PERU

AGENCY: FREE COMPETITION COMMISSION - INDECOPI

EXPERIENCE: WORKING SINCE 1991

This experience covers the period from 1 January 2000 to the present.

1. Provide a copy of each formal co-operation agreement between your country or your competition agency and a foreign country or competition agency relating to competition investigation or cases.

The Free Competition Commission of INDECOPI doesn't have an agreement with other competition agency about mutual co-operation in the investigation of cases.

2. Describe your country laws or regulations that relate to or effect you agency's ability to exchange information or co-operate with competition agency.

The Law doesn't permit an interchange of information, nevertheless if the information is not confidential, the public can access to it. In consequence, if a competition agency asks for information that is public, the Commission will provide it.

Cartels

3. If you agency issued one or more formal requests to a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests.

We haven't made a formal requirement for information. But, we asked for information to the FTC. If that's the case, we can say that we just required information once, for one case.

4. If your agency received one or more formal requests from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests

Once we received a communication from CLICAC, the Competition Agency of Panama, asking for the proofs and information about the case of presumption concerted prices in the commissions paid to the travel agencies for selling airline's tickets.

5. Please describe any other instances of co-operator with a foreign competition agency core cartel investigation or case not described above, such as meetings, telephone or email

communication, including, if possible the co-operating country or countries, the nature of the co-operation and the importance or significance of the co-operation to your agency.

In all the international meetings, like APEC, ALCA or FTAA, the agents of the competition agencies make contact. The consults are made verbally or by e-mail subsequently the questions.

6. State the number of instances in which a hard core cartel investigations or case could have benefited from information or co-operation from a foreign competition agency but your agency did not request such assistance because you knew that it could not or would not be granted. Describe the type of assistance that would have been useful and impact of its unavailability on your enforcement effort.

In our experience we don't cope cases with such characteristics.

Mergers

7. Identify each merger that your agency reviewed that, to your knowledge, was also reviewed by the competition agency of another country.

In Perú, just the mergers of electrical companies are analysed. In that way, the case of ENDESA had repercussions in Chile, Argentina and Peru, because the economical group had investment in these countries. The Free Competition Commission asked for information related to the Fiscalía Nacional Económica de Chile and to the Superintendencia de Administración de Fondos de Pensiones en Chile.

8. For each investigation or proceeding involving a merger in which there was communication between your competition agency and the competition agency of another country during the course of the investigation or proceeding.

Any other kind of information has not been required to another competition agency.

9. Describe any instances in a merger case of investigation
 - a. in which your agency sought the assistance of a foreign competition agency but it was denied;

We don't need this assistance.
 - b. in which your agency sought a waiver of confidentiality restrain from one of the merging parties but it was denied.

We don't have this problem because we don't need this assistance.

10. Describe any investigation or proceeding involving a merger that would have benefited from co-operation with a foreign agency but your agency did not pursue such co-operation because

you knew that it would not be possible. Describe the type of co-operation that would have been useful and the impact of its unavailability on your enforcement effort.

The cases that we administration are local, then we don't have experience about this question.

Unclassified

CCNM/GF/COMP/WD(2002)9



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

05-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM ROMANIA

This note is submitted by Romania as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120340

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)9
Unclassified

English text only

I. - COMPETITION POLICY AND ECONOMIC DEVELOPMENT

The period since 1989 has witnessed an unprecedented process of political, economic and social transformation in the countries of Central and Eastern Europe.

The Plan of Actions of the Governing Program for 2001-2004 includes the measures required in order to respond to the objectives stated in line with the conclusions of the EU Commission Report from 2000. In the same time the implementation of those measures has to assure the attainment step by step of the objectives from the Strategy on Medium Term Development of Romania.

Given the importance and centrality of markets in the overall transition process, the specific rules and institutions under which markets operate have a fundamental and formative role to play.

The activity of the Romanian Competition Council followed, as concerns the establishment of a legislative coherent framework and also its effective enforcement, the economic national strategy and, particularly, the efforts to comply with the economic performance criteria and with the European social standards. The guide for examining the economic developments in Romania is represented by the conclusions of the European Council from Copenhagen in June 1993 which stated the conditions that should be made by a candidate country for the accession to the European Union, respectively:

- the existence of a functioning market economy;

- the capacity to cope with the competitive pressures and market forces within the Union.

The setting up of the Competition Council, as an autonomous administrative body, was the first step of this process. Competition is necessary precisely because it is not enough simply to provide a basic framework of law to enable private agreements to be enforced. In the absence of explicit competition policy, there is a real risk that the competition process might be obstructed or distorted by the actions of private parties or the organs of the state itself.

From the beginning of its activity, in 1996, the Romanian Competition Council was directly interested in participating to the building of a stable and functioning market economy as key condition of the Romanian economic development.

Competition policy is sometimes perceived to carry a very tough message in particular in countries undergoing an immense process of structural change like Romania. Without a strict competition discipline the market economy is unlikely to deliver the advantages it promises. The discipline is not born by itself, but it has to be created and enforced by means of public policy.

Competition policy when properly conducted is an essential component – through antitrust, state aid policy and concentration control – of a more healthy economy. Indeed liberalization, a key element of growth of an economy, needs competition policy as support and guidance. It is very important that the competition and state aid policy has to be designed and implemented taking into account the Romanian specific characteristics and capabilities.

Until 1990, the Romanian economy was characterized, in the key sectors, by monopolistic and oligopolistic type structures, with great, integrated enterprises, connected among them by strong interdependence relations.

The process of the transition to the market economy, of demonopolization and decentralization of the economic activities required as a sine qua non condition, the creation of a competitive environment as a key of efficiency.

1. The competition policy

In the competition area, the Romanian law and secondary legislation are modeled after the similar European legislation and, consequently, there is a high degree of compatibility in the way of assessing and regulating the agreements, the concerted practices, the abuse of dominant position and the control of economic concentrations.

This legislation is essential for developing the market economy, for strengthening the private sector as an engine of growth and development and for prohibiting any restrictive practices by undertakings, which may be shaped as agreements or abuse of dominant position. The objectives pursued by the competition legislation can be observed only if the national legislation covers all anti-competitive practices, which affect the national market.

The Competition Council considers the adoption of the *acquis communautaire* as an ongoing process, states the necessity of transposing new Community regulations and guidelines into the national legislation. The Competition Council is completing and adapting the secondary legislation in the antitrust area by following the process of harmonization with the Community provisions.

The Competition Council is working now on adopting the following regulations:

- Regulation on vertical restraints in line with the Commission Regulation (EC) no. 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices and with Commission Notice – Guidelines on vertical restraints;
- Regulation concerning horizontal co-operation agreements in line with Commission Notice “Guidelines on the application of Article 81 to horizontal co-operation agreements and new block exemption regulations for R&D”;

By adopting and implementing these regulations and guidelines the Competition Council aims to streamline the competition review process and reduce the number of notifications to the Council to ensure that antitrust enforcement focuses on the most harmful competition violations.

Also, a major aspect is the effective enforcement of the legislation adopted in accordance to the *acquis* by “strengthening the legal discipline in the competition field so that the latter functions under the specific conditions of a market economy” as 2001-2004 Government Program states.

The legislation is applicable to all economic agents in both the public and private sectors. Where exemptions or special regulations are applicable, the rationale is clearly established, with minimal adverse impact on the competitive process.

One of the major objectives of the national economic recovery is the substantial improvement of the business environment, mainly by ensuring a proper legal, economic and financial background, by means of market competition development, by diminution of the monopolies action range, continuation of the price liberalisation process for public utilities and inflation fighting.

The enforcement by Romania of the rules within art. 86 of the Treaty of Amsterdam aims the public undertakings as defined within EEC Directive no.80/723, namely “any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation there in, or the rules which govern it” and the undertakings with special or exclusive rights which operate on the market and may be subject to competition to the extent that the rendering of certain services of general interest was granted to them or have a monopoly position yielding benefits as well.

Public undertakings and the undertakings with special or exclusive rights entrusted with the rendering of services of general interest are governed by rules aiming, in particular, their adjustment through restructuring and privatization, and the enforcement of the competition rules in order to ensure non-discriminatory access to the basic services and infrastructure.

The adopted liberalisation measures, some of them being currently implemented, envisaged all aspects that may influence the existence and development of a normal competitive environment. Public utilities, including activities of natural monopoly features as well as activities subject to a special regime established by law, are in an adjusting process by restructuring and privatizing the enterprises of such kind.

In the main sectors the auxiliary activities were externalized and exposed to the free competition, the enterprise charged with administration of essential utilities were separated and the obligation to be allowed non-discriminatory access to same was established.

Liberalisation measures were adopted and are under implementing process in certain regulated sectors such as telecommunication, electric energy and postal services.

The state aid policy

The Competition Council was vested by the Competition Law no. 21/1996 and by Law on State Aid no. 143/1999 with powers for endorsing the state aid policy and aid schemes as for the effects on competition and for controlling the observance of state aid rules.

The Competition Council is completing the secondary legislation on state aid by adopting:

- the Regulation regarding the state aid granting to the SMEs;
- the Regulation regarding the state aid granting for rescuing and restructuring firms in difficulty;
- the Regulation regarding the state aid granting and the regional state aid;
- the regional maps for granting regional state aids with various intensities.

Aid granted by public authorities most commonly supports a firm, an economic activity or a region in order to promote its developments or alleviate its difficulties. At first sight, particularly from the recipient’s angle, the state aid might well seem to be beneficial. But very often all it achieves is to delay inevitable restructuring operations, without helping the recipient to return to competitiveness. By favouring certain firms or products to the detriment of others it seriously disrupts normal competitive forces. This effect on competition is the primordial concern under state aid rules when looking at the grant of State resources.

In transition economies, same kinds of State aid are granted in many cases. The fact that State aid is being granted to attract investments is not necessarily against the rules.

Any state aid, irrespective of the form or recipient, has to be authorized, from the competition point of view, through decisions by the Competition Council. Through its decisions, the Competition Council ensures that the State Aid does not significantly distort the normal competitive environment and does not affect the proper application of the international agreements to which Romania is a party.

The Competition Council intimated the responsible authorities on different cases of overlapping of the provisions of the law on State Aid no. 143/1999 (the Ministry of Development and Prognosis in the case of Law no. 134/2000 on the industrial parks and also, in the case of the facilities granted within D areas through the Emergency Ordinance no. 75/2000 modifying the Emergency Ordinance no. 24/1998; the Ministry of Finance as concern the fiscal facilities regarding the collection of taxes and other budgetary duties.

The enforcement of the competition and state aid rules: effects

Lack of the competition reform imposes heavy costs on the society. A noncompetitive environment leads in most cases to high prices, poorer quality of products or services, backwardness in terms of innovation and investment.

A functioning competition policy has a direct impact on the daily life of the consumers. For example, merger control ensures a diversity of mass-market consumer goods and low prices for the final consumer. Likewise, by contributing to economic and social cohesion, the monitoring of state aid helps to promote viable and durable jobs.

Requiring firms to compete with each other fosters innovation, reduces production costs, increases economic efficiency and, consequently, enhances the competitiveness of the country's economy. Competition also means that less efficient undertakings will go bankrupt and close down activities. At the same time, an illicit anti-competitive behavior of competitors it is countered through competition rules enforcement. Competition rules are the "rules of the game" under which the country's prosperity will thrive.

The full implementation of principles like non-discrimination, transparency and rule of law, as enshrined in competition rules, will lead to improvement of the investment climate. The reduction of the state interference in the economic process must call for the effective and strict enforcement of competition and state aid law: the state aid control, the regulatory framework for natural monopolies. Hence, the full use and application of competition and state aid rules is one of the main factors increasing the competitiveness of the Romanian economy.

The process of relancing and development of Romania must be conducted in the complex context of globalisation. Thus, it is necessary to give a particular attention to the strengthening of the national and regional economic structures and to the impact of the globalization concerning the legitimation of the economic actors on the competition market.

The Plan of action for 2001-2004 includes measures that have to assure a lasting economic growth with an annual rate of 5,6%. A particular attention will be given to the consolidation of a competitive environment and to the elimination of the blocking of the economic structures by loneliness of non-viable sectors.

In order to improve the business environment, it must be underlined the role of the Competition Council on establishment of a coherent competition policy and on its effective implementation. The key objectives of this process are:

- to check the existing legislation for its harmonization with the EU acquis;
- to clarify the objective and the limits of State regulations of the activities on different economic sectors;
- to apply the rules on granting the state subventions in the manner provided by the Law no. 143/1999 on State aid;
- to develop the competition on the Romanian market by effective enforcement of competition and state aid policy;
- to promote the competition and State aid rules;
- to strengthening of the administrative capacity to enforce the competition and State aid rules;
- to assure a coherent economic environment by identification and elimination of the actions or acts as unfair competition.

The Romanian Competition Council stated following plan of actions in order to fulfil on medium term these objectives:

- an shaded approach of the vertical restraints in order to assure a great space for companies actions, accordingly with the EU present tendency;
- a clear delimitation of the domains that are regulated by the State (natural monopolies, as prefferency);
- the sensibilisation of the State aid grantors to apply the legislation in force;
- the improvement of the mechanism concerning the regulated prices in order to assure a correlation between the economic reform and the restructuration process in all sectors;
- the improvement of the harmonization on State aid area;
- the focusing of the enforcement resources on the kinds of conduct that most seriously obstruct the proper working of markets;
- the competition advocacy;
- the training of the experts involved in enforcement of the competition and State aid policy;
- the adoption of the measures for analysing the cases concerning the unfair competition.

2. The competition culture

The efficiency and the quality of the enforcement efforts go hand in hand with the competition advocacy. The competition policy can gain an ever more important role among economic operators. The Competition Council acts in order to achieve an environment, which genuinely discourages collusive behavior among businesses or lessens the inclination of national governments to resort to the bail-outs of bad business with the help of public money.

The enforcement of competition law is the core business of any competition authority. But it cannot succeed in its task if not supported by others. It is important that the competition authority is being perceived as having the role of being a privileged interlocutor to those who feel that market parties are conducting anti-competitive practice.

A very useful tool is to give media coverage and raise awareness about the provisions of the Competition Law and State Aid Law as well as of the regulations for their enforcement and the sanctions and measures imposed. A business community responsive to antitrust and state aid rules represents an important priority so that Romanian undertakings get acquainted with an environment similar to the European Union's. In this respect, the Competition Council issues an Annual Report and publishes a quarterly newsletter PROFIL: CONCURENTA, distributed to the interested communities.

In collaboration with the Ministry of Justice, the Competition Council is preoccupied on specialization in the competition and state aid law of judges from the administrative sections of Bucharest Court of Appeals and the Supreme Court of Justice and magistrates by their participation in the training programs on competition and state aid issues organized with Community assistance.

Also, symposiums and conferences on competition and state aid issues are organized and judges from the Supreme Court of Appeals and Court of Appeals, representatives of administrative bodies, public institutions and undertakings are invited to take part in.

Ensuring greater transparency and public awareness of the competition law enforcement will represent one of the greatest challenges and opportunities for the competition authorities. Transparency and public awareness will constitute important weapons in the hands of competition authorities in order to persuade firms as well as public entities to fully comply with market rules.

The private enforcement plays a useful complementary role in the conduct of competition policy. Along with the public enforcement by the competition authorities, companies and private individuals can do a lot to help to enforce the rules by bringing forward competition cases before Courts and complaints before the competition authorities.

By combining the public and private enforcement it could create something that could be called functioning competition culture. The active involvement of all interested parties (the business community, the lawyers, the universities, and the authorities) would in many respects be essential to obtain this result.

3. Conclusions

Over the longer term, the economic environment has to change in the direction of better functioning and more fluid markets.

Effective competition law and policy has the potential to influence business behavior by focusing management attention on increasing efficiency, and preventing monopolistic practices.

Competition policy encompasses economic regulation, privatization, antitrust laws and international trade. The application of these policies, and the interface between these and other related policies have a significant bearing on industrial structure, business behavior and, consequently, on economic performance. It may also foster more flexible and dynamic environments that enable countries to respond more effectively to changing market conditions.

The ability to operate within the rules on competition and State aid policy and survive the competition pressures of the regional and international markets are the core preoccupation of the Romanian government. This would positively contribute to the development of the competitiveness and economic growth of Romania.

II. - EXPERIENCES IN INTERNATIONAL CO-OPERATION IN MERGER CASES

The globalisation of commercial exchanges and the necessity to stimulate the domestic economic growth require an open market and loyal relations between undertakings as pre-requisites of the economic dynamism.

Having in view the globalisation process and the fact that undertakings are more and more involved in international operations, the competition agencies are to have the power to ask these undertakings operating on various markets to observe their national competition laws.

The Competition Council considers that the promotion of convergence between the competition laws and policies of the European countries, on the one hand, and of the member states of UNCTAD, on the other hand, can bring a lot of value-added to the strategy the competition agencies in transition economies will adopt.

To this end, the Competition Council has close relations with the international organisations having attributions in the competition area, with the competition agencies from the Central and Eastern European Countries and the Member States of the European Union, with the EU institutions and with competition agencies in the USA, as well.

1. Competition Council's experience in the field of international co-operation

Technical assistance programs

The Competition Council was the recipient of the assistance granted by the European Commission and will benefit, besides the Competition Office, from the project entitled "Strengthening the Administrative Capacity to Manage the Acquis in the Field of Competition and State Aid " financed through 1999 PHARE budget.

Direct contacts with experts from the European Commission by participating in a series of annual conferences on competition policy for associated countries, organised by DG Competition, allowed the exchange of experience and addressed various competition issues of mutual concern.

The Council also benefited from technical assistance granted by the United States Government through the United States Agency for International Development that consists of long-term and short-term missions from the U.S. Federal Trade Commission and U.S. Department of Justice. At present, a special advisor from the U.S. Federal Trade Commission assists the Council staff in dealing with competition cases.

Within the multilateral assistance program granted by OECD to Central and Eastern Europe countries the Competition Council experts benefited from a series of seminars focused on various topics such as abuse of dominant position, vertical agreements, mergers, horizontal agreements, the interface between competition and economic regulation, de-monopolisation.

Bilateral co-operation

International co-operation materialised in the participation in conferences and seminars on competition issues within the framework of the bilateral co-operation agreements to which Romanian

Competition Council is a party, in other workshops organised in the neighbouring countries with whom co-operation agreements have not been concluded, and in the exchange of information with competition agencies although a legal framework for such co-operation did not exist yet.

The Competition Council has continued the co-operation with the competition agencies from the Russian Federation, Czech Republic, Belarus, Bulgaria and Georgia on the basis of the existing agreements.

Although a co-operation agreement is not concluded yet, co-operation relations with the Monopoly Authority (within the Ministry of Economy) of Macedonia have been developed and materialised in the participation in a conference organised by the Macedonian Monopoly Authority under the auspices of the Stability Pact for South-East Europe.

The Competition Council has also collaborated with the Hungarian Office for the Protection of Competition in resolving several competition cases on the tobacco market, the cement market and the market of health care services (pharmacy services). During the investigations on the mentioned markets, information were exchanged also with the competition agencies of Czech Republic, Bulgaria, Poland, Germany and Belgium.

2. Why is co-operation for merger control necessary?

The benefits of trade liberalisation and market-oriented economic reforms in transition countries depend to a large extent on competition due to the fact that, in the absence of clear rules, companies might take part in operations, such as mergers to consolidate their market position and act in the way of distorting the international trade and adversely affect the development of developing and transition countries.

On the other hand, mergers are a necessary pre-requisite for the companies in order to achieve a suitable size for competing on global market, being at the same time subject to the essential requirement of maintaining a competitive environment.

Therefore, cross-border co-operation in reviewing mergers should be encouraged and further deepened and work-sharing arrangements be developed. Establishment of a single form for notification of mergers falling within the jurisdiction of at least two competition agencies, as recently agreed by France, Germany and the United Kingdom, could be taken as an example proving that co-operation may go further and has practical effects and not only general implications. For Romania, such a practical arrangement could be a useful instrument, considering that Romania is an associated country to the European Union and will be a Member State after its accession is formally agreed.

3. A factual case where co-operation with foreign competition agencies was needed

A major task of the Competition Council is securing the competitive environment by exercising the greatest vigilance on large mergers. In the light of the Romanian Competition Law no. 21/1996, mergers are illegal when having the effect of creating or consolidating a dominant position, lead to or are likely to lead to a significant restriction, prevention or distortion of competition on the Romanian market or on a part of it.

One of the major cases resolved by the Competition Council was a merger on the cement market.

Privatisation in the cement industry

The privatisation of the cement industry took place between 1997-1998, when foreign private companies, leaders on the world cement market, took over the control of the Romanian undertakings.

After the privatisation process terminated, this sector was not fully stabilised and a lot of changes of the stock ownership of the undertakings acting on this market have been made during 2000. Currently, the cement industry is passing through a relaxation period.

Trends on the cement market

The foreign companies owning the control of the Romanian undertakings acting on the cement market have massively penetrated the adjacent markets such as:

- The market of river mineral aggregates;
- The market of quarry mineral aggregates;
- The market of concrete, mortar and hoes;
- The market of concrete prefabs.

Consequently, an intense vertical integration of these companies took place.

Generally, the investments do not seem to re-launch in the future. The only industry which is of interest as for the investments and attracts the building-companies acting on the Romanian market is the industry of road, highway building, etc.

The industry of road building is of particular interest that explains the massive penetration of the cement producers on the markets of river and quarry mineral aggregates.

When privatising the quarries and the ballast-pits, process that is still on going, a particular interest was paid to those located on the Pan-European routes where the workings will start in the nearest future.

Parties involved and definition of relevant market

Lafarge Romcim SA Bucuresti and Breitenburger Auslandbeteiligungs GmbH concluded a selling-buying contract through which a merger was realised. The acquiring company, Breitenburger Auslandbeteiligungs GmbH is 100% controlled by Holderbank Group (a Swiss group) which operated at that time on the Romanian market through SC Cimentul SA Turda.

The acquired company, SC Alcim SA Alesd, was former Alesd subsidiary of SC Lafarge Romcim SA Bucuresti that was controlled by Lafarge Group (a French group). The acquired company produces and markets cement.

Both groups involved in the merger are the most important producers of building materials on the world market. Holderbank Group is the first producer and Lafarge the second one on the cement market. SC Cimentul SA Turda and SC Lafarge Romcim SA Bucuresti were companies controlled by the two groups on the Romanian market (the former by Holderbank Group and the latter by Lafarge Group), having the main activity cement production and marketing.

The specificity of this building material was taken into account when the cement geographic market was defined.

For cement, the transport costs have an important weight in the product price. The low ratio price/mass limits the selling market of this product. This is the reason why the analysis of that market imposed a regional approach. Taking into account that cement delivery was made “ex works” and organised distribution networks for this product were not available yet, the optimum distance up to which the cement may be profitably marketed depended on the location and distance between the cement factories and the beneficiaries representing the most important share of the consumers. In the case of cement, this distance was of maximum 200 Km, considering both road transport and railway transport, and the geographic markets were considered circles with a radius of 200 Km approximately, around the factories.

Competition on the cement market

All the mentioned data led to the conclusion that generally, the Romanian cement market was a competitive market, except of few regions.

Thus, within few counties in North-West, the consumers did not have any choice because there was only one cement factory in the region which was controlled by the German Group Heidelberger Zement. The lack of competition in the region did not constitute a serious problem taking into account that the demand was extremely reduced.

A similar situation existed in Dobrogea, in South-East, where only one cement supplier controlled by the French Group Lafarge operated in the region. The demand was extremely reduced also in this region which included villages from Danube Delta. In North-West, near the border with Hungary and Ukraine, there was a region within which there were two close cement factories which were controlled by the Holderbank Group.

For assessing the merger, the Competition Council requested information on the Hungarian cement market and especially on the operations and companies owned by Holderbank Group in Hungary from the Hungarian Office for the Protection of Competition. After resolving the case, the Council informed the Hungarian Office for the Protection of Competition on its decision.

As all mergers, the operation has positive effects and, therefore, its conditioned authorisation was considered to bring more advantages than in the case of denying the operation. Anyway, certain conditions were imposed to the acquiring company for protecting the consumers in the counties where no competition existed from the potential negative effects of the operation. It was taken into account the fact that Holderbank Group could abuse of its dominant position in that region by imposing discriminatory prices as compared to the prices for the beneficiaries within other counties. For those reasons, certain measures were to be imposed in order to prevent the price discrimination of the consumers within the affected region by Holderbank Group.

Having in view the Competition Council experience in co-operating with foreign competition agencies on various cases including merger cases, we consider that an effective co-operation in the competition area would be an effective tool for promoting a competition culture, for generating benefits in terms of exchange of experience for developing countries having in view that trade and investment policies are complementary to the competition policy, and for addressing complex competition cases having international impact.

ANNEX A

**QUESTIONNAIRE TO INVITEES ON INTERNATIONAL CO-OPERATION
IN CARTEL AND MERGER INVESTIGATIONS**

This questionnaire covers the period from 1 January 2000 to the present.

If you are unable to provide all of the information requested, either because it would impose too great a burden or because of confidentiality constraints, please provide as much as reasonably possible.

1. Provide a copy of each formal co-operation agreement between your country or your competition agency and a foreign country or competition agency relating to competition investigations or cases.
2. Describe your country's laws or regulations that relate to or affect your agency's ability to exchange information or co-operate with a foreign competition agency.

Cartels

3. If your agency issued one or more formal requests to a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):
 1. the number of such requests;

1
 2. the requested country or countries;

Belgium, Bulgaria, Poland, Czech Republic, Italia, Germany.
 3. descriptions of the requests, such as the type of information or assistance required;

Request concerning the entrance on the drug market, geographical and demographical criteria, the existence and the importance of the pharmacists trade association.
 4. the number of requests that were granted, and for those that were not, the reason(s) given, if any, by the requested country for the refusal; and

4 requests were granted from: Bulgaria, Poland, Germany and Czech Republic
 5. for the requests that were granted, your assessment of the usefulness and importance of the information or assistance received, and for those that were not granted, your assessment of the impact of the refusal on the investigation or case.

The answers transmitted by the requested countries have been very useful and helpful for our investigation in making a point of view regarding the situation in other countries and to understand the manner this problem is dealt with..

4. If your agency received one or more formal requests from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):
 - a) the number of such requests;
-
 - b) the requesting country or countries;
-
 - c) descriptions of the requests, such as the type of information or assistance required;
-
 - d) the number of requests that were granted, and for those that were not, the reason(s) for the refusal.
-
5. Please describe any other instances of co-operation with a foreign competition agency in a hard core cartel investigation or case not described above, such as meetings, telephone or email communications, including, if possible, the co-operating country or countries, the nature of the co-operation and the importance or significance of the co-operation to your agency.
-
6. State the number of instances in which a hard core cartel investigation or case could have benefited from information or co-operation from a foreign competition agency but your agency did not request such assistance because you knew that it could not or would not be granted. Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement effort.
-

Mergers

7. Identify each merger that your agency reviewed that, to your knowledge, was also reviewed by the competition agency of another country.
-
8. For each investigation or proceeding involving a merger in which there was communication between your competition agency and the competition agency of another country during the course of the investigation or proceeding, please state or describe:
A
 - a. the identity of the merging parties;
Interagro Company SA
National Company "Tutunul Romanesc" SA

- b. the foreign competition agency or agencies with whom there was communication; Competition authorities of Ucraina, Bulgaria, Poland and Hungary.
- b. The nature of the communications, including the means of communication, the parties to the communications, the subject matter of the communications and the type of information exchanged, if any;
the nature of the communications: formal letters by fax,
the parties of the communications: Romanian Competition Council and the other competition authorities;
the subject matter of the communications: privatisation of tobacco industry;
the type of information exchanged: the way in which the privatisation process was made, structure of tobacco market at the level of production, distribution and tobacco growing.
- d. whether the merging parties agreed to a waiver of confidentiality restraints, permitting the exchange of information directly between your agency and a foreign agency, and if there was such a waiver, its terms and the type of information that was exchanged;
-
- e. the effect of the communications on your investigation or proceeding.

Very useful for the Competition Council in assessing the economic concentration and in making a motivated decision.

B

- a. the identity of the merging parties;
 - Breitenburger Auslandsbeteiligungs GmbH that belong to the Holderbank Group
 - SC Alcim SA Alesd.
- b. the foreign competition agency or agencies with whom there was communication; Competition Authority of Hungary
- c. The nature of the communications, including the means of communication, the parties to the communications, the subject matter of the communications and the type of information exchanged, if any;
the nature of the communications: formal letters by fax;
the parties of the communications: Competition Council and the Competition Authority of Hungary;
the subject matter of the communications: cement market;
the type of information exchanged: the actions of Holderbank Group on the Hungarian market (the controlled cement manufacturers, their location, exports on Romanian market, the competition on the market where the controlled cement manufacturers are acting) the behaviour of Holderbank Group on the Hungarian market;
- d. -

- e. Competition authority of Hungary has not provided as many information as our institution expected to receive.
9. Describe any instances in a merger case or investigation
- a. in which your agency sought the assistance of a foreign competition agency but it was denied;
-
 - b. in which your agency sought a waiver of confidentiality restraint from one or more of the merging parties but it was denied.
-
10. Describe any investigation or proceeding involving a merger that would have benefited from co-operation with a foreign competition agency but your agency did not pursue such co-operation because you knew that it would not be possible. Describe the type of co-operation that would have been useful and the impact of its unavailability on your enforcement effort.

Unclassified

CCNM/GF/COMP/WD(2002)2



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

30-Jan-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM THE RUSSIAN FEDERATION

This note is submitted by the Russian Federation as a background material for the second Global Forum on Competition to be held on 14 and 15 February 2002.

JT00120135

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)2
Unclassified

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Russian Ministry for Antimonopoly Policy and Support of Entrepreneurship

I. - COMPETITION POLICY AND ECONOMIC GROWTH AND DEVELOPMENT

Over the past decade the Ministry for Antimonopoly Policy of Russia (MAP) has carried out substantial work within the framework of reforming Russia's economy. Formation of competition environment as an essential element of economic reforms, was taking place parallelly with demonopolization of economy, liberalization and privatization. Direct state intervention into the economic processes was replaced with market mechanisms; at the same time private sector of economy was growing at a fast pace. At present, it is admissible to say that the foundations of competitive markets and entrepreneurship have been laid in Russia.

The active promotion of competition resulted in sustainable economic growth in the economy of the Russian Federation in the last decade. Though rate of the industry growth has, on the whole, lowered for various reasons in 2001, in a number of branches it has increased (fuel, glass, porcelain and faience, microbiological, flour-grinding and cereal/mixed fodder, polygraphic branches of industry).

The amount of economic entities on the regional markets has substantially increased in the past decade as reflection of main trend of industry growth. This process was going most intensively on the markets of butter, petrol, bread and bakery.

Effective competition on the markets, which is to be observed at present, is developing not by itself but thanks to purposeful state policy implemented by MAP.

Prevention of monopolistic practices is one of the priorities of MAP' activity, which is aimed at securing stable and positive business environment and creation of normal market conditions based on effective competition.

It is necessary to indicate substantial rise in the number of cases, investigated by MAP on monopolistic practices in the last years (abuse of dominant position, anticompetitive agreements, concerted actions). In 2001, the total number of investigated cases on monopolistic practices of economic entities has increased by 26%. Most wide spread infringement of abuse of dominant position remains unfounded refusal of natural monopolies in transport, communications, fuel and energy complex sectors to conclude a contract on services offered.

Significant attention in securing economic growth is paid to prevention of monopolization of the markets through economic concentration process. State control over economic concentration is one of the key conditions for normal functioning of market economy.

In 2001 MAP has considered 6500 notifications on concentration which were applied pursuant to articles 17, 18 of the Antimonopoly Law. 60 petitions were rejected due to possible restriction of competition (which amounts 0,9% of total petitions number).

Over the last years, concentration has reduced on the markets of many goods groups. The greatest reduction took place in the markets of: petroleum (38%), oil products (29%), macaroni foods (26%), maintenance and servicing of elevators (18%), dairy products (16%), flour (14%), bread and bakery (8%).

Overall, the level of concentration in different sectors of economy is diminishing. Competition is successfully developed on the markets of food industry, building materials, construction services, medical engineering, in the area of oil and gas condensate production, oil-refining, petroleum processing, combustive-lubricating materials, pharmaceutical products, light industry products, timber industry, woodworking industry, pulp and paper industry and others.

One of the main tasks of MAP Russia is prevention of ungrounded protectionism, development of effective competition, inter alia by means of imports. So, for example, competition between domestic and foreign motorcar producers is now very strong in the domestic market. As compared with 1999, level of concentration in trucks industry lowered by 8,3%. At the same time, highly monopolized market segments still exist, i.e. small buses class.

At present stage, the important place in the MAP' activity is given to preservation of single economic space of Russia. Competition in the markets may be restricted not only by actions of economic entities but also by acts of regulatory bodies. Various administrative barriers adversely affect circulation of commodities and distort normal competition. Among violations of this kind prohibited by article 7 of the Antimonopoly Law, the most common are the following: restrictions imposed by regional authorities on movement of commodities from one region to other ones, imposing illegitimate licensing, creation of advantages for entrepreneurship or individual enterprises of one region to the prejudice of the others, as well as illegal engagement of state employees in entrepreneurial activities. On the basis of the Antimonopoly Law, MAP initiates the administrative proceedings against anticompetitive actions of regulatory bodies and issues prescriptions on stopping violations. Cases filed by the Ministry under article 7 of the Antimonopoly Law constitute considerable part of the total number of the cases proceeded. In 2001 MAP reviewed 1,1 thousand of such cases, which is 24% more as compared with the year 2000.

Following the results of cases considered generally by MAP in 2001, over 3000 prescriptions on elimination of infringements of the Antimonopoly Law has been issued, at that, near 80% were fulfilled till the end of the year. The procedure of preliminary submission to MAP of draft acts issued by regulatory bodies was introduced.

Monopolistic activity of natural monopolies may substantially influence the commodity market functioning. That is the reason why natural monopolies fall under the provisions of the Antimonopoly Law and regulation of those by tariff policy instruments was one of the important aspects of the Ministry's activity in the last years.

In accordance with the legislation, MAP Russia is a federal body of executive power that exercised in 2001 state regulation and control over activities of natural monopolies in the sphere of transport and communications.

In respect of the communications, the major goals of the state regulation were the following: ensuring communication services development, provision of availability of communication services for consumers, achievement of balance between interests of consumers and those of producers, stimulating efficiency of economic activity and development of natural monopolies in communications.

The priority of federal policy in this area is tariff regulation. State regulation of tariffs is applied to the following communication services: posting and telegraphing, providing with access to telephone network, providing with local and long-distance connection, broadcasting, providing organizations with backbone links.

The phased arrangements for reduction of cross-subsidizing and creation of balanced tariffication system, which have been carried out by MAP for the last years in this branch, have allowed gaining 87 billion rubles and obtaining tax proceeds into the state budget totaled 34 billion rubles for 9 months of 2001.

The key objectives of state regulation in the area of transport are the following: ensuring balance of concern between natural monopoly entities and freight services consumers, control over activity of natural monopolies in respect of pricing, creation of conditions for development of competition on the market of freight services, providing consumers with equal access to the transport infrastructure.

The sound tariff policy aimed at accomplishment of these objectives has ensured the efficiency of operating of railroad transport. For instance, the turnover of goods has increased by 15,8% in for the 9 months of 2001 as compared to the same period of the year 1999.

Summing up, it is necessary to underline that in spite of a number of complications stemming from the past, positive tendencies in the economy of Russia prevail. Being implemented effectively by the Antimonopoly Ministry, competition policy plays now an important role in bringing these tendencies to the stage of consolidation. It contributes substantially to the economic growth and creation of favorable business environment via such instruments as control over economic concentration, prohibition of monopolistic activity, elimination of administrative barriers and regulation of natural monopolies' activity.

II. - EXPERIENCES OF AND NEEDS FOR CAPACITY BUILDING AND TECHNICAL ASSISTANCE

by
**Mr. Ilya Yuzhanov, the Minister,
Russian Ministry for Antimonopoly Policy and Support of Entrepreneurship**

1. **Russian competition policy – the history and actual activities**

The antimonopoly authorities exist in the Russian Federation since 1991. They were created just at the beginning of the economic reforms in Russia as one of the first market-promoting institutions. The Law of the Russian Federation “On Competition and Limitation of Monopolistic Activities on the Goods Markets”, which was elaborated with the assistance of OECD, adopted in 1991 and modernized during the following years, was one of the first market oriented laws in Russia. While elaborating this Law, the existing foreign experience in this field was taken into consideration.

Now the antimonopoly policy plays an important role both in the macroeconomic state policy and in the creation of the favorable business environment in Russia. This may be explained by the remarkable influence exerted by the antimonopoly law and policy on the economic growth, competitiveness and those on the whole character of the market relations.

In Russia the main responsibility for developing of effective economic competition belonged firstly to the State Committee on Antimonopoly Policy and Support of Entrepreneurship, and then, since 1999 - to the Ministry for the Antimonopoly Policy and Support of Entrepreneurship (MAP).

In the past ten years the Russian competition authorities have contributed to the high extent to successful economic development in Russia, safeguarding transition from the planned-administrative system to the market and creation of sound competition environment. In these years a big experience has been accumulated by MAP both in the development and in the implementation of the competition law. The competition policy, based on this law, is directed at stopping monopolistic activities, prevention of monopolization and promotion of fair competition on the market. The role of MAP is not limited by the antimonopoly policy – it consists also in promoting procompetitive reforms and economic development. MAP plays nowadays a significant role in the processes of deregulation and restructuring of natural monopolies.

In accordance with the Antimonopoly Law MAP undertakes wide-scale activities on promoting the development of goods markets, competition and entrepreneurship. A big attention is paid to develop “competition advocacy” – activity directed at better understanding of the goals and results of competition policy in the society. In the framework of these activities the antimonopoly authorities take part in elaboration and realisation of federal, regional and inter-regional programs and projects directed at development of competition. This work is undertaken in accordance with the Decrees of the President, Governmental Decrees and on the own initiative of the Ministry.

2. **International cooperation and technical assistance (main partners and programs)**

The international cooperation and technical assistance on the part of foreign countries and international organizations has played from the beginning and continues to play an extremely important role in developing an effective competition policy in Russia.

The international cooperation and technical assistance to MAP Russia is provided both on multilateral and bilateral levels (see Annex B). Sometimes it is difficult to specify, what kind of relations do you have- international cooperation or technical assistance: MAP Russia is now not just a “recipient” of technical assistance but brings also its own experience for consideration of international institutions and foreign partners.

On the bilateral level we appreciate very much our co-operation and technical assistance provided to MAP Russia in the competition sphere by Republic Korea, France, Germany, Italy, Finland. The regular consultations organised on bilateral level with competition authorities of Finland, Poland, Bulgaria, Rumania, Lithuania and other countries are also very useful.

A visit to Russia of the President of the Bundeskartellamt and the Head of French competition authority in June 2001 was very productive. The hold meetings and discussions with Russian authorities and business have been extremely useful for further development of competition policy in Russia, for better mutual understanding and further co-operation. We appreciate very much the assistance of the Bundeskartellamt provided for our participation in International Cartell-conference in Berlin in Mai 2001.

Very productive have been also meetings and consultations with experts from Italian and French competition authorities which took part in the framework of the technical assistance programs.

In most cases bilateral co-operation is undertaken on the basis of the interstate Agreements or bilateral programs on co-operation in the field of competition.

On the **multilateral level OECD** was the first and remains one of the main consultants and sponsors of the technical assistance for Russia in the field of competition policy.

The cooperation between OECD and MAP Russia in the field of competition is organized on the basis of the annual plans of cooperation between OECD and Russia. The assistance, provided by OECD, includes legal advise on basic antimonopoly legislation and its modernization, seminars for staff of the antimonopoly authorities and judges on competition law enforcement, consultations on methodology of competition policy, high-level meetings on the deregulation of natural monopolies.

The provided possibility to participate regularly in sessions of CLP and roundtables is very useful for Russian specialists, enabling them to exchange opinions with highly qualified specialists and to get comprehensive documentation in competition area. The Recommendations, elaborated in OECD in the last years in the field of competition, provide us with excellent guidelines in the process of development of legislative and methodological work.

And of course, the participation in the recently established OECD Global Forum for Competition provides us with a good possibility to be involved in the intensive international dialog on the most actual issues.

Only in 2001 OECD has organized a number of seminars on antitrust enforcement and reform of natural monopolies. On 21 January 2002 in Moscow a high-level meeting on the results of deregulatory

events took part. The summary materials on results of these measures have been submitted to the Government of the Russian Federation.

With a purpose to improve the enforcement mechanism of the antimonopoly law and to raise the efficiency of the prevention and stopping of the monopolistic activity and unfair competition, the Ministry has prepared in 2001 amendments to the Law "On Competition...". The expertise currently provided by OECD on these amendments is extremely useful for our Ministry.

A number of events in the framework of competition policy and regulatory reform was organized in recent years by OECD together with other partners – APEC and USAID. The events, organized together with APEC, covered important issues of regulatory reform and the main aspects of competition policy.

A number of seminars, organized in different regions of the Russian Federation by OECD and USAID on the key elements of the antimonopoly law and enforcement, were very useful for the staff of MAP enabling it to compare current Russian enforcement practices with approaches of foreign competition authorities.

We are very thankful to OECD and to the Fordham Corporate Law Institute (USA) for the provided possibility to participate in 2001 in the Fordham Annual International Antitrust Conference in New York. The materials of this Conference including decision on creation of International Competition Network, presentation of the position of the Russian Federation on polit-economy of antitrust, participation in the debates on actual problems of competition policy were very useful.

A special place in our international cooperation takes a cooperation with the European Commission based on the Agreement on Partnership and Co-operation which took in force in 1997. Article 53 of this Agreement includes the obligations of the Parties in the area of competition and state aid. In addition to this Agreement, obligations on competition were also included into the Russia-EU Agreement on Trade in steel goods. This Agreement provided for the gradual liberalization of trade in steel products under the condition of creation of a proper competition in Russia.

During the last years the Parties have established a good dialog in this area in the framework of the Russia-EU Committee on Cooperation. In 1998-99 in the framework of TACIS a big program of technical assistance to MAP Russia was successfully realized in the sphere of competition. This program contributed to high extent to developing competition in the Russian Federation by means of effective competition law and policy. The program included such important aspects as legal advice, training in European Commission and European competition authorities, forming Information Center in our Ministry, consultations on main problems of antitrust enforcement etc.

In 2001 the Head of DG "Competition" of the European Commission Mr.A.Schaub visited MAP and its regional office in St.Petersbourg. The high-level discussions on main trends of competition policy in European Union and Russia, including regional aspects (on the example of MAP' St.-Petersbourg Regional Office) were very interesting and useful.

The Russian and European experts continued in 2001 consultations in the framework of Russia-EU Committee on Cooperation both in Brussels and Moscow. A big attention was paid during these meetings to expertise of the draft Law "On State Aid" which was elaborated in MAP Russia.

In 2002 we expect the launching of the new TACIS project "Antimonopoly Policy and State Aid", which will concentrate on the modernization of the antimonopoly legislation and creation of the effective system of state aid control in accordance with the Agreement on Partnership and Cooperation.

UNCTAD belongs to our main traditional partners. The contribution made by this organization into the process of developing competition law and policy in Russia in the past decade is difficult to overestimate.

The Russian antimonopoly authorities put into attention, while elaborating its competition legislation, the provisions of the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices”, which was adopted by the UN General Assembly in 1980 and which remains the sole multilateral document of the universal character in this area.

MAP is an active user of the documentation published by UNCTAD on competition issues. In particular we will highlight the Model Law which contains the main, most typical elements of different national competition laws.

The representatives of our Ministry participate regularly in the UN Review Conferences on RBP and in the meetings of UNCTAD Intergovernmental Group of Experts on Competition Law and Policy. The exchange of opinions among experts from different countries and high quality documents distributed on these meetings make these events very useful for our work.

One of the big advantage of UNCTAD activity is that the Russian language is used there as a working language both in discussions and publications.

UNCTAD is contributing actively to promotion of regional cooperation between competition authorities in the Commonwealth of Independent States (CIS), regularly assisting in organization and participating in sessions of CIS Antimonopoly Council.

One of the very important elements of the technical assistance from UNCTAD is promoting “competition culture” in Russia and other CIS countries by means of seminars, conferences and publications. A very good example is here the recent publication by UNCTAD of the book “Competition Policy: Law, Regulation, Cooperation” (in Russian) prepared by the Russian expert. This book is widely used in CIS countries as a teaching and informative material in competition sphere.

International cooperation among antimonopoly authorities of CIS countries has strengthened in the last years. This cooperation is mainly undertaken on multilateral basis in the framework of the Interstate Council for Antimonopoly Policy in accordance with the Interstate Treaty about Coordinated Antimonopoly Policy in CIS countries, signed in 1993. In 2000 a new version of the Treaty was signed in Moscow.

In 2001 two sessions of the Interstate Council took place – in Moscow and in Astana (Kazakhstan). The next, XY session is planned to be held in Odessa (Ukraine) in April 2002. The sessions are usually organized and financed by the Governments of CIS member-countries with financial and intellectual assistance of UNCTAD.

The cooperation of CIS countries in competition area plays an extremely important role for development of the harmonized competition policy in these countries. On the sessions of the Council there are considered the most actual issues and taken common decisions of recommendatory character, which are then taken in mind by national authorities while developing their competition law and policy.

3. The strong and weak points of technical assistance

The current technical assistance to Russian antimonopoly authorities generally corresponds to real needs of the Ministry in the realization of the task to develop effective competition policy.

Very effective and positive are programs of technical cooperation which cover different aspects of competition policy, as for example TACIS projects (EU). This enables MAP to organize activities parallel in many areas, such as study of new trends of foreign antitrust experience, discussion of amendments to legislation, joint consideration and discussion of the most important cases etc.

One of the most effective methods of technical assistance is providing ad-hoc operative legal consultations on draft laws, methodologies and other normative documents or proposals. We appreciate very much such operative legal advice and consultations provided by OECD and EU.

Very useful are such methods of technical assistance which are directed at improvement of enforcement practices, especially in regions. A good example here is organization by OECD/USAID practical seminars in Regional offices of MAP to consider and discuss actual case on special articles of the law (cartels, abuse of dominance or mergers). This enables to bring together key specialist in the concrete area of competition law and make high professional comparative discussions. A very strong point of such methods is an advance distribution of the relevant materials among the participant in Russian language.

At the moment, when CIS countries have to the high extent the same tasks in developing their competition policies, it is very productive to use the synergy effect while providing technical assistance to these countries. Such approach is traditionally practiced by UNCTAD, which is sponsoring integration events of CIS antimonopoly authorities contributing thus to harmonization of their competition law and practices in accordance with international principles. As it was mentioned earlier, the usage of the Russian language is also a big advantage of these assistance.

Taking in mind the remaining lack of the literature on competition law and policy in Russian, the antimonopoly authorities in Russia and other CIS countries have a big need in publications in Russian in this area. We appreciate very much the technical assistance in this regard from UNCTAD and EU, but still the requirements are here much more than provided assistance, and we stress again the importance of technical cooperation directed at competition advocacy in transitional countries, which may be realized by means of publications.

This task may be also achieved by organization of different kinds of round tables and press-conferences with participation of governmental officials, society and business. The sending of Recommendations to the Government is also very useful for support of the competition policy in the country. These methods are actively used by OECD while providing technical assistance.

I would like to stress also that from the point of view of competition advocacy the visits to the Russian Federation of the leaders of competition authorities such as Mr. Bernard J. Phillips, Mr. Phillippe Brusick, Mr. Alexandr Schaub play an extremely important role.

Now, after ten years of existing competition policy, we have accumulated rather rich experience in this field. We think that we could also share our experience with less developed countries, which are in the process of creation and modernizing their competition policy. The example, when UNCTAD and German Foundation for International Development invited in 2000 specialists from our Ministry to Vietnam to share our experience on the seminar on competition issues, is new, successful and very interesting in this regard.

It is not very convenient for me to speak about the weak points of technical assistance, because we are really very thankful to everybody who provides such assistance which plays a very important role in developing competition policy in Russia. Nevertheless I will mention some difficulties which we meet in the process of technical assistance.

One of the main weak points of the provided technical assistance is a high bureaucracy. Sometimes a very long period is needed from the getting of principal decision to provide the technical assistance till the beginning of the project.

Sometimes in case of technical assistance for short term events a recipient is requested to provide a sponsor with a lot of calculations and data what makes a big additional pressure on the staff taking in mind very limited human and technical resources in antimonopoly structures in transitional countries.

The specificity of the Russian Antimonopoly Ministry as a recipient of foreign technical assistance (as well as other CIS antimonopoly structures) is that very few people still speak foreign languages there. This fact creates high barriers for exchange of information and consultations. In these circumstances we need very much inclusion of translatory works in technical assistance and, especially – further organization of courses for Business English for the staff of our Ministry.

In some cases sponsors' assistance for the participation of MAP specialists in the events held abroad is limited to the accommodation expenses. For Russia and other CIS countries it is a very actual need that technical assistance for these purposes covers also transport expenses. Otherwise, due to limited financial resources, the participation in very important international events becomes impossible. This is evident also here – the most CIS antimonopoly authorities (which exist in all CIS countries) still remain outside international competition dialog.

We would be glad to make more intensive our bilateral contacts and receive replies on our requests for technical assistance from the countries which have rich experience in antitrust policy. I mean first of all the Ministry of Justice and Federal Trade Commission of USA whose theoretical and practical experience in antitrust is very interesting for us.

4. Actual tasks of international cooperation

In our understanding technical assistance is very important but only one of the various forms of international cooperation. That is why we consider as an actual task the strengthening of other forms of international cooperation. For us it means first of all active participation in elaborating common approaches for competition policy and in cooperation on concrete cases with other antimonopoly authorities.

The competition authorities' interaction by investigations of concrete cases is extremely important from the point of view of harmonised approaches, reduction of administrative barriers and cutting budget expenses. Till now we have a limited practice of such co-operation - only with CIS' competition authorities. Unfortunately with other countries such practice is still not developed, due to the lack of corresponding inter-state agreements and rather limited volumes of transnational operations. But the significance of such interaction between competition authorities seems to grow, and the regulation of the procedure of such interaction shall be specified in the bilateral agreements.

Very important is also another form of international co-operation – it is the common elaboration of new approaches to competition policy' methods. The economic realities are raising quite new problems before competition authorities, and it is impossible to solve them along. In this case we are speaking not

only about transmission of experience from one group of countries to others – the new economic situations require new decisions, which are possible to elaborate only through common efforts, taking into account specificity of different groups of countries.

So, for example, to our opinion, the problem of determination of relevant market in the conditions of global economy and internet-technologies is very important. The reduction of trade-and economic transborder barriers, the growth of international production are leading to higher integrity of national economics. While determining a relevant geographical market it is not more possible to orient on national borders – the markets became regional or international character. The harmonised approach of competition authorities is here needed.

The rapid development of internet-technologies is also raising new problems before competition authorities, which may be solved also through international co-operation. This was stressed in particular on the X Cartellconference in Berlin in May 2001.

Another important issue, which needs common solution, is the elaboration of new criterion for considering effects of economic concentration. Shall this or another transaction be prohibited or allowed? In the conditions of growing markets and keen international competition it is difficult to find exact reply to this question.

Another new form of international co-operation may be organisation of international dialog between state authorities and business community.

Competition law is now one of the most difficult branches of law, and the lack of transparency may constitute a significant administrative barrier for business. In the circumstances when transnational economic relations are raising, this problem may not be regarded as a pure national: being too complicated and not homogenous, competition regulations may become a hamper of international economic integration.

In these conditions the competition authorities shall initiate a permanent international dialog with business, seeking maximum transparency of competition regulation, its simplification and harmonisation.

The current forms of international support are very useful but not sufficient for effective regulation of competition in international scale. The effective regulation is to our opinion possible only on the basis of multilateral agreed mechanisms. The issue of elaboration of the international Agreement on competition in the WTO is widely discussed for the long time and may become reality in the future.

We fully support the creation and activities of the Global Forum for Competition as well as International Competition Network and may presume that international co-operation between competition authorities from different countries will become more effective in the framework of these initiatives and may provide a good basis for the future international competition rules in WTO.

In the last time there are arising new arguments towards creation of such rules. Even when national competition legislation is very effective, it covers only acts and actions of companies and sometimes – regulatory bodies, but it does not touch the international activity of governments, which may also have anti-competitive character. The competition authorities are often not involved in the process of such decisions –making and thus may not influence such processes. Sometimes competition authorities are even not informed about them.

In December 2001 the negotiations on Multilateral Steel Agreement have started in the framework of OECD on the initiative of the United States. The goal of such agreement shall be limitation

of production and introducing international delivery' quotas. As we know, mostly trade authorities were participating in these negotiations – competition authorities have been not involved. The fact, that the proclaimed goal of this agreement is the stabilisation of the corresponding market, may not hide the anticompetitive nature of such agreement which constitute in fact international legal cartel. But if cartels limiting production and introducing delivery' quotas are prohibited by competition legislation in main countries, why such cartels shall be allowed on the intergovernmental level? We are convinced that this problem shall be discussed only with the participation of competition authorities and suggest that next OECD negotiations shall be undertaken jointly by Trade and Competition structures of OECD. We think that this problem shall be in the center of international co-operation of competition authorities and suggest to consider it on the Global Forum.

III. - INTERNATIONAL COOPERATION IN MERGER AND CARTEL CASES

The Russian Federation has a number of agreements between the Government of the Russian Federation and the Governments of foreign countries on cooperation in the field of antimonopoly policy. Such agreements are concluded with the Governments of People's Republic of China, Poland, Bulgaria, Ukraine.

Moreover the Ministry of the Russian Federation for Antimonopoly Policy and Support of Entrepreneurship has similar bilateral documents on cooperation with several competition authorities. So, MAP Russia has signed the agreements with the Office of Free Competition of Finland, the Fair Trade Commission of the Republic of Korea, the Ministry of Industry and Foreign Trade of Italy, the Direction General on Competition, Consumer Policy and Fraud Suppression of the Ministry for Economy of France, the Antimonopoly Office of the Slovak Republic, the Romania Competition Council, Office for the Protection of Competition of Czech Republic, and the Office of Economic Competition of Hungary.

In the framework of the Commonwealth of Independent States there is the Interstate Treaty on conducting of coordinated antimonopoly policy. The last agreement determinates the order of international cooperation and in particular exchange of information (article 6) taking into account the national laws of Parties.

All these documents define the spheres and directions of cooperation with foreign partners that include the standard article concerning the exchange of information between the parties. But this article doesn't specify the provision on exchange of confidential information.

At the initial stage of cooperation between competition authorities the exchange of information was focused on the exchange of legal and other normative documentation, statistic dates.

Nowadays the process of globalization of the world economy and integration of the Russian economy into the world economic system predetermines the necessity to pass on the new form of cooperation such as interaction in investigation in concrete cases of violation of antimonopoly legislation that have transactional effect.

This tendency of development of international cooperation has found its reflection in programs on interaction with a number of competition authorities of, for example, with the People's Republic of China, Bulgaria, Poland, Hungary. At present there are provisions on rendering assistance in investigation of cases on unfair business practice, carried out by economic entities of the Parties, informing on measures for the law observance, voluntary exchange of information, holding of joint consultations.

It necessary to underline that the Program on cooperation with the Office of Economic Competition of the Republic of Hungary has the special article that defines the procedure of provision of this information including term of confidentiality, time periods and responsibility of Parties of submit of information and the bodies are responsible for this activity.

The interaction of such kind unable of national competition authorities including MAP Russia to participate in prevention of transnational anticompetitive actions.

The Joint Statement between the Commodities' Exchanges Commission of the Ministry of the Russian Federation for Antimonopoly Policy and Support of Entrepreneurship and the United States

Commodity Futures Trading Commission Regarding Cooperation, Consultation and the Provision of Technical Assistance signed in December 2000.

The Law of the Russian Federation “On Competition and Limitation of Monopolistic Activity on Goods Markets” of March 1991 (as amended 1995, 1998, 2001) includes the article 25, which is called “Liability of Officials of the Federal Antimonopoly Authority for Violation of this Law”. According to this article:

”Officials of the federal antimonopoly authority (its territorial agency) shall bear administrative liability for the disclosure of information constituting a commercial secret of commercial and non-profit organisations and individual entrepreneurs in the form of a warning or a fine amounting up to 80 times the minimum (monthly) wage, unless the above actions do not entail other liability stipulated under the legislation in effect legislation”.

Cartels

Regarding the cooperation with the foreign competition agencies in the investigations or cases involving a hard core cartels MAP Russia had not requested and received any official requests from/for partners on information in the years 2000-2001.

In 2001 the Karelia Regional Office of MAP Russia received the information letter from the Office of Free Competition of Finland. The Finland competition agency has conducted an investigation on appeal of the Central League of Agricultural Consumers and Foresters of Finland concerning the legitimacy of the price collusion of three Finnish timber companies, engaged in the import of birch balances from Russia, and six Russian organizations – timber sellers. The Office of Free Competition of Finland considered these deal but didn't find the horizontal-vertical agreement on the export of crude timber, obliging its participants to conduct a coordinated pricing policy.

At the same time, the Finnish Competition Department assumes that in the Russian market, the price collusion deprives competing manufacturers of their ability for independent pricing, restricts competition between enterprises, which may considerably influence the Russian trade and, therefore, the case refers to the jurisdiction of the RF Law “On Competition and Restriction of Monopolistic Activity on Commodity Markets” and falls under the jurisdiction of the Russian antimonopoly bodies.

After the conducting of the investigation on this case in the Karelian Regional Office, it established the lack of confirmation of the violation of the antimonopoly legislation by the economic entities.

Mergers

In the year 2000 MAP Russia has reviewed 3882 deals concerning the merges investigations including 183 deals with participants of foreign companies.

Usually the Ministry and regional offices of MAP Russia don't experience the necessarily to send the formal request for addition information to foreign authorities. But there is the indicative example of merger case in which the Ministry sought the assistance of the Antimonopoly Committee of Ukraine but it was denied.

The Rostov Regional Office of MAP Russia controlled the observance of Antimonopoly Law in the cases of purchase of stocks in the sphere of metallurgy industry and determined that share holding was purchased by some Ukrainian companies.

The Agreement between the Government of the Russian Federation and the Government of Ukraine about the cooperation in the field of competition development includes the articles 8 and 13, which define the condition for information exchange.

According to the article 8, called "Exchange information":

1. "Parties shall render each other assistance in obtaining necessary information of mutual interest or that of interest for either of Parties, which:
 - may contribute to increase of effectiveness of the Russian Federation and Ukraine competition legislation enforcement;
 - includes the data related to competition legislation enforcement.
2. Parties shall provide each other with all information regarding practices which have adverse effect on competition in case such information is subject to imposing penalties."

According the article 13, called "Maintenance of confidentiality".

"Information obtained as a result of implementation of the Agreement is not to be divulged, unless agreed by Parties.

In the exercising cooperation within the framework of the Agreement, Parties shall take into account concern of their States in respect of maintenance of confidentiality of commercial information as well as the other privacy protected under the national laws of the Russian Federation and (or) Ukraine."

The MAP Russia issued the formal request to the Donetsk Regional Office of Antimonopoly Committee of Ukraine, but received the refusal in which the Ukrainian body made reference to the confidentiality of data on basis of the legislation of Ukraine.

The experience of MAP Russia cooperation with foreign competition authorities concerning concrete cases is rather limited now, but we expect that it will become more active taking in mind the growth of transnational operations. The new legal basis will be needed for such interaction and we hope that foreign competition authorities and international organizations will be ready to cooperate with us in this area.

Unclassified

CCNM/GF/COMP/WD(2002)22



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

08-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM DAVID LEWIS, COMPETITION TRIBUNAL (SOUTH AFRICA)

This note is submitted by David Lewis, Chairperson, Competition Tribunal (South Africa) as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120555

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CCNM/GF/COMP/WD(2002)22
Unclassified

English text only

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It's not possible to speak about the response to our competition law without saying something about the background out of which the law emerged. Indeed, I hesitate to present a 'developing country perspective'. We all accept that the results of competition law enquiries are heavily driven by the facts relevant to a particular case; the same is true of the reception accorded to the introduction of a competition law – it too is a function of a set of pertinent facts specific to the time and place in question. It is possible to identify a number of general responses although I think that these will be boringly familiar to everyone here, whether from developed or developing country. These general responses are driven by predictable interests. These characteristically proclaim a strong commitment to enhanced competition in everyone else's backyard but usually find reasons for disputing its efficacy on their own turf.

South African has had a competition statute in place these past 30 odd years. However this underpinned a very weak regime of competition enforcement – the law was weak, the enforcement agency was starved of resources and the government of the day gave little political support to competition law and policy. Indeed among the many reasons for which the South Africa of the time was well known, high levels of market and ownership concentration, cronyism between government and a strong sector of the business elite and the powerful role of state owned enterprises rank high. In short competition law existed in an environment which would have defeated the most zealous enforcer.

In 1999 a new law was passed. But this didn't happen in a vacuum. You will all know that the passing of this new law followed a veritable revolution that ushered in a new dominant set of social values partly enshrined in a brand new constitutional dispensation. The newly dominant values represented a significantly improved environment for the robust enforcement of competition law. This does not, of course, mean that government's reasons for embracing competition were the same as those of the average economics professor. Hence, although, as reflected in the statute, the political champions of the new competition law appreciated and supported its role in promoting efficiency and consumer welfare, the new law was also embraced because of its potential contribution to broadening the ownership base of the economy, to affecting the racial composition of this ownership base, to easing access by SMEs and, in general, to disciplining a business elite that was widely perceived to have grown sloppy under the protective umbrella provided by their cronies of the old order. In other words, although it often meant different things to different people, competition law was received not as some esoteric contribution to economic policy but rather as a robust statement of where government and the society stood on a number of core social values.

Hence a new, much strengthened law was passed, the institutional base, including the budgets of the various agencies, was profoundly strengthened, and government, in its public stances and through other complementary economic policy initiatives, evinced strong support for the promotion of a competition-friendly environment.

This environment afforded little opportunity for outright opposition to the strengthening of competition law. Hence while the business establishment may not have liked the widespread notion that the law was aimed at long established business practices and structures, it was forced to acknowledge that it was an aspect of an approach consistent with privatisation and a general reduction in the role of the state

in the economy. In other words, though sceptical of the intentions of the new competition policy, business was happy to accept it because it in part represented an embracing by the new government of the market. Or, conversely, while the unions were sceptical of the embracing of the market that the competition law represented, they were cheered by the fact that big business was going to be subject to a new set of rules and institutionalised discipline.

This combination of enthusiasm and wariness has given rise to an elaborate statute. While all those involved in the process (which included lengthy formal negotiations between government, business and labour and an elaborate parliamentary process) paid lip service to the need to balance the twin requirement for judicial certainty with the flexibility that economic regulation demands, in fact all the stakeholders predictably wanted those aspects dear to their divergent interests enshrined in the law. Hence we have a law that in its elaboration is very far away from the terse treatment of the Sherman Act or of Articles 81 and 82. Interestingly, the active involvement of a range of stakeholders in the lawmaking process and their shared concern to prevent competing interest groups from dominating the decision making structures and processes of the competition authorities has also given rise to a family of competition institutions whose independence is strongly guaranteed in the new law.

This particular background to the competition law also accounts for a statute that incorporates a multiplicity of objectives, a mix of 'traditional' competition objectives and a range of social objectives, such as employment creation and retention, black economic empowerment and the promotion of SMEs. It's generally thought that this is a feature of developing countries and I'm happy to acknowledge that specific features of our country account for the particularly strong emphasis on 'non-competition' objectives in our law. I am not sure that the pressure to include these considerations is unique to South Africa or to developing countries generally. Racially or ethnically skewed access to the economy and high levels of unemployment – both fairly common features of many developing countries – may account for the unusually explicit incorporation of these objectives in our law and in those of other developing countries. But I'm pretty certain that these considerations influence prosecutorial and even judicial decisions everywhere. The difference is that pressing developing country circumstances force these out into the light of day where, because many are actually driven by narrow interest group pressure, they often disappear.

Our law deals with both merger regulation and anti-competitive practices. In merger regulation we are regularly confronted with the argument, from both government and the private sector, that developing countries should take a benign, even facilitative, position on 'national champions', or, expressed otherwise, that the operation of scale economies in small markets dictates a permissive approach to mergers in developing countries. This is a highly case specific question although our experience to date strongly suggests that the cases do not bear out the general proposition. The argument is most often couched in the form of a plea in favour of 'international competitiveness'. We have insisted, however, that, as a general proposition, firms that dominate their domestic markets are not incentivised to achieve international competitiveness, they are not successful exporters. Nor are we persuaded that, as a general proposition, firms are driven down their cost curves by scale rather than competition. In our limited experience, where scale considerations are overwhelming, markets tend to be truly international and, in those relatively rare circumstances, competition authorities, whether in developing or developed countries, should arrive at the same conclusions. So, in summary, I don't hold that there are special circumstances that dictate a more permissive merger regime in developing rather than developed countries.

Those who favour a robust competition policy sometimes suggest to us we should not be doing merger regulation at all, that our limited resources should be devoted to prosecuting anti-competitive restrictive practices. While often well intentioned, this is quite wrong. It both underestimates the harm done by anti-competitive mergers and it overestimates the ability of new competition agencies, especially in newly democratised developing countries, to launch successful restrictive practice prosecutions. Our

experience is that the first restrictive practice cases inevitably have to pass through a range of procedural and constitutional reviews partly because the law (both the competition statute and the constitution itself) is genuinely unsettled and requires judicial consideration. In the meantime the competition authority is seen to be doing nothing other than paying lawyers to argue obscure legal points in distant courts and its reputation suffers, and partly because defendants in restrictive practices, unlike merging parties, are incentivised to obstruct the prosecution of their case. Robust merger regulation, on the other hand, not only makes a substantive contribution to promoting competition, it enables the competition authority to rapidly establish credibility and reputation – in the nature of merger regulation, a reputation for standing up to the most powerful private interests in the country.

The domestic business response to restrictive practices enforcement is best characterised as utter bemusement. Suddenly long established practices are illegal; they are being raided; they are hauled before an administrative tribunal and potentially subject to what, in their view, are massive fines. Multinationals, on the other hand, are far more sophisticated in their response – I discern that they are less impressed by our punitive capacity, more cognisant, perhaps, that the returns from anti-competitive practices outweigh the fines that we are able to impose.

Those who support robust anti-trust enforcement often urge us to focus on selected, particularly egregious offences, with hard-core cartels generally singled out for attention. I'm not sure that hard-core cartels are the correct prioritisation for developing countries. Ubiquitous single firm dominance of important markets may bring other cases to the fore – for example vertical agreements whereby a monopolist ties up a source of supply or means of distribution may well pose a greater threat to competition than horizontal agreements. However, the argument for prioritisation is generally well taken, although difficult to achieve in a new competition regime and one that lacks the consumer protection capacity of developed countries – hence complainants frequently bring an array of unfair trading practice cases and contractual disputes to the competition authorities. The Commission has been courageous in turning these away, although many of them choose to bring these directly to the Tribunal.

We are also frequently told to focus on advocacy and the promotion of a 'competition culture' rather than enforcement and merger regulation. Though again well intentioned, I am sceptical. Respect for competition is more easily engendered by a successful prosecution than by a research paper or a press conference. But advocacy and winning the public debate is vitally important. Here I think focus is important – we should eschew general advocacy in favour of a focus on particular areas, like, for example, telephones. Not only does this kind of focus engage with areas of huge importance to the mass of the population, it also helps establish a reputation for independence from government.

Which leads to my final remark: I think that in our early days, our reputation has been significantly enhanced by the structure of our act which essentially provides for three independent bodies – a prosecutorial agency, the Commission; a quasi-judicial Tribunal; and a specialist Appeal Court. Not only is each agency independent of government – there is no ministerial override over any of our decisions - but they are independent of each other. We have, in our first years, undoubtedly made mistakes. But the fact that these are palpably our mistakes, rather than the product of a self-interested lobby or a ministerial instruction has earned us a grudging respect. In every way I think that this may well be the most important aspect that developing countries have to get right. A reputation for independence and integrity may be the most vital ingredient for successful competition enforcement - it is a feature not to be taken for granted, even in developed countries.

THE POLITICAL ECONOMY OF ANTITRUST**FORDHAM CORPORATE LAW INSTITUTE
28TH ANNUAL CONFERENCE INTERNATIONAL ANTITRUST LAW AND POLICY****October 25 and 26, 2001**

There are a number of prisms through which to view the political economy of anti-trust. I'll use the most common and pose the following question:

Accepting that a principal objective of anti-trust is allocative efficiency, how does it deal with a real world driven by distributional conflicts and whose order is effectively structured by the chosen mode of resolving these conflicts?

South Africa is an interesting site upon which to pose this question. It's trite that massive unresolved distributional conflicts are at the heart of its political transition - the new regime clearly seeks to distinguish itself by its promotion of greater equality in access to wealth and income earning opportunities; it wants interest groups marginalized by the previous order, essentially the new ruling party's electoral constituency, to be principal beneficiaries of the new order. However, government also recognises that these distributional goals can only be achieved through a significant improvement in economic performance, in economic efficiency.

South Africa's political leaders do not, in common with most of their kin in the rest of the world, view these objectives as mutually exclusive; they do not, in other words, easily accept or admit to an efficiency/equity trade-off - on the contrary the popular view in South African society is that poor economic performance is, in large part, a product of power relations that excluded the majority from access to the economy. Concretely these broad objectives translate into support for, *inter alia*, black economic empowerment (seen largely as broadening the ownership of economic assets), for small and medium sized enterprises and for job retention and creation. In order to achieve any credibility in the society every major piece of economic legislation would have to embody, in letter and spirit, this range of objectives.

This imperative to elevate distributional goals is particularly strong where antitrust legislation is concerned. This may appear ironic in a field, the practitioners of which are so anxious to immunise from political influence. However, it should not be surprising - it clearly derives from the very powerful distributional overtones present at the birth of antitrust and that still resonate through much of its current enforcement. *The historic role of antitrust is to constrain the behaviour of large concentrations of economic power, particularly private concentrations of economic power.* And so although competition professionals may have come to recognise the inordinate complexity of this task and the many unintended consequences that flow from it, it is not surprising that the contemporary political midwives of antitrust think little of including in its objectives the defence of those whose interests they believe, wrongly or rightly, are vulnerable to the exercise of big business power, like employees and small business. Accordingly these objectives are enshrined in the South African competition statute enacted two years ago.¹ They are to be found not only in the broad preamble and purposes of the act,² but they are also

1 Competition Act, 89 of 1998 (as amended). The Act is available on the Competition Tribunal's website (www.comptrib.co.za) as are all the decisions of the Tribunal.

2 Section 2.

written into, for example, the merger evaluation process³ and the criteria for exemption.⁴ These objectives – employment, small business, and Black economic empowerment are the ‘public interest’ objectives of the act. The act also allows for explicit efficiency defences – that is, an anti-competitive transaction or practice can be defended on the basis of the ‘efficiency’ gains that it realises. Although this defence also allows – in the name of ‘efficiency gains’ – for a departure from ‘pure’ competition norms and presents even more complex balancing decisions, I am going to confine my remarks to the public interest/competition trade off.⁵

I am quite comfortable with the requirement that we balance competition and public interest considerations. I recognise that it makes for complex decision making, however *real politiek*, at least, dictates that we do not insist on eliminating either the ‘political economy’ or distributional objectives or the ‘pure economy’ or allocative efficiency objectives. The trick is reconciling them in practice, and this, in turn, is tied up, first, with the process of building a new, broad-based constituency for antitrust and, second, with the mode of implementation of the policy and the legislation.

On building new constituencies, the point is that while one should, neither in the legislation nor in its implementation, ignore constituencies like small business and labour, nor should one rely on them to consolidate support for antitrust. Even on the most populist interpretation of the act, organised labour and small business are likely to prove fickle allies at best, precisely because of inevitable conflicts, at least between their narrow, short term interests and the broader interests of promoting competition. More reliable allies are, firstly, consumers and, secondly, and possibly more important, that broad inchoate mass of citizens who are comforted and empowered by the presence of institutions in their society tasked with checking the activities of powerful interest groups.

Building new constituencies is an inordinately difficult task. It confronts the classic dilemma that every reformer confronts – those who stand to lose from the reform are well organised and coherent, while those who will benefit from the reform are dispersed and incoherent. This places an enormous burden on the advocacy and public relations functions of the enforcement agency. In the time consuming and resource sapping business of investigating complaints and mergers and in preparing and fighting lawsuits, the advocacy role is often relegated to the backburner. However, the requirement to build a powerful social base for antitrust may dictate that it comes to the fore – not only is it often easier to shame a monopolist in public than it is to get a court to agree to fine him, but it also may act as a more effective deterrent in societies where reputation is important and enforcement difficult. The importance of building more reliable constituencies may also be an argument for combining consumer protection with competition enforcement. It essentially allows the agency to develop a reputation for robust enforcement in the broad arena of fairness to consumers, leaving it free to take an appropriately more nuanced approach in the arena of competition enforcement.

But the reconciliation of the politics and economics of antitrust has also to take place in the law itself and in its implementation. Building a broadly based constituency for antitrust will act as a counterweight to the demands of narrow interest groups but it will not make them go away nor will it eliminate the substantive underlying societal concerns that put these diverse objectives on the antitrust

3 Section 12A.

4 Section 10.

5 The Tribunal, in the two years of its existence, has only accepted an efficiency defence on one occasion. See: Trident Steel Pty Ltd and Dorbyl Ltd (Case no.: 89/LM/Oct00), where a merger which, in terms of Section 12A of the Act, was found to ‘substantially prevent or lessen competition’ was nevertheless approved because, in the words of the Act, the ‘technological, efficiency or other pro-competitive gains’ resulting from the merger were held to be ‘greater than, and offset, the effects of any prevention or lessening of competition’.

agenda in the first place. There are essentially three alternative mechanisms for resolving the trade offs between competition considerations, on the one hand, and, on the other, public interest or distributional concerns:

The first is to pretend that they don't exist and then, when society presses in on the enforcers and judges, to sneak them into the competition decision. There was an example of this approach at last year's Fordham conference – in the panel discussion on purchasing power one participant argued the pro-competitive merits of protecting mom and pop retailers in Germany from competition from large, efficient supermarkets. On 'pure' competition grounds the argument was thoroughly unpersuasive, of the same order as the arguments for protecting French farmers or US steel makers from international competition. What was apparent though was that this class of small retailers (like French farmers and US steel makers) was thought to play an important role in the cohesion of local communities. I would much rather have heard why the imperative to protect this public interest outweighed the gains derived from protecting competition, than to see the logic of competition law and economics tortured by an attempt to make all antitrust decisions conform to a narrow efficiency standard. Judicial officers decide interest disputes all the time – there is no reason why they should find it impossible to balance the conflict that sometimes arises between the promotion of competition, on the one hand, and the concerns of a particular interest group on the other.

The second, and, arguably most popular, approach to resolving this trade off is to give a public representative, a minister of state, a veto, on public interest grounds, over the decisions of the competition authority. I think that this is extremely undesirable. It often leads to the same results as that outlined above – namely, the competition authority, in order to avoid the indignity of a veto, second guesses the Minister's decision by shrouding a public interest finding in the cloak of a competition analysis. It also diminishes the stature of the competition authority and intensifies lobbying activity. But I object to this approach, above all, because it actually shies away from making the trade-off – it essentially allows the competition authority to blithely ignore the hard world outside there; and it allows the minister to simply weigh up the strength of the lobby while ignoring the competition consequences of his decision. Unifying the decision at least forces the ultimate decision maker to confront the real world consequences of the decision and, I am convinced, makes for better decisions.

This then is the third approach: put the public interest or distributional issues in the act and oblige the competition authority to make the trade off. This is the approach followed in the South African Competition Act. Hence mergers, for example, are first evaluated on standard competition criteria and then this decision has to be weighed up against the impact on the stated public interest criteria – employment, small business and Black economic empowerment. Is this ideal? No it isn't. Is it a price worth paying for the credibility of the authority? Yes, it certainly is.

However, it is imperative that the balancing not be capricious or whimsical. This is satisfied by two broad requirements: first, rules and guidelines for making the trade offs have to be developed. And, second, the independence of the investigative and, particularly, the adjudicative authority has to be beyond question.

Our act provides nothing by way of rules and guidelines for balancing public interest and competition considerations and so these have to be developed in the investigative practice and in the Tribunal's decisions. On employment the Tribunal has started to develop some rules of thumb. For example, we recently prohibited an anti-competitive vertical transaction between the country's monopoly supplier of candle wax and the dominant candle manufacturer, a transaction that we found to be anti-competitive. However, for reasons that I will not go into, the prohibition was likely to lead to fairly significant unskilled employment loss in a depressed area of the country. We were accordingly asked to approve an anti-competitive merger because of the employment loss that would allegedly flow from a

prohibition. However, when we thought about the product in question – candles used for household lighting in a country where a large swathe of the poorest members of the society have no access to electricity - the socio-economic consequences of the anti-competitive transaction were held to dwarf the negative impact on employment and so the transaction was prohibited. On the other hand, were there to be significant employment loss in a merger between the monopoly producer of silk cloth and the largest producer of silk scarves, the employment consequences may weigh more heavily because the interests of the consumers in question are less pressing even though in the economics laboratory an allocative inefficiency is an allocative inefficiency regardless of whether it originates in the market for candles or the market for silk scarves.⁶

Note also that the Act requires a definite sequencing of the analyses – first the impact on competition is analysed; secondly, an anti-competitive transaction is examined for evidence of countervailing efficiency gain; third, the transaction is examined for its impact on specified public interest factors. In short, the balance is always struck through the filter of a competition analysis. The upshot is that the outcome of the competition analysis will tend to lead the decision to prohibit or approve with the impact on public interest influencing the imposition of conditions. In the two years of our existence we have never made a decision to approve or prohibit a transaction on public interest grounds – all our decisions have been made on competition grounds with the exception of one occasion on which an anti-competitive transaction was approved on efficiency grounds.⁷

Institutional design also influences the balancing of public interest. When the competition agencies – prosecutorial and adjudicative – are required to balance competition and public interest it is particularly imperative that the agencies be independent, transparent and accessible. It is also essential that there be a clear separation between the investigative and prosecutorial function, on the one hand, and the adjudicative function on the other. These institutional features are imperative because where public interest issues are considered it is essential that the decision making body, at least, is seen to be beyond the influence of any one interest group. It is not good enough that only the court of final appeal should embody these features – we all know that, in anti-trust matters, particularly in mergers, timing issues effectively limit the disciplining function of distant appeal courts.

This has worked well for us. Our competition authority is made up of three autonomous agencies: the Competition Commission, the prosecutorial division; the Competition Tribunal, the court of first instance to which all mergers and restrictive practices must be referred after investigation by the Commission; the Competition Appeal Court, composed of three High Court judges and which enjoys the status of a High Court and which hears appeals from decisions of the Tribunal. The Tribunal is composed of lay persons – essentially economists and lawyers rather than judges – appointed for a fixed term by the President. While in office the degree of protection and independence accorded to Tribunal members is functionally equivalent to that accorded a high court judge – notably, they may not be dismissed except for serious misconduct. Note that all restrictive practices complaints have to be referred to the Tribunal as do all mergers over a specified threshold. That is the Commission, the investigative authority, has no power to approve or prohibit a large merger or determine a restrictive practice – it is only empowered to recommend a course of action to the Tribunal which then ventilates this recommendation at a full hearing in which the Commission, the merging or respondent parties, and all other interested parties are entitled to participate. Although there naturally are procedures for protecting confidential information, as a general rule all procedures before the Tribunal are open to the public and all its decisions, including naturally the reasons for the decision, have to be published. Although the Tribunal, in its area of jurisdiction, has the powers of a normal court, it is permitted, indeed enjoined, to conduct itself with relative informality hopefully

6 Schumann Sasol (SA) (Pty) Ltd and Price's Daelite (Pty) Ltd - Case no: 23/LM/May01.

7 See footnote 5 above.

improving its accessibility. Once a matter is referred to the Tribunal, that is after the conclusion of the Commission's investigation, the Tribunal may, in contrast with much of the rest of our judicial system, assume inquisitorial powers that would allow it to call witnesses and order further investigation.

That in short is my view: antitrust has its origins as an instrument to constrain the exercise of political and economic power by big business and by government when it acts in support of those centres of power. This accounts for its enduring political and popular support. To ignore this, is to cut the ground from underneath antitrust. As with all equity/efficiency trade offs, the conflicts must be managed; they cannot be eliminated. They are also usually significantly exaggerated. The two pillars in the management of this trade-off are, first, building a broad based constituency in support of antitrust, something that is best achieved by stressing its historic and continuing role in supporting the powerless against the powerful. Second, ensuring that an independent and accessible antitrust authority with a clear demarcation between the investigative and adjudicative functions develops clear criteria for performing the balancing act that characterises all important legislative and judicial activity in the real world.

Unclassified

CCNM/GF/COMP/WD(2002)16



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

Cancels & replaces the same document of 30 January 2002

OECD Global Forum on Competition

CONTRIBUTION FROM CHINESE TAIPEI

This note is submitted by Chinese Taipei as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120622

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)16
Unclassified

English text only

I - COMPETITION LAW AND ECONOMIC DEVELOPMENT: CHINESE TAIPEI EXPERIENCE

The Fair Trade Law, the competition law in Chinese Taipei, has been in place for 10 years since February 1992. Its competent authority, the Fair Trade Commission, has adopted the three following concurrent measures to enforce the Fair Trade Law and competition policy:

1. Enforcement actions against violations;
2. Deregulation of certain regulated sectors;
3. Promotion of competition culture.

Over the past 10 years, Chinese Taipei has identified that the following issues are vital to the building of competition regime:

1. Independency of the Competition Authority

Maintaining the independency of the competition authority is not only the foundation for effective enforcement of the competition law, but also ensuring the credibility of the Fair Trade Commission decisions.

In Chinese Taipei, legislation allows the Fair Trade Commission to exercise its authority independently. The nine commissioners are appointed three-year guaranteed terms, and their work transcends political party affiliations. This protective umbrella enables the commissioners to become resilient against external pressures. Although the Chairman of the Fair Trade Commission is a member of the Cabinet, the Chairman receives no pressure from the Premier or other cabinet members. In addition, the Commissioners' Meeting is convened at least once every week. The different views of commissioners on the applicability of the Fair Trade Law are likewise published in the Fair Trade Gazette to enable the general public to understand the decision making process of the Fair Trade Commission and substantiate the credibility of the Commission.

2. Exceptions and Disputes to the Competition Law

Effective enforcement of the competition law hinges on the exceptions to the law. Prior to the first amendment of the Fair Trade Law in February 1999, Article 46 of the Law stated that "the acts of a governmental enterprise, public utility or communications and transportation enterprise shall not be subject to the application of the Law until the elapse of five years after the promulgation of the Law." The five-year grace period is detrimental to the enforcement of the competition law, and its legitimacy was questioned by private enterprises.

For this reason, the Law was first amended in February 1999. Article 46 was amended to read that "where there is any other law governing the conducts of enterprises in respect of competition, such other law shall govern; provided that it does not conflict with the legislative purposes of the Law." This amendment gave the Fair Trade Commission greater authority to enforce the competition policy.

The Fair Trade Law likewise stipulates that with regards to issues involving the duties and responsibilities of other government agencies, the Fair Trade Commission shall handle such cases in consultation with the respective government agencies. The right to consult with other government agencies enables the Fair Trade Commission to introduce forthwith the concept of “market competition” into the policy implementation of the other government agencies to prevent conflicts with the competition policy. The liberalisation of the telecommunications industry is a very good example.

3. Education and Use of Outside Resources

The Fair Trade Commission has designed training and seminars for enterprises and the general public to enable a better understanding of the competition law. This is an important step in creating a domestic environment for competition. In addition, the Fair Trade Commission also grants scholarship to encourage academic research in competition law, so that students can become advocates of the concept of competition when they leave school.

To promote the efficient use of manpower, the Fair Trade Commission will invite experts and scholars to assist in the research of special issues such as new forms of market transactions, or hold symposiums on these issues. The Commission hopes to learn from outside sources so as to help facilitate the work of its staff members.

4. Co-operation with Foreign Competition Authorities

To avoid duplicating similar mistakes, experiences and information of law enforcement from overseas are very important to the Fair Trade Commission. In addition to engaging bilateral co-operation agreements with foreign competition authorities, the Commission also holds bilateral meetings with the foreign authorities regularly. In addition, the Commission likewise sends staff members overseas to carry out researches and learn from the law enforcement experiences of advanced countries. These arrangements help elevate the efficacy of competition law enforcement in Chinese Taipei, making it at par with international standards.

In the year 2000, former commissioners Dr. San Gee and Dr. Lo Chang-fa developed an empirical model, using data between 1969 and 1998, to study the overall effects of the Fair Trade Law on Chinese Taipei's overall economic development, particularly in the fields of export competitiveness, commodity prices, employment, direct foreign investment, and R&D expenses.

Model:

$$EX = a_0 + a_1K + a_2FDI + a_3RD + a_4T + a_5D_2 + a_6S_1 + \varepsilon_1$$

$$CPI = b_0 + b_1GE + b_2EX + b_3T + b_4D_1 + b_5D_2 + b_7S_1 + \varepsilon_2$$

$$E = c_0 + c_1GE + c_2EX + c_3T + c_4D_2 + c_5S_1 + \varepsilon_3$$

$$FDI = d_0 + d_1GE + d_2EX + d_3R + d_4T + d_5D_2 + d_6S_1 + \varepsilon_4 \quad RD = e_0 + e_1K + e_2EX + e_3T + e_4D_2 + e_5S_1 + \varepsilon_5$$

The dependent variables are :

- EX: annual export value in USD million
- CPI: consumer price index in percentage
- E: employment levels in thousand persons

- FDI: approved private foreign direct investment in USD million
- RD: annual R&D expenditure in NTD 100 million

The explanatory variables are:

- K: gross domestic capital formation in NTD billion
- T: time trend variable, the data period for the above econometric model ranges from 1969 to 1998
- S₁: annual total number of decisions with sanction made by the FTC
- GE: government expenditure in NTD billion
- EX: annual export value in USD million
- D₁: dummy variable for the first and the second oil shock that took place in 1974 and from 1979 to 1981
- D₂: dummy variable for the period of 1992 to 1998 to capture the implementation effort
- R: three-month time deposit interest rate from 1968-1998

The study found the following results:

1. Export Competitiveness
 - (1) Capital formation improved Chinese Taipei's export performance, but direct foreign investments and R&D expenses did not affect export performance.
 - (2) The cases handled by the Fair Trade Commission produced significant positive effects in improving Chinese Taipei's export competitiveness.

2. Commodity Price Index
 - (1) Except for the first and second global oil crises that had adverse impact on commodity prices, government expenditures and export value did not have adverse effects on the commodity price index.
 - (2) The Commission's handling of cases, and its promotion of deregulation and competition, did not have any adverse impact on the Chinese Taipei's inflation.

3. Employment Index
 - (1) The Commission's handling of cases did not have significant impact on Chinese Taipei's employment index.

- (2) However, the Commission's efforts toward deregulation and promotion of competition had significant positive impacts on the generation of more employment opportunities.

4. Foreign Direct Investments

- (1) Government expenditures did not affect foreign direct investments, but export competitiveness has significant positive impact on foreign direct investments.
- (2) The Commission's handling of cases had significant positive impact on foreign direct investments.

5. R&D Expenses

- (1) Capital formation had significant positive impacts on R&D expenses.
- (2) The Commission's handling of cases stimulated R&D expenses. However, it was not possible to prove whether the promotion of deregulation and competition concepts had adverse impacts on R&D expenses.

It is generally believed that competition law is better suited for countries with larger economic scales, and the law is not very helpful to countries with smaller economic scale. Although Chinese Taipei falls into a small economic scale category, the implementation of competition law over the past 10 years still creates positive results on the overall economy and sectors specific. Ten years may not be a long time, Chinese Taipei will continue to devote its efforts in creating a more competitive environment and is willing to cooperate with other competition agencies.

II. - REPLY TO THE QUESTIONNAIRE TO INVITEES ON INTERNATIONAL CO-OPERATION IN CARTEL AND MERGER INVESTIGATIONS

1. Provide a copy of each formal co-operation agreement between your country or your competition agency and a foreign country or competition agency relating to competition investigations or cases.

Chinese Taipei has signed co-operation arrangements with Australia and Zealand respectively regarding enforcement of competition and fair trading laws. Copies of the arrangements are as Attachment 1 & 2.

2. Describe your country's laws or regulations that relate to or affect your agency's ability to exchange information or co-operate with a foreign competition agency.

Chinese Taipei's laws that relate or affect the exchange of confidential information with foreign competition agency is provided as Attachment 3.

Cartels

3. If your agency issued one or more formal requests to a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

Chinese Taipei has not issued such request from 1 January 2000 to the present.

4. If your agency received one or more formal requests from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

Chinese Taipei has not received such request from 1 January 2000 to the present.

5. Please describe any other instances of co-operation with a foreign competition agency in a hard core cartel investigation or case not described above, such as meetings, telephone or email communications, including, if possible, the co-operating country or countries, the nature of the co-operation and the importance or significance of the co-operation to your agency.

Chinese Taipei has no such kind of co-operation with any foreign competition agency from 1 January 2000 to the present.

6. State the number of instances in which a hard core cartel investigation or case could have benefited from information or co-operation from a foreign competition agency but your agency did not request such assistance because you knew that it could not or would not be granted. Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement effort.

Chinese Taipei does not have such cases from 1 January 2000 to the present.

Mergers

7. Identify each merger that your agency reviewed that, to your knowledge, was also reviewed by the competition agency of another country.

Chinese Taipei has reviewed 9 cases that we believe also reviewed by foreign competition authorities from 1 January 2000 to the present. The cases are:

Citycorp./Traveler Group Inc.;

Union Zurich Insurance Co./B.A.T. Industrial P.L.C.;

Citigroup Inc./Associates First Capital Co.;

ING Group N.V./Aetna Inc.;

Ericsson/Sony;

Bently/General Electric Co.;

Koninklijke Philips Electronics N.V./Marconi Co. Plc.;

General Electric Co./Kretztechnik AG;

General Electric Co./Dover Co.

8. For each investigation or proceeding involving a merger in which there was communication between your competition agency and the competition agency of another country during the course of the investigation or proceeding, please state or describe:

Chinese Taipei does not have such cases from 1 January 2000 to the present.

9. Describe any instances in a merger case or investigation

- a. in which your agency sought the assistance of a foreign competition agency but it was denied;
- b. in which your agency sought a waiver of confidentiality restraint from one or more of the merging parties but it was denied.

Chinese Taipei does not have such cases from 1 January 2000 to the present.

10. Describe any investigation or proceeding involving a merger that would have benefited from co-operation with a foreign competition agency but your agency did not pursue such co-operation because you knew that it would not be possible. Describe the type of co-operation that would have been useful and the impact of its unavailability on your enforcement effort.

Chinese Taipei does not have such cases from 1 January 2000 to the present.

**III. - THIS ATTACHMENT INCLUDES LAWS OF THE REPUBLIC OF CHINESE TAIPEI
RELATING OR AFFECTING THE ABILITY OF THE FAIR TRADE COMMISSION TO
EXCHANGE CONFIDENTIAL INFORMATION WITH FOREIGN COMPETITION AGENCY**

Criminal Code

Article 132

A government employee who discloses or gives to others any document, picture, information, or other things of a secret nature relating to matters other than national defence shall be punished by imprisonment for not more than three years.

A government employee who negligently commits an offence specified in the preceding paragraph shall be punished by imprisonment for not more than one year, detention, or a fine of not more than 300 New Taiwan Dollars.

Any person other than government employees who, having knowledge over or being in possession of such document, picture, information, or other things specified in paragraph 1 because of his post or occupational activities, discloses or gives to others the above said shall be punished with imprisonment for up to one year, detention, or a fine up to 300 New Taiwan Dollars.

Article 316

A medical doctor, pharmacist, druggist, midwife, clergyman, lawyer, advocate, notary public, accountant, an assistant to any of the above, or one who has previously engaged in such occupation who, having knowledge over or is in possession of another's secrets because of his occupational activities, discloses without justifiable reason shall be punished with imprisonment for up to one year, detention, or a fine up to 500 New Taiwan Dollars.

Article 317

Any person who, having knowledge over or being in possession of another's business secrets because of his occupational activities and being ~~is~~ required by law, regulation, or contract to preserve such secrets, discloses such secrets without justifiable reason shall be punished with imprisonment for up to one year, detention, or a fine up to 1,000 New Taiwan Dollars.

Article 318

A government employee or a former government employee who, having knowledge over or being in possession of another's business secrets because of his post, discloses such secrets without justifiable reason shall be punished with imprisonment for up to two years, detention, or a fine up 2,000 New Taiwan Dollars.

Business Secrets Law

Article 9

A government employee who has knowledge over or is in possession of another's business secrets because of his duty shall not use or disclose such secrets without justifiable reason.

A party, counsel, advocate, expert witness, witness or other relevant person who has knowledge over or is in possession of another's business secrets because of judicial investigation or trial shall not use or disclose such secrets without justifiable reason.

The preceding paragraph shall apply *mutatis mutandis* to arbitrators and other persons handling arbitration cases.

Article 10

Any of the following behaviours constitutes an infringement of business secrets:

1. acquiring business secrets with unjustifiable method;
2. acquiring, using, or disclosing such business secrets specified in the preceding subparagraph with the knowledge of the nature of the secrets or without such knowledge because of gross negligence;
3. using or disclosing such business secrets specified in the preceding subparagraph with the knowledge of the nature of the secrets, after having acquired the secrets, or without such knowledge because of gross negligence;
4. using or disclosing with unjustifiable method business secrets acquired through legal behaviours;
5. using or disclosing business secrets without justifiable reason in violation of the obligation of preserving such secrets under laws and regulations.

The term "unjustifiable methods" as used in the preceding paragraph means theft, fraud, threat, bribery, reproduction without authorisation, violation of obligation of keeping secrets, seduction of another to violate the obligation of keeping secrets, or any other similar methods.

Administrative Procedure Law

Article 46

The party or interested person may apply to the government agency for reading, making copies, photocopies, or photographing relevant data or records, with the condition that such requests shall be limited to those necessary to assert or maintain its legal interests.

The government agency may not reject the application referred in the preceding paragraph, unless there is any one of the following situations:

1. It has to do with proposals for administrative decisions or other preparatory documents;
2. There involve secrets of national defence, military, foreign affairs, or general public affairs, being required by laws and regulations to be kept confidential;
3. There involve personal privacy, professional secrets, or business secrets, being required by laws and regulations to be kept confidential;
4. There is a likelihood of infringing third party's rights;
5. There is a likelihood of seriously impeding the normal function of duties related to social order, public safety, or other public interests.

Fair Trade Law

Article 27-1

The party or interested person, in the process of the investigation procedure referred in the preceding Article, may apply for reading, making copies, photocopies, or photographing relevant data or records, with the condition that such requests shall be limited to those necessary to assert or maintain its legal interests; unless there is any one of the following situations:

1. It has to do with proposals for administrative decisions or other preparatory documents;
2. There involve secrets of national defence, military, foreign affairs, or general public affairs, being required by laws and regulations to be kept confidential;
3. There involve personal privacy, professional secrets, or business secrets, being required by laws and regulations to be kept confidential;
4. There is a likelihood of infringing third party's rights;
5. There is a likelihood of seriously impeding the normal function of duties related to social order, public safety, or other public interests.

The relevant procedure and requirement such as the qualification of the applicant, the time period for application, the restrictions of content of data or records for reading, the procedure for reading data or records shall be prescribed by the central competent authority.

Unclassified

CCNM/GF/COMP/WD(2002)10



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

05-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM THAILAND

This note is submitted by Thailand as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120338

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CCNM/GF/COMP/WD(2002)10
Unclassified

English text only

THE THAILAND TRADE COMPETITION ACT AND INTERNATIONAL COOPERATION

1. Competition Policy

Globalization has impelled world economies to be more connected. The movement of production factors and investments all over the world can be done more rapidly and conveniently. This will result in severe competition in the world market.

Under open economy and liberalization, the investment of transnational enterprises will make a contribution to a host country in terms of new technology and know-how. This will be beneficial for its structural improvement and production efficiency for its competitiveness. On the other hand there is the possible danger that those transnational enterprises may exercise their market power in an abusive way which may cause damage to small and medium-size enterprises and the competition within the country. The rigorous competition law and policy is therefore indispensable to control and maintain competition.

Thailand fully realised the importance of having a strong and effective competition policy. It is stated in Article 87 of the Constitution of the Kingdom of Thailand that the government is to support an economic system under a free market system. It has to regulate in order to have fair competition, consumer protection and anti-monopoly controls through direct and indirect means. The Ministry of Commerce which is directly responsible for national trade and competition has defined its vision to promote free and fair trade in order for there to be an efficient market mechanism, to eliminate anti-competitive practices and monopoly, and to protect consumers”.

The Competition Act is one of our tools to achieve the goals of the competition policy. It prohibits 5 types of the practices which are the abuse of dominant position, mergers that may result in monopoly, concerted acts that may amount to monopoly, reduction and restriction of competition, the restriction of opportunities for consumers to purchase goods or services directly from business operators outside the Kingdom, and unfair trade practices that may result in destroying, impairing, obstructing or impeding other business operators.

2. Thailand and its position about competition policy under international forums

The international trading system has changed, countries have entered into bilateral, multilateral as well as regional agreements for international trade. This is done for their mutual benefits.

With respect to international forums, Thailand established a sub-committee on competition policy to consider any issue related to competition policy and prepare the positions of Thailand for negotiations under WTO forums. The resolution of which the sub-committee provided as the position of Thailand for the Ministerial Conference at Doha was that we agreed for the negotiations to be taking place. However, the issue of enhancing support for technical assistance and capacity building in this area to developing countries is required. The reason that we agreed to the negotiations is that increasing effects of international cartels and transnational mergers on global, and in particular, to small countries such as Thailand who are price takers and have limited power in the international market, the possibility for them to establish cartels are rare compared to big enterprises of developed countries. There is sufficient evidence to indicated that this kind of cartel will cause developing countries to buy goods and services at a higher price.

3. International Cooperation

Countries became increasingly concerned and realized about the possible effect of international cartels and transnational mergers. Without proper and effective enforcement of the competition Act, it may cause damage to the world economy. In order to deal with these practices, national action was not sufficient and needed to be complemented by international cooperation.

Organizing international conferences/seminars is one way to foster understanding and cooperation in gathering information, investigating and proceedings among competition authorities. In particular, competition authorities of developed countries with long-time experiences in the competition field will be able to share their knowledge and experiences with developing countries which are in the beginning stage of implementing the Competition Act.

For Thailand, we were a co-initiator in organizing a five-year Partner for Progress (PFP) project on competition policy for member countries of the APEC with the financial support from Japan. It was quite a successful project as there were many countries requested for organizing such a project. We have also planned for another project of the same kind with Japan and the proposal is now in the process of being submitted to the APEC Ministerial Meeting. Thailand has not only organized international seminars, but has also attended various international conferences/seminars on competition policy and law in order to gain information and knowledge as well as the experiences shared by other countries. For example, we recently attended a seminar organized by OECD and Chinese Taipei Fair Trade Commission on competition policy and law issues for Southeast Asia countries in Phuket, Thailand.

4. Conclusion

International cartels and transnational mergers are having disastrous effects on economies, in particular small countries which are at a disadvantage because of their limited bargaining power. One possible method is to seriously establish a regional or global resource network which would focus on competition and consumer protection issues.

This should be done for the following purpose, firstly, better information to solve the lack of sufficient information such as improved access to information, facilitating exchange of information, improved dissemination of information. Secondly, Technical assistance from developed competition countries to less developed competition countries such as training program, short-term consultancies, staff exchange programs. And finally, further co-operation which means cooperation between member economies will be facilitated by the resource network such as formation of a participant's network and development of bilateral or multilateral co-operation arrangement. It will be very beneficial for member economies to efficiently deal with international cartels and transnational mergers.

QUESTIONNAIRE ON TECHNICAL ASSISTANCE EXPERIENCES AND NEEDS

1. It would be useful if you could provide as much as reasonable possible of the data and information requested in the attached table on technical assistance your authority has received in 2000-001 and is expecting to receive in 2002. More important than this quantitative data, however, are you views on the issue raised below.

Answer We received technical assistance from the World Bank in 1999 to draft guidelines of the Competition Act. However, the drafted guidelines did not conform to the business culture of Thailand, thus it had to be adjusted. To perform this task based on the drafted one, the Department of Internal Trade (DIT) has been consulting with professors from academic communities concern.

In year 2000-001, we did not receive any assistance from any other source. With our limited resources, the DIT adopted several projects related to the competition issues, for example, advisors, the study of anti-competitive practices of other countries in order to adopt guidelines of unfair trade practices (Article 29) of the Competition Act, and the survey of business practices in industries which are suspected to have anti-competitive practices.

For year 2002, we have a project to acquaint our staffs most aspects of the competition by a professional in this field.

2. Based on your experiences :

- What topic have been most and least useful, and why?

Answer Every topic is very interesting and useful for us because we are only now starting to learn about competition issues. In particular, the concerted acts to fix prices of goods and services by transnational enterprises, especially the hard core cartels that damage the consumer interests in many countries. It is a topic that is always being raised in the negotiation forums of the WTO. We have therefore prepared ourselves in respect of these issues for the new round of the negotiations.

- What kind of assistance (conference, seminar, advisor, internship) have been most/least useful, and why?

Answer The internship is the most useful and important assistance for us now because we can practice and learn how to solve problems that may occur in reality when dealing with the anti-competitive practices. The second important assistance is the conferences/seminars and advisors.

- What are the advantages and disadvantages of single-country or regional events? Does this answer depend on the topic being covered? Please explain.

Answer Single-country events are advantageous because they will enable us to have a detailed discussion about the problems that incurred in implementing the competition law and how to solve those problems. However, regional events will be the advantageous in the respect that we can learn and share experiences with countries in a similar position in the same region. However, it also depends on the topic to be covered in the events and the contributions that are made by all the participants.

- Besides knowledge of competition law and policy, what skills and experience do you think are required or important for an assistance provider? How do you rank the following?
 - Experience working in a competition authority?
 - Experience in providing assistance to transition or developing economies?
 - Knowledge of competition law and policy system in different parts of the world?
 - Detailed knowledge of your actual legal, institutional, and economic systems?

Answer The following is the ranking of skills and experiences that are required by an assistance provider.

1. Experience working in a competition authority is required by an assistance provider. With the said experience, the provider will be able to deal with a particular anti-competitive practice, if it occurs, and be able to solve any related problems that may arise when put into the practice.
 2. Detailed knowledge of our actual legal, institutional, and economic systems is needed by the assistance provider to enable them to adapt their knowledge and experience to correspond with the situation in our country.
 3. Experience in providing assistance to transition or developing economies will be beneficial in that the assistance provider will clearly see the problems that the country faces and be able to adopt a particular means which is suitable for that country to solve those problems.
 4. Knowledge of competition law and policy system in different parts of the world will also be useful since we are not alone in this world and as it is the liberalization era, we have to deal with trade and investment of many countries. Knowing about the competition law and policy systems in those countries will be helpful.
- What are the advantages and disadvantages of receiving assistance from current competition officials and private consultants (including consulting firms, law firms, professors, etc.)? Does the answer depend on the topic being covered? Please explain.

Answer The topic which is the most advantageous to us is the methodology to investigate on identify the violation cases such as tie-in sales, price discrimination, predatory pricing etc.

3. Have there been instances when an apparent lack of co-ordination among providers has been a problem for you? Also, please provide any comments you have on advantages or disadvantages to greater international co-ordination of technical assistance programs?

Answer We received technical assistance from the World Bank a few years ago to draft guidelines for implementing our Competition Act. The problem that we faced was the difference in business culture, ways of life, concept of the Act, etc. that caused the misunderstanding when drafting the guidelines. It needs to be adjusted to correspond with the situation in Thailand. Furthermore, the consultants always have their own scope of work and they will not provide any other assistance beyond their own scope. This is one of the limitations of the assistance.

4. What do you currently consider your economy's greatest need in terms of competition law and policy assistance?

- Drafting a competition law? Drafting secondary legislation/regulations?
- Implementing a competition law?
 - Against abuse of dominance by natural monopolies?
 - Against abuses of dominance by “unnatural” monopolies?
 - Against cartels?
 - Against anti-competitive mergers?

Answer We need the assistance in implementing a competition law under all of the above topics.

- If assistance in implementation is the need, what kind of assistance would be most valuable?
Establishing procedures, training staff, other?

Answer Internship is the most valuable for us because we can learn by practising.

5. Please provide any other information or comments you wish to contribute.

Answer Thailand is a developing country and it has just enacted the Competition Act. What we need is assistance from other countries in any form, either technical assistance or financial assistance for developing and carrying out the task of implementing the competition Act. We believed, that with the said assistance, the enforcement of the Competition Act will be more efficient.

Unclassified

CCNM/GF/COMP/WD(2002)12



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

13-Feb-2002

English - Or. French

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

CCNM/GF/COMP/WD(2002)12
Unclassified

OECD Global Forum on Competition

CONTRIBUTION BY TUNISIA

This note is submitted by Tunisia as background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120777

Document complet disponible sur OLIS dans son format d'origine
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English - Or. French

CONTRIBUTION BY TUNISIA

I. - RELATIONSHIP BETWEEN COMPETITION AND ECONOMIC DEVELOPMENT

1. Historical background

Tunisia's economic development, like that of other developing countries and centrally planned economies, was marked up to 1986 by the omnipresence of the State in regulation, control and management of almost all economic activity.

This omnipresence manifested itself in the following ways:

1. Direct responsibility for the bulk of economic and industrial activities, especially in strategic sectors (or industrialising industry) such as oil, cement works, steel, transport, energy, etc.).
2. Direct control of marketing of basic products through offices created for that purpose: cereals and cereal products, oils, sugar, coffee, spices...
3. Control of private investment, both in terms of sector and geographical location of projects, by making investment subject to prior authorisation.
4. Protection of fledgling local industry through the introduction of import permits and high customs duties.
5. Price controls in the local market, with the administration fixing prices of basic products and defining profit margins for other products.
6. Regulation of wholesale and retail trade and distribution activities, such activities being subject to prior agreement and authorisation by the administration.
7. Protection of the Tunisian consumer against the vagaries of world prices for imported basic products, through the establishment of the general compensation fund designed to cover the difference between import prices and those applied in the local market (cereals, oils, milk, sugar, fertilisers, paper).

2. Legislative, regulatory and institutional reforms introduced since 1986

The adoption by Tunisia of the structural adjustment agreement (SAP) in 1986 in agreement with the World Bank and the International Monetary Fund, and its accession in 1994 to the World Trade Organization, together with the signing in 1995 of the free trade agreement with the European Union gradually brought about necessary and inevitable change to the Tunisian economy in the form of adjustment to international competition and its "harnessing" to the global economy through trade liberalisation and globalisation.

This transition from a protected economy to a market economy governed by rules of competition and competitiveness was achieved through a raft of legislative, regulatory and institutional reforms.

The objective of those reforms was to lay the foundations of an economy open to national and international competition by a progressive dismantling of tariffs, deregulation of the main economic activities and gradual withdrawal of the State from most sectors of the economy (production and services).

These reforms mainly concern the following aspects:

1. Liberalisation of investment in the framework of the 1993 investment code, prior authorisation being replaced by a system of fiscal incentives in favour of certain priority sectors and economically disadvantaged regions.
2. Progressive liberalisation from 1994 of some 80% of imports of foreign goods.
3. Gradual dismantling of tariffs by lowering the level of customs duties for the majority of imported goods.

On a transitional basis, for a limited period and with the agreement of Tunisia's foreign partner organisations (European Union, WTO, World Bank, International Monetary Fund), locally manufactured goods escaped this reduction.

1. The 1991 liberalisation of distributive trades and replacement of administrative authorisation by compliance with specifications for certain sectors or products.
2. The introduction of the principle of price freedom in 1991. Exceptionally, price-fixing by the administration was maintained for a list of basic products and for situations where certain economic sectors were dysfunctional and experiencing serious economic disruption.
3. The refocusing of the activities of the general compensation fund to limit its operations to staple products consumed by the most deprived social groups. Thus several products, such as fertilisers, seed potatoes, beef, lump sugar and animal feeds, no longer enjoyed support by the fund.
4. The progressive elimination of preferences granted to Tunisian companies in the award of government contracts.
5. The privatisation of 158 state enterprises by 31 October 2001.
6. The creation in 1991 of the *Conseil de Concurrence* (competition council).

The opening of the local market to foreign goods, the liberalisation of private enterprise in the manufacturing and service sectors, the introduction of competitiveness and competition as vectors governing economic life and the withdrawal of the State from direct management of the economy necessarily involved the creation of a body responsible for monitoring compliance with the rules of competition and thwarting any anti-competitive practices. Hence the creation by the Tunisian legislator, along the lines adopted in several other countries, of the *Conseil de Concurrence*.

The creation of this *Conseil* was accompanied by the introduction of the first core of Tunisian competition law. This legislation drew much of its inspiration from French law, but nevertheless differed on several important points.

It thus systematically prohibited certain anti-competitive practices while allowing a derogation to certain conduct which, although anti-competitive, generated technical or economic progress and thus gave rise to benefits for the consumer.

By these measures, the legislator affirmed the principle that competition is not an end in itself and that it is limited by the demands of technical and economic progress, and consumer interests, which are the ultimate goal of any economic policy.

Thus the 1991 law, as subsequently amended, systematically banned abuses of dominant position and abuses of economic dependency.

It also prohibited:

- exclusive distribution contracts.
- cartels with an anti-competitive purpose (limitation of market access, limitations and control of sales, investment, market sharing, etc.).

However, the law authorised the Minister of Trade to grant derogations for specific situations.

Furthermore, the Tunisian legislator made any concentration that might create or strengthen a company's dominant position subject to prior approval by the Minister of Trade.

3. Limitations of competition law as a vector of economic development

It is, of course, unanimously accepted, in the light of the failure of the economic systems in the so-called socialist or centrally planned economies, that enterprise competition is the basis of all success and all economic development, albeit that total and unconditional compliance with the rules of competition as a necessary condition for economic development and the prohibition by so-called free-market countries of any form of anti-competitive practices and behaviour are more debatable.

Indeed, the eclipse of the State in economic matters in developing countries has not been replaced by domestic economic forces capable of taking over the economic activities abandoned by the State or creating new ones. Under these conditions, opening the local market to foreign goods is a real danger for still delicate economies and can lead to their collapse.

Moreover, the institution of competition as the only rule governing economic life runs the risk, with the withdrawal of the State, of leading to serious social repercussions in terms of jobs, especially considering that the State used to be the principal employer.

Tunisia, which opted irrevocably for a market economy based on free competition under its international commitments, suffered, like other emerging countries, a high social cost, reflected in particular in the liquidation of 37 state enterprises that could not be saved and the contraction of thousands of jobs either in the context of privatisation of certain state enterprises or the restructuring of state enterprises in difficulty.

Moreover, are developing countries like Tunisia protected and do they have the means to protect themselves from unfair competition from certain products from developed countries and anti-competitive practices by some companies in those same countries in developing countries' markets?

And even where this unfair competition such as dumping and where anti-competitive behaviour such as selective and even exclusive distribution in developing countries' markets are found to exist, do the latter have the means to sanction parent or holding companies given that they are located in developed countries and exert pressure on their subsidiaries or partners based in developing countries?

Moreover, do the so-called developed countries and free market economies, which have forced the rest of the world to introduce and observe the rules of free competition and open up markets, themselves honour the rules of free competition? Do they fully open their own markets to imports as developing countries demand?

The application of quotas to products, especially agricultural products, from developing countries, the introduction by developed countries of a variety of non-tariff barriers, the setting of limited periods during which imports are authorised (citrus fruits, vegetables, fruit...) so as not to disadvantage local production, are these not anti-competitive behaviour designed to restrict market access?

Under such conditions, would it not have been preferable, before demanding that developing countries open their markets to foreign products, first to draw up an international code or charter on competition law precisely defining the content of competition rules and anti-competitive practices, and establishing an effective mechanism to combat such practices and sanction any breach of competition?

Furthermore, and with a view to allowing developing countries to protect themselves against abuses by holding companies, which unquestionably occupy a dominant position in sectors or market segments where they operate and which abuse this position by imposing draconian anti-competitive conditions on their distributors in developing countries, would it not have been appropriate to establish an international legal aid agreement in respect of competition?

Would such an agreement not have helped developing countries to sanction anti-competitive behaviour by foreign companies in their countries by helping them to undertake investigations in countries where the parent companies had their registered office and enforce sanctions pronounced against them?

In the light of the foregoing, it would seem that free competition, even in developed countries, is not an end in itself and that it is limited by the need to protect the economic and social interests of the country concerned in the light of its particular characteristics and constraints.

It is against this background that the Tunisian legislator, as a precondition for the total opening of the Tunisian market to imports, established a series of accompanying measures and included some exceptions in competition law to the principle of free competition.

4. Accompanying measures and exceptions to the rules of free competition

A. The transition from a protected economy to a market economy necessarily involved preparing Tunisian companies to meet competition in their own market and to invest in foreign markets in order to alleviate the structures of the market. This preparation was effected through a series of measures:

Upgrading

A huge assistance programme has been in place since 1996 to support Tunisian companies and help them to improve their performance at all levels (management, production, acquisition and mastery of new technologies, etc.).

This programme, which continues until 2007, covers some 500 companies.

Up to 2001, the number of companies benefiting from the programme was 2000, for a total of 2000 million dinars. The programme, which initially involved manufacturing companies, was extended in 2000 to service companies.

Fonds de développement de la compétitivité:

Created in 1995, this competition development fund is intended to help companies to improve their management by granting subsidies of 10 to 20% of planned investment.

Fonds de promotion et maîtrise de la technologie:

This fund for the promotion and mastery of technology was instituted in 1991 to help finance acquisition and mastery of technology by industrial enterprises. The assistance takes the form of direct financial aid up to 50% of the cost of financing.

Fonds de Promotion des Exportations:

Created in 1984, this export promotion fund aims to assist companies in entering foreign markets, especially new markets, by financing market prospecting, advertising campaigns abroad and participation in foreign fairs and salons.

Fonds d'insertion et d'adaptation professionnelle:

Instituted in 1991, this vocational training and employment fund operates several schemes to help preserve jobs, stimulate the creation of new jobs and encourage labour mobility.

B. As free competition is a vector of economic development and not an end in itself, the Tunisian legislator laid down exceptions to that principle where the application of competition rules might dangerously disrupt a sector or where derogating from it would contribute to economic and technological development.

1. An exception to the principle of price-setting by market forces is contained in article 3 of the 1991 Act for a list of basic consumer products widely used by the most deprived sections of the population.
2. The Minister of Trade is authorised under article 4 of the Act to take temporary derogating measures for a period of 6 months when there is found to be serious disruption in an economic sector so as to combat excessive price rises.

3. The Tunisian legislator, who prohibited cartels and exclusive dealerships, allowed the Minister of Trade to authorise them when it was shown that such practices would lead to economic or technological progress and that they provided a benefit to the consumers.
4. Economic concentrations were made subject to prior approval of the Minister of Trade when they might cause or accentuate a dominant market position.

II. - TECHNICAL ASSISTANCE IN THE AREA OF COMPETITION

Tunisia has been embarked since 1986 on economic reforms aimed at creating an environment to encourage the development of competition in the domestic market. Noteworthy among these reforms is the institutional system responsible for applying competition rules. It consists of the administration (Department of Competition and Domestic Trade and the Regional Departments of Trade) and the *Conseil de Concurrence*.

The administration is primarily responsible for the implementation of competition policy and consumer protection, as well as drawing up the related regulations, monitoring the operation of the market and conduct of economic surveys.

The *Conseil de Concurrence* has a dual role:

- A judicial role in which it is a judicial authority in respect of anti-competitive practices.
- An advisory role whereby it can be called on to give its opinion on draft legislation and regulations and all competition-related issues.

Despite the changing legal and institutional environment, the application of competition rules has proved difficult. In general, the causes are related to the structure of the market, the behaviour of economic operators and consumers and the lack of effective means of communication. Aware of this situation, the *Conseil* intends to introduce a broad programme with the following objectives:

1. Enhancing the *Conseil's* powers to intervene in the case of dysfunctioning of the domestic market.
2. Advocacy concerning competition rules aimed at economic agents and legal circles.
3. The programme consists of four key components:
 - training for the staff of the *Conseil*.
 - technical assistance in undertaking surveys and studies.
 - promotion of a competition culture.
 - equipment.

1. Training:

The aim is to enhance the skills of the staff of the *Conseil* in carrying out investigations and surveys into anti-competitive practices and passing judgement on the legality of the practices at issue. The activities envisaged in this context include, in particular, organising:

- conferences and seminars in Tunisia and abroad;

- regional seminars;
- workshops with small groups on specific technical subjects. These subjects could include:
- criteria for evaluating a competitive market;
- techniques for investigating anti-competitive practices;
- use of economic concepts to analyse a competitive market.

2. Sectoral surveys and studies

This involves conducting sectoral surveys with the objective of creating a database on the structure of sectors to be used by the *Conseil* in its work.

Among the sectors that could be covered by these surveys, the following should be mentioned:

- the construction materials sector;
- the agro-food sector;
- the transport sector.

3. Competition culture

The objective of this component is to disseminate competition policy, particularly among economic operators who would benefit from this policy.

This component should be centred on publicising the rules and benefits of competition through a publicity campaign aimed at:

- a broad audience (consumers);
- professional bodies through associations;
- economic operators and their professional organisations (sector by sector);
- government administration and local authorities;
- professions and bodies concerned with competition law (universities, lawyers, judges).

All possible media (radio, television, brochures, creation of a competition law association...) will be used for this campaign.

4. Equipment

It is planned in this context to acquire computer equipment to strengthen the *Conseil's* material resources, thus increasing the operational capacity of the staff of the *Conseil*. The computer equipment will consist of 10 desktop and portable computers.

It should be noted that the cost of this programme (excluding taxes) is estimated at 300,000 euros.

III. - OVERVIEW OF THE TUNISIAN *CONSEIL DE CONCURRENCE*

Enforcement of rules against anti-competitive practices under Tunisian law is the responsibility of the *Conseil de Concurrence* together with the Department of Competition and Domestic Trade which effectively take on the powers of economic police.

Two issues are discussed below:

1. **Description of the *Conseil de Concurrence* and overview of its relationship with the Department of Competition and Domestic Trade through the procedures applied by it:**

The *Conseil de Concurrence* was created by Law No. 95-42 of 24 April 1995 amending the Competition and Prices Act, Law No.91-64 of 29 July 1991, article 9 of which created the Competition Commission. This Commission did not operate on a continuous basis and was replaced by the *Conseil*, which is defined as an independent authority with judicial and advisory powers in competition matters.

A. *Composition*

The *Conseil de Concurrence* consists of 13 members appointed by decree.

1. A full-time chairman appointed from the judiciary or experts in economics, competition or consumer affairs for a period of 5 years, which is not renewable in the case of judges, and renewable once for the others.
2. Two vice-chairmen:
 - An adviser to the administrative court as first vice-chairman.
 - An adviser to one of the chambers of the court of auditors responsible for control of public institutions as second vice-chairman.

Their term is also 5 years, renewable once.

3. Four judges, 2nd grade or above.
4. Four persons who work or have worked in the manufacturing, distribution and service sectors for a term of 4 years not renewable.
5. Two persons chosen for their expertise in the field of economics, competition or consumer affairs, for a period of 6 years not renewable.

The composition of the *Conseil de Concurrence* is thus diverse and all parties concerned with the free play of competition are represented on it.

Alongside the judges, the present members include a professor of management, representatives of the economic and professional world and a representative of the consumer protection organisation.

A government commissioner is appointed to the *Conseil de Concurrence*, currently the Director of Competition and Domestic Trade or his representative.

Cases are drawn up by permanent reporters or contractual reporters appointed for one or more cases. These reporters are supervised by a reporter-general.

The secretariat consists of a permanent secretary with the rank of Director in the central administration.

The *Conseil* is currently chaired by a judge. He is assisted by two full-time vice-chairmen.

B. Functions

The *Conseil de Concurrence* has a dual role: one judicial, the other advisory.

With respect to its judicial activity, the *Conseil* has powers to judge and sanction anti-competitive practices based on illicit cartels and abuse of dominant position, to which should be added abuse of economic dependency; unreasonable limitation of market access by choosing selective or exclusive distribution channels; fixing of minimum prices; sales on discriminatory terms; refusal to sell and conditional sales, segmentation of markets or sources of supply.

Of course, this list is not exhaustive.

However, under article 8 practices which can be justified by their authors to the competent authorities as having the effect of securing an economic programme and that they produce for users a fair share of the resulting benefit are not considered to be anti-competitive. Such practices are subject to time limits.

Authorisation is granted by the Minister of Trade, who may seek the opinion of the *Conseil* on the matter.

With regard to its advisory mission, the *Conseil* has a very important role:

It gives its opinion on:

- competition law and regulations.
- proposed company mergers.
- any competition issue, especially exemptions.

The request for an opinion is optional for the Minister of Trade, except for authorisations of requests for concessions or exclusive representation.

Prosecution by the *Conseil* is subject to a number of rules, in both litigation and advisory matters.

Procedure

Persons entitled to make application to the *Conseil*:

In litigation, only persons listed in the article 11(new) of the Competition and Prices Act can make application to the *Conseil de Concurrence*.

They fall into six categories:

- The Minister of Trade on his own initiative or at the request of the Government;
- Economic enterprises;
- Professional organisations;
- Trade unions;
- Accredited consumers' organisations;
- Chambers of agriculture or commerce and industry.

Enterprise must be understood in the broad sense: they are deemed to include not only legal persons in private or public law operating for profit but also all non-profit economic entities such as approved associations. A natural person who is self-employed or a member of a liberal profession is also deemed to be an enterprise.

Likewise, the *Conseil de Concurrence* may act on its own initiative where a plaintiff withdraws his action or if it discovers offences in other markets linked to the market concerned in a case before it.

The case file

The procedures for application to the *Conseil de Concurrence* are set out in the above-mentioned article 11(new).

The proceedings are initiated by an application signed either by the Minister of Trade or the legal officer of the enterprise or the applicant organisation or by any person duly authorised for the purpose by the legal officer or a lawyer acting on his behalf.

- the application must be accompanied by preliminary evidence;
- the application may be lodged with the secretariat of the *Conseil* against receipt or sent by registered letter with a receipt.

The applicant is not required to inform the other parties to the proceedings nor to communicate the contents of the file to them.

Legal representation before the *Conseil* is optional and the procedure does not give rise to financial outlay. It results in a "decision" given by a section. It may be appealed to the administrative court.

The *Conseil's* decision has binding force. It is notified by an officer of the court and executed by the Minister of Trade.

Advisory proceedings:

The *Conseil de Concurrence* may be consulted by any of the persons entitled to submit complaints other than enterprises, through the Minister of Trade.

The *Conseil* sitting in full session issues an opinion, but it is not a binding opinion. In practice, however, the Minister has always taken the *Conseil's* opinion into account, especially in the area of company mergers where the *Conseil* is normally consulted as an expert solely on the competition issues arising from the merger.

In conclusion, the *Conseil's* advisory powers extend to all sectors of economic activity on all competition issues, but in litigation, it can only deal with so-called "anti-competitive" practices.

It therefore does not have the power to investigate and sanction so-called "restrictive" practices except in the context of cartels or when they result from an abuse of dominant position or economic dependency. It also does not have the power to hear complaints of unfair competition or actions for void of contract.

Unclassified

CCNM/GF/COMP/WD(2002)33

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

14-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM UKRAINE

This note is submitted by Ukraine as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120840

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)33
Unclassified

English text only

I. IMPACT OF COMPETITION POLICY ON ECONOMIC GROWTH IN UKRAINE

In 2001 competition in Ukraine developed under conditions of the increase in and the strengthening of positive tendencies existing in the national economy.

Economic processes which took place in the mentioned year displayed mutual relationships between and mutual impact of, on the one hand, the development of competitive relations and, on the other hand, economic revival.

The increase in the gross domestic product that for the first time during the independence was fixed in 2000 has been continuing. For the first seven months of 2001 the real gross domestic product increased by 10.5% as against 5% for the relevant period of 2000. The tendency towards broadening internal demand is strengthening. The increase in production is to be observed in terms of nearly all the basic types of economic activities.

The internal market is broadening thanks to the growth in real incomes of the population. The gross retail turnover of both retail trade enterprises and catering enterprises increased by 11.4% for the first seven months of 2001. Products of Ukrainian producers constitute nearly three fourths of the gross sales of consumer goods to be sold by officially-registered trade enterprises.

The revival of investment activities continues. For the first half of 2001 the volume of investments in fixed capital (capital investments) increased by 23.6% as against the volume in the relevant period of the previous year (in the previous year the corresponding volume increased by 21.1%).

The introduction of market reforms activating both the realisation of entrepreneurship potential and the development of private initiative continues. Prerequisites for the formation of competitive environment are created as a result of measures taken in the course of the demonopolisation of the economy. For the last five years the number of monopolised national product markets decreased by approximately 26%. Demonopolisation by means of the liquidation, split-up or reorganisation of both state organisation structures of a monopoly type and economic entities is completed in the main.

Industrial production continues to increase rapidly. For the first seven months of 2001 its volume increased by 17.9% as against the volume in the relevant period of the previous year (in the previous year the corresponding volume increased by 11.9%).

From January through July the highest rate of increase in products was to be observed in those branches where competitive environment had formed. While the gross increase in industrial products was equal to 17.9% the rate of increase in products was equal to 22.2% in both the food industry and the sphere of processing agricultural products, 20.7% in the light industry, 24.3% in the pulp and paper industry, 30.4% in the woodworking industry. In the sphere of services the physical volume of bulk turnover increased by 16% and the physical volume of retail turnover increased by 11.4% in comparison with the relevant volumes in the previous year. The high rate of increase took place in such export-oriented branches of the economy (mechanical engineering, metallurgy and metal-working industry) that operate under conditions of significant competition with foreign producers of goods on external markets.

According to the preliminary estimate of the situation, the share of the most monopolised branches and spheres of the economy in the gross domestic product has decreased predominantly thanks to higher rates of growth in the competitive sector of the economy.

There were measures taken with a view to improving tariff policy in the sphere of natural monopolies, in particular measures of that sort were taken in the electric-power supply industry, in the sphere of water supply and on the railway.

Some measures were taken for the purpose of removing groundless barriers to entering specific product markets. In particular, certain work was done in order to revise some normative and legal acts on the use of broadcasting channels, in particular channels of broadcasting and cable television, with a view to removing restrictions of the consumer right to choose means for receiving television programmes.

The separation of airports from enterprises which carry out transportation by air is completed in the main, in particular in 2001 there were seven separated airports.

In 2001, however, the need for the practical introduction of a modern non-departmental system of the state regulation of subjects of natural monopolies, in particular those in the spheres of transport and communication, became more acute. The necessity for the radical improvement of the system of state regulation in the sphere of electric communication is getting more urgent in connection with the forthcoming privatisation of the Public Company *Ukrtelecom*, the largest enterprise in the branch.

The problem of ensuring equal conditions of entrepreneurial activities to all economic entities irrespective of their forms of ownership is not tackled completely. The non-regulation of the system of state aid rendered to certain economic entities and branches of the economy has a negative impact on conditions of competition. The artificial monopolisation of certain product markets is facilitated by the non-adherence of bodies of executive power to competition principles in the course of their defining such economic entities that are empowered to be engaged in specific types of economic activities when the number of economic entities of that sort is limited.

The basic purposes, tasks and mechanisms of the implementation of competition policy at the present stage are defined by the Decree of the President of Ukraine of 19 November 2001 No 1097/2001 "On the Basic Directions of Competition Policy for 2002-2004."

The implementation of a complex of measures to form effective competitive environment as a mechanism which in the nearest future should facilitate fixing and strengthening such economic growth that is combined with the fulfilment of the basic tasks of social development and which in the remote future should become one of the major factors determining the creation and functioning of effective and socially-oriented market economy in Ukraine is provided for. The decrease in the share of the monopoly sector in the economy of Ukraine, in particular down to 10-12% of the gross domestic product, is considered to be the long-term goal. As far as the competitive sector of the national economy is concerned, the Decree defines the improvement of competition rules, the protection and maintenance of competition and the development of institution support to be its goal. Finally, as far as the sphere of natural monopolies is concerned, the goal of state policy in the nearest years is the introduction of modern methods to regulate activities of subjects of natural monopolies as the first preparatory stage necessary for the liberalisation of entrepreneurial activities in this sphere.

It is defined that one of the basic directions of competition policy for the nearest years should be the co-ordination of other elements of economic policy of the state, namely industrial, foreign economic, regulatory and privatisation policies, with competition policy.

This co-ordination should ensue from the necessity to ensure the effective development of competitive relations, the further decrease in the monopolisation of the economy. The increase in the competitiveness of national enterprises is an important aspect of the development of effective competitive

environment. For this purpose it is provided for that necessary measures to improve the structure of enterprises during their preparation for privatisation by separating non-profile production subdivisions and objects of social infrastructure, by creating the proper conditions of foreign economic activities for domestic economic entities, in particular in connection with violations of antidumping procedures outside and inside Ukraine, should be taken.

The optimisation of activities of bodies of executive power and bodies of local self-government as subjects of economic relations which is considered to be an element of competition policy includes the following: ensuring the observance of competition principles in cases where bodies of that sort perform regulatory functions in terms of economic entities' entering product markets; improving the mechanism of performing functions associated with managing state property by bodies of executive power; optimising the volume of economic activities to be performed by bodies of executive power; introducing a mechanism to regulate both prices and tariffs of services rendered by bodies of executive power.

The primary measures to improve the regulation of activities of subjects of natural monopolies in Ukraine in the nearest years are as follows: the improvement of rules of rendering services by subjects of natural monopolies, the creation of such mechanisms of their forming prices (tariffs) that could stimulate the decrease in both costs and losses; the improvement of both the procedure of licensing activities in spheres of natural monopolies and mechanisms of exercising control over the observance of licence conditions by subjects of natural monopolies; the revision of rules of joining networks which belong to subjects of natural monopolies in order to exclude any possibility of imposing groundless requirements.

It is provided for that measures to improve organisation, material, technical and scientific support to the implementation of competition policy should be taken.

Proceeding from the fact that the implementation of the basic directions of competition policy requires concerted actions of both state bodies and the whole society, it is provided for that representatives of economic entities, their associations and public organisations should be involved in the development of drafts for normative and legal acts on the protection of economic competition.

II. EXPERIENCE IN INTERNATIONAL CO-OPERATION IN CARTEL AND MERGER INVESTIGATIONS*

1. The most specific norms of co-operation in the investigation and consideration of cases concerning competition are contained by the following two official intergovernmental agreements, to which Ukraine is a party:

- Treaty of Conducting Concerted Antimonopoly Policy by Countries of the Commonwealth of Independent States (of 25 January 2000).
- Treaty Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation Signed to Co-operate in the Development of Competition (of 13 July 2000).

Unfortunately, at present there are no official translations of the mentioned documents into English, thus in case of need the documents can be submitted only in the original.

We should like to inform that, as it is provided for by these international treaties, the Antimonopoly Committee of Ukraine may exchange information and co-operate with foreign competition authorities. These documents contain a modern procedure of specific interaction between competition authorities in the application of national antimonopoly laws, of the co-ordination of joint measures taken with a view to preventing, limiting and terminating anticompetitive activities of economic entities, overcoming negative consequences resulting from that sort of activities or interference of state bodies in economic activities of member countries if the consequences infringe on important interests of the relevant parties and negatively impact on their trade relations. In the course of the development of the above agreements international experience in this sphere was used, in particular recommendations of the European Commission, the UNCTAD and the OECD and effective agreements in this sphere were taken into account, including the Agreement Between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws.

The above matters are regulated by norms of the Treaty Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation Signed to Co-operate in the Development of Competition, in particular:

- Article 4 establishes that co-operation of that sort should be carried out in such forms that make it possible to take into account interests of the parties to the treaty in competition timely and maximally, including such forms as sending notifications, making requests for information or consultations, exchanging information, exchanging experience, pursuing joint studies.
- Article 5 establishes that if one of the parties to the treaty finds out that actions of economic entities or bodies of state power to be carried out in the territory of its state can negatively impact on competition on product markets of another party, the former should notify the latter of the fact. The latter should consider an opportunity for taking the relevant measures in accordance with requirements of national laws and should inform the former of the results.
- Article 6 establishes that in the course of the consideration of actions which negatively impact on competition a party to the treaty has the right to send another party a request for sharing

* The present document contains answers to the QUESTIONNAIRE TO INVITEES ON INTERNATIONAL CO-OPERATION IN CARTEL AND MERGER INVESTIGATIONS. The numbering of the points of the present document is conformed to the numbering of the relevant questions.

such information that concerns entrepreneurial activities of economic entities. The latter has the right to refuse the requested information if that sort of information has already been submitted or can be submitted by the relevant economic entity in accordance with national laws or is considered to be confidential.

- Article 7 establishes that parties to the treaty for the purpose of approving agreed decisions should hold consultations on matters concerning the application of the treaty.
- Article 8 establishes that parties to the treaty should assist each other to receive such information that is of mutual interest, that could facilitate the increase in the effectiveness of the application of competition laws of Ukraine and (or) the Russian Federation and that could include data having relation to the application of competition laws.
- Article 10 provides for an opportunity for pursuing joint studies in the relevant branch of the economy if there are signs of such actions that negatively impact on competition.

The Treaty of Conducting Concerted Antimonopoly Policy by Countries of the Commonwealth of Independent States contains provisions on the exchange of information about the state of product markets, practical results of demonopolisation, methods for and experience in work having relation to preventing, limiting and terminating monopoly activities and the development of competition. On the basis of this treaty its parties may exchange data contained by national registers of enterprises being monopolists which supply products to their product markets and may exchange experience in the consideration of cases concerning violations of antimonopoly laws.

Ukraine within the framework of its participation in the work of the Interstate Council on Antimonopoly Policy, which has been established in accordance with the mentioned treaty, has developed such model methodological recommendations on exercising state control over economic concentration that are based on the application of antimonopoly laws by the relevant bodies of member countries of the Commonwealth of Independent States.

The methodological recommendations are designed for using them in the course of exercising state control over such actions performed by bodies of power of all levels and by economic entities that can result in the establishment of monopoly formations, in the monopolisation of product markets, in the attaining or substantial strengthening of a monopoly position by certain companies, in significant restrictions of competition.

2. In addition to the above mentioned treaties, Ukraine has signed a number of such interstate normative and legal acts concerning economic co-operation that, in particular, contain provisions in regard to the establishment of co-operation in the sphere of competition policy. Norms which concern economic co-operation and which are considered to be the general basis for interstate co-operation in the implementation of competition policy, including control over economic concentration, are contained by agreements on free trade which have been signed between the Government of Ukraine and the Governments of the Republic of Azerbaijan, the Republic of Armenia, the Republic of Byelorussia, the Republic of Georgia, the Republic of Kirghizstan, the Latvian Republic, the Lithuanian Republic, the Republic of Estonia, Macedonia, the Republic of Moldova, the Russian Federation, the Republic of Turkmenistan and the Republic of Uzbekistan.

The interdepartmental co-operation in the improvement of both conceptual and legal principles of competition policy, the exchange of experience in conducting investigations are also provided for by agreements which the Antimonopoly Committee of Ukraine has signed with the relevant authorities of the Republic of Byelorussia, the Republic of Bulgaria, the Lithuanian Republic, the Republic of Poland, the Slovak Republic and the Czech Republic. The major goals of these agreements were the establishment of professional contacts and the exchange of general information rather than professional co-operation in the consideration of cases concerning violations of competition laws because the agreements had been

concluded at the time when the relevant competition authorities and competition laws were in the making. At the present stage the Committee has assigned itself the task to renew the mentioned agreements qualitatively with a view to creating the appropriate prerequisites for their practical application in the consideration of violations having international character.

Cartels

3. As far as formal requests to foreign competition authorities for information which were issued by the Committee during its considering cases, the following data are available:

- a. One request.
- b. Germany (Federal Cartel Office — *Bundeskartellamt*).
- c. In the request, it was suggested that pieces of information about facts established during the investigation of cartel agreements between producers with the participation of a group of companies comprising *Dyckerhoff Rhein Main GmbH* (Germany), *Lafarge* (France), *Heidelberger* (Germany) and *Holderbank* (Switzerland), that information of any companies being purchasers of cement about cartel agreements between producers of cement and other information about such international cartels on markets of cement that could impact on markets of both cement and cement products of Ukraine should be submitted.
- d. There was one granted request.
- e. The information received in response to the request was rather useful because it, first, elucidated the circumstances under which the above group of companies took part in cement cartels in member countries of the European Union, second, contained additional data on the investigation of regional aspects of concentration on Ukrainian markets and, third, was taken into account in the course of the Committee's making decisions to give its consent to economic concentration. At the same time, for lack of direct links with competition authorities of other countries in which the cement-producing companies were established it was not possible for the Committee to send the relevant formal requests, which necessitated the collection of additional information and caused the period of the case consideration to be extended.

4. The Committee has received no formal requests from foreign competition authorities for information or assistance in the course of the investigation or consideration of a case concerning hard core cartels.

Mergers

7. The Antimonopoly Committee of Ukraine has no information about cases where a merger that the Committee had reviewed was also reviewed by the competition authority of another country. At the same time, we inform that the Committee gave its consent to such mergers of economic entities that took place in other countries.

The Committee considered an application of the authorised representative of both *Case Corporation* (USA) and *New Holland N. V.* (the Netherlands) for giving the Committee's consent to the purchase of a controlling block of shares of *Case Corporation* by *New Holland N. V.* The mentioned economic concentration took place outside Ukraine; nevertheless, economic entities having relations of control with both the former and the latter performed economic activities in Ukraine. The submitted information was sufficient for the Committee's taking a positive decision and therefore the Committee did not request foreign competition authorities to submit information.

Similarly, the Committee considered an application for giving its consent to the purchase of shares in authorised capital of *Ameli GmbH* by *Braureret Beck GmbH Co KG*. Although the purchase took place in Germany, the purchaser is comprised by the group of companies *Interbrew S. A.* which operates in Ukraine on the national market of beer. The company whose shares were being purchased also operates in Ukraine on the same market. That is why the mentioned concentration could impact on the national market. Having analysed the market shares of the participants in the concentration, the Committee concluded that the concentration would result neither in the limitation of nor in the removal of competition on markets of beer and non-alcoholic drinks in Ukraine.

The Committee considered the relevant application and gave its consent to the purchase of shares of *Henkel-Ecolab GmbH & Co OHG* (Germany) and shares of *Henkel-Ecolab Inc* (USA) by *Ecolab Inc* (USA). Although the concentration proper has taken place outside Ukraine, *Henkel-Ecolab GmbH & Co*, a participant in the concentration, exercises control over economic entities operating in Ukraine.

8. As far as co-operation with foreign competition authorities is concerned, the following information is provided.

- I. Co-operation with the Federal Cartel Office of Germany.
 - a. The Public Company *Volyn* (the town of Zdolbuniv, Rivnenska region) is the emitter; the Group of Companies *Dickerhof AG* (Germany) — is the purchaser.
 - b. The Federal Cartel Office of Germany.
 - c. Requests for information were sent by ordinary post and transmitted by telefax to Mr Ulf Böge, the President of the Federal Cartel Office of Germany, in connection with a complaint lodged by *Volyn* against the participation of *Dickerhof AG* in cement cartels. Four plants of the mentioned group which are situated close to the western boarder of Ukraine operated on Polish markets, which was indicative of the probability of the group's monopolising regional markets of cement in Western Ukraine. In addition, there was an exchange of materials concerning activities of the competition authorities as a result of which the Antimonopoly Committee of Ukraine has received a report of the Federal Cartel Office of Germany on the study of cartel agreements having relation to markets of concrete mortar and mixtures in Germany.
 - d. The parties to the merger did not object to enabling the Antimonopoly Committee of Ukraine to exchange information directly with the Federal Cartel Office of Germany.
 - e. The information given by the Federal Cartel Office of Germany had a substantive impact on the proceedings concerning the concentration because the given information confirmed honest intentions of the purchaser with respect to Ukrainian markets of cement.

- I. Co-operation with the Ministry of the Russian Federation for Antimonopoly Policy and Support Given to Entrepreneurship.
 - a. The Public Company *Rivneazot* (Rivnenska region) is the emitter; the Closed Company *Ukragrokhimpromholding* (the city of Kyiv) and the Public Company *Gazprom* (Russian Federation) and the Limited-Liability Company *Mezhregiongaz* (the two companies have relations of control with *Ukragrokhimpromholding*) constitute the purchaser of a controlling block of shares.
 - b. The Ministry of the Russian Federation for Antimonopoly Policy and Support Given to Entrepreneurship.
 - c. Requests for information were sent by ordinary post and transmitted by telefax to Mr Iliya A. Yuzhanov, the Minister of the Russian Federation for Antimonopoly Policy and Support Given to Entrepreneurship. In addition, there was an exchange of materials concerning activities of the competition authorities. Relations of control existing between the purchaser

- and economic entities registered in the Russian Federation constituted the subject matter of the relevant request for information.
- d. The parties to the merger did not object to enabling the Antimonopoly Committee of Ukraine to exchange information directly with the Ministry of the Russian Federation for Antimonopoly Policy and Support Given to Entrepreneurship.
 - e. With the assistance rendered by the Ministry of the Russian Federation for Antimonopoly Policy and Support Given to Entrepreneurship the necessary information was provided directly by the relevant economic entities without delay. The furnished information confirmed the honest intentions of the purchaser and had a substantive impact on the proceedings concerning the concentration.

III. In addition to cases of co-operation in the form of such exchanges of information that were initiated by the Antimonopoly Committee of Ukraine, the Committee, in its turn, furnished information about market situation which was necessary for conducting studies, namely:

- to the Ministry of the Russian Federation for Antimonopoly Policy and Support Given to Entrepreneurship — information about existing relations of control and about the volume of products supplied by the Closed Companies *ARS* and *Danko* and the Corporation *Industrialnyi Soyuz Donbasu (The Industrial Union of the Donbas)*. The information was necessary for considering a merger case. The Committee did not furnish the total volume of information because information about existing relations of control, as it is provided for by effective laws of Ukraine, is confidential. With the assistance rendered by the Antimonopoly Committee of Ukraine the necessary information was provided directly by the relevant economic entities without delay.
- to the State Committee of the Republic of Uzbekistan for Demonopolisation and the Development of Competition — information about characteristics of the Ukrainian energy market and about conditions of operation on the market.
- to the State Antimonopoly Service Under the Ministry for Economy, Industry and Trade of Georgia — information about activities of the Company *AES* in the territory of Ukraine. The request concerned information about the company's fulfilling its obligations to consumers.

10. The Committee, when studying cases of concentration where Ukrainian enterprises being monopolists were objects of purchases and where transnational corporations operating on the markets of the same products were purchasers, thanks to its co-operation with foreign companies evaluated the impact of concentration on the mentioned markets. This took place, in particular, during the Committee's giving its consent to the purchase of blocks of shares of the Company *Malynska Paperova Fabryka (Malyn Paper Mill)* (Zhytomyr region) by the Company *WICOR Holding AG* (Switzerland). In order to conduct detailed research, requests were made with a view to ascertaining the situation on such market of insulating cardboard that has signs of a world market. It was established that there were more than 10 large companies operating on the mentioned market, which resulted in the application of a rather complicated procedure of obtaining information. The Committee is convinced that co-operation with foreign competition authorities, the absence of which was tangible during the consideration of the above case, is especially useful and necessary in cases of that sort.

The Committee, when considering the application of *Vychodoslovenske energeticke zavody*, a state enterprise in Koshice, for giving the Committee's consent to its purchase of a block of shares of Ukrainian energy-supplying companies, needed information about the financial support of *Vychodoslovenske energeticke zavody*. The Committee was informed that *Vychodoslovenske energeticke zavody*, having involved credit resources given by *Ukrainian Energy Partners*, a limited-liability company which is registered in the USA, had purchased three companies. The Committee managed to receive information about relations of control over economic activities from *Ukrainian Energy Partners* with great efforts. The Committee considered the received information to be sufficient for taking a decision, but

because of the short period within which it was necessary to consider the application the Committee had no opportunity to apply to the competition authority of the USA for its checking the information about relations of control received from *Ukrainian Energy Partners*.

Commentary on the above answers

In Ukraine, intensive processes of economic concentration take place. At the same time, each year more than 100 applications out of the total number of those submitted to the Antimonopoly Committee of Ukraine for giving its consent to economic concentration are filed by foreign investors or enterprises having foreign investments. For example, in 2000 and 2001 the Committee considered 169 and 143 applications (respectively) for giving its consent to concentrations in which foreign capital took part. The acquired experience in considering such applications made it possible to discover a number of problems whose solution needs co-operation on the international level. At present the major problems are as follows: the complete and right definition of relations of control between participants in a concentration, in particular relations concerning economic entities being non-residents of Ukraine; the appreciation of such potential competition that could be provided by economic entities operating outside Ukraine; the appreciation of an impact which concentration has on transnational markets.

It is considered that the basic forms of international co-operation, in which the above problems could be settled, are as follows:

- the creation of international legal basis which could lay down the foundations of that sort of co-operation;
- the exchange of information about forms of and methods for exercising control over economic concentration; the mutual development of a methodological basis for exercising that sort of control;
- co-operation in considering specific cases of economic concentration.

As the above data indicate, after 1 January 2000 the number of cases in which the Antimonopoly Committee of Ukraine co-operated in investigating activities of international cartels was insignificant. It should be pointed out, however, that the general tendency of the development of foreign economic relations of Ukraine, which is defined by a course held by our state for both its gradual integration into the world economy and the involvement of foreign capital with a view to developing national production, gives rise to interests of the Antimonopoly Committee of Ukraine in, first, acquiring professional experience to investigate activities of cartels and, second, developing co-operation with foreign competition authorities in this sphere. The Committee, proceeding from its practice, comprehends that the effectiveness of detecting and terminating activities of cartels, especially activities of transnational cartels, depends to a great extent on the proper exchange of both information and experience between competition authorities of different countries. National legal and procedural norms having relation to the detection and termination of activities of cartels are significantly improved thanks to the adoption of the Law of Ukraine "On the Protection of Economic Competition." The Antimonopoly Committee of Ukraine considers its joining the 1998 OECD Council Recommendation Concerning Effective Action Against Hard Core Cartels to be the next necessary step in this sphere. At present, this matter is developed by interested bodies of state power of Ukraine which are responsible for the implementation of competition policy of our state.

The Antimonopoly Committee of Ukraine hopes to co-operate with foreign competition authorities, first, in developing and applying rules of competitive behaviour with respect to activities of economic entities in different branches, in particular on the markets of building materials, building work, pulp and paper products, services rendered in the sphere of polygraphy, etc., and, second, in familiarising itself with such methods and instruments for investigating anticompetitive cartel agreements and mergers

that are applied by the competition authorities of Germany, France and Italy. The mentioned information is necessary, first, to develop the theory and practice of analysing both product markets and relations of control, second, to substantiate factors which make it possible to forecast effects of mergers with sufficient accuracy and, third, to develop methods for investigating cases concerning violations of competition laws of Ukraine.

**III. NEEDS
HAVING RELATION TO BOTH CAPACITY BUILDING
AND RENDERING TECHNICAL ASSISTANCE***

In 2000-2001 the Antimonopoly Committee of Ukraine received the following technical assistance (see also the annex).

1. A regional conference on competition policy was held in Kyiv on 13-14 July 2000 for Member Countries of the Commonwealth of Independent States and Countries of Central and Eastern Europe within the framework of the preparation for the Fourth Review UNCTAD Conference on Restrictive Business Practices.

Representatives of 22 countries and experts from international organisations took part in the regional conference thanks to the organisation and financial support provided by the UNCTAD, the European Commission, the OECD, the WTO and the Federal Trade Commission of the USA. The goal of holding an event of such a scale (in the region comprising countries of the Commonwealth of Independent States, Baltic countries, and those of Central and Eastern Europe conference of that sort was held for the first time) was to support activities of transitory economy countries and international organisations in the development of bilateral and regional co-operation, first, in competition sphere with a view to preventing and terminating anticompetitive practices which transcend territories of the relevant countries and, second, in the course of exercising control over international mergers.

The conference was a significant event of the historic and economic life of Ukraine. Proceeding from the results of the conference, its participants adopted the Kyiv Declaration and addressed it to the Fourth Review UNCTAD Conference on Restrictive Business Practices.

2. An international seminar on the application of competition laws, which had been organised jointly by the Antimonopoly Committee of Ukraine, the OECD and the Federal Trade Commission, was held in September 2000. Representatives of the central office of the Antimonopoly Committee of Ukraine and those of its territorial offices from among officials working at legal subdivisions and foreign experts took part in the seminar. Both pressing matters having relation to the application of competition laws by the Antimonopoly Committee of Ukraine and judicial practices in this sphere were considered with giving examples of specific cases concerning violations of competition laws.

Holding that sort of seminars in Kyiv turned to be an annual good tradition which is of great importance in terms of, first, their specific trend towards such analysis of the application of Ukrainian laws that is made, in particular, by foreign specialists of standing reputation and, second, the opportunity to broaden and strengthen professional knowledge accumulated by Ukrainian specialists and to associate informally with foreign colleagues. It should be pointed out that such association is mutually useful because in Ukraine there are peculiarities of the application of competition laws.

3. The implementation of the TACIS Project EDUC 9802 "Support to the Reforms of the Government and Central Organs of the Executive Power" started in February 2001. The basic goal of the project is to improve the capacity of the Government of Ukraine to implement a consistent strategy of reforming the government of the state. The task of a group of officials of the Antimonopoly Committee of Ukraine was to conduct research, within the mentioned project, into the subject: "Optimising the Organisation Structure of bodies of the Antimonopoly Committee of Ukraine" by making a study and

* The present document contains answers to the QUESTIONNAIRE ON TECHNICAL ASSISTANCE EXPERIENCE AND NEEDS.

comparative analysis of activities of competition authorities. The training was organised in accordance with the following scheme:

- a course of studies to be held for the purpose of familiarising participants with the key topics of the administrative reform;
- seminars, workshops and conferences to be held for the purpose of discussing the key aspects of a topic, reviewing the relevant European experience and developing a plan of actions and recommendations;
- training trips to Belgium, the Netherlands, Great Britain and Finland with a view to familiarising participants with alternative approaches to a topic;
- a two-week training of highly-qualified officials in Germany and Great Britain;
- making out the final report containing conclusions concerning the present situation in Ukraine, European experience, recommendations with respect to the reform and implementing plans.

It should be pointed out that, in general, the Committee has been getting technical assistance since 1993, in other words from the beginning of both the making of the competition authority and the enforcement of competition laws. The technical assistance has been rendered in the following forms: consultative assistance, training, seminars, international conferences, providing the Committee with legislative, normative and methodological literature concerning problems of competition laws of the EU member countries. All the forms of the assistance turned to be useful and important to us and, as it is obvious from practice, the greatest effect is produced when different forms of assistance are combined within the framework of a long-term project. For example, the Committee hopes that the TACIS Project "Legal and Institutional Basis for the Protection of Competition" will be approved and implemented. The project will consist of the following five components:

- Component 1: Executive guidelines, methodological framework and organisational structure to implement competition policy in Ukraine;
- Component 2: Informational and analytical support to the activities of the Antimonopoly Committee of Ukraine;
- Component 3: Development of legislation, in particular regarding state aid;
- Component 4: Communications (PR) policy, strategy and technology;
- Component 5: Development of the skills of the personnel of the relevant public bodies responsible for competition policy.

An international seminar on competition policy, on the initiative of the Antimonopoly Committee of Ukraine and with the organisational and financial support received from the UNCTAD, is planned to be held for member countries of the Organisation of the Black Sea Economic Co-operation in April 2002. The seminar should be an important step in acquiring experience necessary to develop international rules of competition. It is provided for, in particular, that a draft agreement on co-operation between member countries of the Organisation of the Black Sea Economic Co-operation in the sphere of competition policy should be developed on the basis of proposals made by the Antimonopoly Committee of Ukraine. The conclusion of that sort of agreement will facilitate, on the one hand, bringing about a rapprochement between Ukraine and member countries of the Organisation of the Black Sea Economic Co-operation and, on the other hand, involving Ukraine more closely in processes of the European economic development.

As far as consultative assistance to be rendered by advisors is concerned, the following comments can be made. In order to avoid circumstances in which a highly-qualified foreign advisor turns to be ignorant of the realities of the local competitive environment, the profound knowledge of effective legal, institutional and economic systems of the country which receives technical assistance is an important condition. In addition, it would be useful to reach such a level of interaction that would make it possible to

receive an expert advice in a highly specialised problem without unnecessary formalities and, in case of need, on the spot.

When characterising the Committee's needs in the sphere of competition law and competition policy, one can distinguish the following directions.

1. In the sphere of lawmaking

The new Law of Ukraine "On the Protection of Economic Competition," which comes into force in March 2002, contains a number of new provisions which are directed towards the enforcement of such material and procedural norms that are in agreement with laws of the EU and the EU member countries, which should ensure a significant rise in the standard of the legal protection of economic competition in Ukraine. This necessitates the development of by-laws, explanatory documents and methodological materials for the purpose of ensuring the transition, without conflicts, from the present regulatory system to a qualitatively new one and in order to insure the prevention of possible negative effects to be produced by that sort of transition on economic processes in the country, including its investment climate.

The next task is, first, to develop the text of a Draft Competition Code of Practice whose purpose is to define a procedure of considering cases examined on the basis of laws on the protection of economic competition and, second, to create a Code of Laws on Competition (Competition Code) which would contain material and procedural norms of competition laws and norms of international law. When this work is completed, one will be able to state that competition policy of Ukraine is implemented in agreement with a number of fundamental principles which have been applied in international trade, namely: non-discriminatory approach, national regime, transparency, interaction, special differentiated approach to countries having transitory economy.

The development of a draft law on rendering government aid is a condition necessary to approximate laws of Ukraine to those of the EU laws and the WTO requirements. This ensues from the absence of control over rendering and using government aid and results in numerous cases of its ineffective use (privileges, subsidies etc.). The adoption of that sort of law will make it possible to significantly increase opportunities of the state for arranging matters which are really necessary to create effective socially-oriented market economy.

2. In forming the culture of competitive relations

In recent years measures to ensure (in terms of the state) the development of competitive environment in Ukraine have been taken and prerequisites necessary for one's being engaged in entrepreneurial activities on the principles of fair competition have been created.

Nevertheless, Ukraine is characterised by a low level of culture in the sphere of competition, which becomes apparent in connection with:

- lack of necessary experience in being engaged in entrepreneurial activities in conformity with market principles;
- a low level of legal and economic knowledge accumulated by the society and a low level of legal culture developed by entrepreneurs;
- the insufficient understanding of both functional market mechanisms and rules of economic activities, in particular rules of competition;

- lack of both norms of professional ethics and traditions to be held in resolving conflicts having relation to competitive struggle, with a procedure of bringing about a reconciliation between the relevant parties being applied.

In many cases it is the insufficient level of culture in the sphere of competition that turns to be the cause of violations of competition laws committed by entrepreneurs.

3. In the sphere of natural monopolies

The Committee is in anxiety because of problems having relation to such economic concentrations that result in mergers of a number of natural monopolies. At the present stage of the making of market relation it is very difficult (sometimes it is even impossible) to arrive at economically-grounded conclusions concerning long-term effects of that sort of concentrations, in particular concerning the effectiveness of functioning of merged subjects of natural monopolies, concerning their impact on competition on other product markets and concerning the possible restriction of consumer rights.

The Committee is also in anxiety because it is on markets of natural monopolies that the Committee has detected many violations of competition laws. In these circumstances the implementation of economic concentrations in which a number of subjects of natural monopoly take part can result in the creation of more favourable conditions for committing violations by economic entities of that sort and at the same time can result in making control over the prevention of that sort of violations more difficult.

Taking into account the above information, the Antimonopoly Committee of Ukraine would be grateful for assistance to be rendered in the form of providing information about the world practice (experience of different countries) in the sphere of arranging matters which have relation to the implementation of economic concentrations in which subjects of natural monopolies take part, in particular in cases where a number of natural monopolies merge.

In addition, it would be very useful to receive (in the capacity of assistance) recommendations with respect to developing approaches to and analysing possible effects of a merger of several natural monopolies, to receive information about examples of considering, by competition authorities of other countries, matters concerning activities of subjects of natural monopolies, in particular examples of economic concentrations with the participation of natural monopolies.

Unclassified

CCNM/GF/COMP/WD(2002)11



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

05-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM VIETNAM

This note is submitted by Vietnam as a background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.

JT00120339

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)11
Unclassified

English text only

**TO BUILD COMPETITION LAW IN THE CONTEXT
OF THE TRANSITION TO MARKET ECONOMY IN VIETNAM**

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In the former central-planned and subsidized economic structure, there were only 2 sectors, the state sector and the collective sector. Enterprises in these two sectors did not have motivation to compete with each other since all input and output factors were assigned and planned. As a result, enterprises – the foundation of any economy – lacked motive for operation, leading to stagnancy in business and production and the shortage of common commodities.

The economic reform was launched in 1986; but in the legal terms only since 1992, our revised Constitution officially acknowledged different types of ownership, acknowledged equitable competition of enterprises.

Our achievements of economic reform in the recent year have helped to realize and fully understand the role of competition. At the present, the competition is considered as an internal drive of the economy. Under the pressure of the producers and the consumers in terms of price, quality and other factors, enterprises are forced to react reasonably. Competition is one of “internal drives” to make the production forces develop for the target of increasing labor productivity, of accelerating production concentration. Especially in the context of the fact that all factors of production such as natural resources, labor force, intellectuals and so on are the goods in the market.

The necessity of building competition law in Vietnam at the present deprives from followings:

1. The nature of the market economy

Vietnam's advocacy is to develop consistently the multi-sectors commodity economy operating in market mechanism under the State management. Competition is one of fundamental rules and principles of the market economy. Shifting the economy into the market direction forces us to continuously renovate our management structure as well as our legal system to regulate economic activities including competition.

2. The need of controlling State monopolies

At the moment, our economy is under the transition into the market economy. However, the State economic proportion in comparison with other economic sectors is still dominant, of which some goods are exclusively distributed by State-owned enterprises. It can be said that monopolistic enterprises in Vietnam market are merely established by administrative decisions, not by free and equitable competition. Therefore, it is critical for Vietnam to control and limit state monopolistic enterprises.

3. The need of international economic integration

In addition, it can be said that Vietnam economy integrated actively into the regional and global markets. In the year of 2001, export value per capita of Vietnam is 200 USD. In the field of investment, by the end of 2000, the total value of foreign direct investment tops USD 41 billions. However, the

appearance of foreign-invested enterprises and branches of foreign companies in Vietnam market intrigues some problems. Those are the differences in terms of the size, experience, financial strength between these enterprise/ companies and Vietnamese partners. Vietnam, like any other transitional economies, may face the situation that foreign enterprises can abuse the advantage of market liberalization to impose their restraints such as price fixing agreement, predatory pricing and other abusive behaviors to distort fair and equitable competition environment.

4. The need of creating equitable business environment

Based on experiences gained during 15 years of the "Doi moi" (renovation), our State has been committed to "continuously creating and completing well-structured market elements; renovating and improving the efficiency of the State economic management". In the light of this statement, we are sparing no efforts to create an equal and open environment favorable for both foreign and domestic investments and responsive to the changing production and business conditions. Vietnam's economy with a low baseline has been moving towards a market mechanism while the percentage of enterprises established in the old system is still very dominant. Therefore, the compromise between paving the way for State economic sector to develop and creating equitable competition environment forces us to have consistent principles in this field.

5. The reality of legal system for regulating competition activities at the present

The 1992 Constitution, which recognizes the right to business freedom of enterprises and the development of multi-sectors economy laid the first stone for competition environment for enterprises under all types of ownership in Vietnam. Since then, other legislations such as Civil Code, Criminal Code, Enterprise Law, Collective Law, Bankruptcy Law, Foreign Investment Law, Domestic Investment Law, Commercial Law, Ordinance on Goods Quality Management, Ordinance on Protection of Consumer Rights and the effort to restructure state owned enterprises have contributed to create equal legal framework for competition.

However, legislations that regulate the competition activities have only covered competition principles on commercial activities and fundamental rules protecting the rights of producers and consumers. These are not adequate for regulating the whole market's current competition activities.

Like any other nation, the objective of the competition policy in Vietnam is to create and to develop an equitable competitive environment, to maintain and to encourage healthy competition, to block any anti-competitive and unhealthy competition actions in the market; to protect the interest of the States, the legal rights and interests of business individuals, institutions and consumers; to contribute to the socio-economic development.

Nonetheless, due to the fact that Vietnam has just entered the market economy for 15 years, the nation is virtually lacking of experience in regulating competition activities. Unlike some suggestion supporting the viewpoint that the enactment of competition regulations will limit foreign investment, on the contrary, we are strongly with the viewpoint that the competition policy is the fourth corner stone in the economic legal framework, apart from commercial, financial and monetary instruments. This means the enactment of competition policy will help increase the attractiveness of the investment environment, toward a healthier and transparent environment. Enterprises will have a more equitable playground, small and medium enterprises are more well protected.

In drafting the Competition Law, Vietnam is facing a challenge that is establishing and running the competition regulatory authority in the future. In this task, the difficulty is how to maintain the independence of this body in the executive branch in accordance with the trend of limiting the establishment of new bodies and the merging of ministries in the light of administrative reform. We are also facing obstacles in setting up the procedures for considering exemption, procedures for investigating competition cases in the market. Therefore, we highly appreciate the international cooperation in assistance for regulating the policy. These helps came from *French Conseil de la Concurrence*, *Bundeskartellant*, UNCTAD. We are very grateful and willing to receive more cooperation and supports from other competition authorities, international institutions in completing the draft of the Competition Law to meet the deadline of submitting the Bill to our government by the end of this year. Besides, we are highly valued for the support from competition authorities in the field of capacity and institutional building to prepare for the human resource requirements of the Vietnam's competition authority in the future.

Unclassified

CCNM/GF/COMP/WD(2002)37



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

14-Mar-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

VENEZUELA'S FREE COMPETITION SYSTEM

This document was submitted by Venezuela as a contribution to the Global Forum on Competition (17-18 October 2001).

JT00122580

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)37
Unclassified

English text only

VENEZUELA'S FREE COMPETITION SYSTEM

The Free Competition Regime

The free competition regime in Venezuela started in 1992 when the government settled a group of new policies in order to prepare the country to face globalisation process, including to the Law to Promote and Protect the Exercise of Free Competition. The objective of the law is to promote and protect the free competition and the efficiency that benefits the producers and the consumers; and to prohibit monopolistic and oligopolistic practices and other means that could impede, restrict, falsify, or limit the enjoyment of economic freedom. In this sense, the normal subjects of law are natural or juristic persons, public or private, engaged in profitable or non-profitable economic activities within the country, or groups of agents engaged in such activities.

The Venezuelan System of Free Competition prohibits in general all the conducts, practices, agreements, etc. that impede, restrict, falsify or limit the free competition. In particular our legislation prohibits boycotts, cartels and other horizontal agreements, bid —rigging, vertical agreements that contains vertical restraints and the abuse of dominant position. The law has also a prohibition for all the mergers - horizontal, vertical or other-that are restrictive of the market or could generate o reinforce a dominant position in a relevant market. Finally, the law prohibits unfair competition in terms of misleading or false advertising, bribery in commerce, violation of industrial secrets, etc. and other commercial policies, which tend to eliminate competitors.

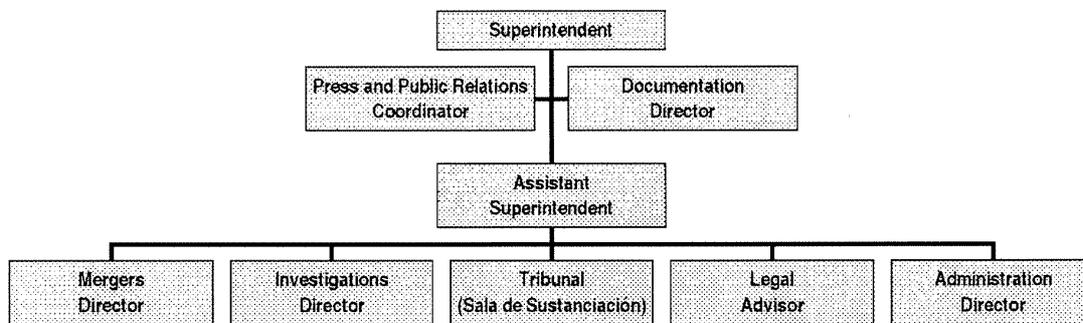
Cartels and bid-rigging, boycotts, abuse of dominant position and unfair competition are *per se* violations of the law. The other anti competitive practices should be analysed by the Office by the rule of reason theory in order to establish if there is or not a violations of the law or if the practice should be authorised by the Office because the efficiency that it provide. In order to develop the case, the Office use the methodology of the relevant market.

In the case of mergers, there are two ways to review them. One is to authorised them (*ex ante*) and that is voluntary for the parties, that is, the pre merger notification procedure is not obligatory. The other is by an administrative procedure of prosecution of an anti competitive practice, which is *ex post* and it is to determine if the merger has violate the law, because is anti competitive or restrictive of the competition.

The Competition Office

The law creates the Competition Office (Office of the Superintendent For The Promotion And Protection Of Free Competition) which is an independent Office (with operational autonomy), that is attached administratively to the Ministry of Production and Commerce. This Office has the power to investigate the existence of anti competitive practices and to impose fines against persons or firms that act against the law. Some of the powers and duties that the Office has are: to conduct the investigations necessary to verify the existence of anticompetitive practices; and prepare cases files concerning with such practices; to determine the existence or non existence of prohibited practices or conducts; proscribe and

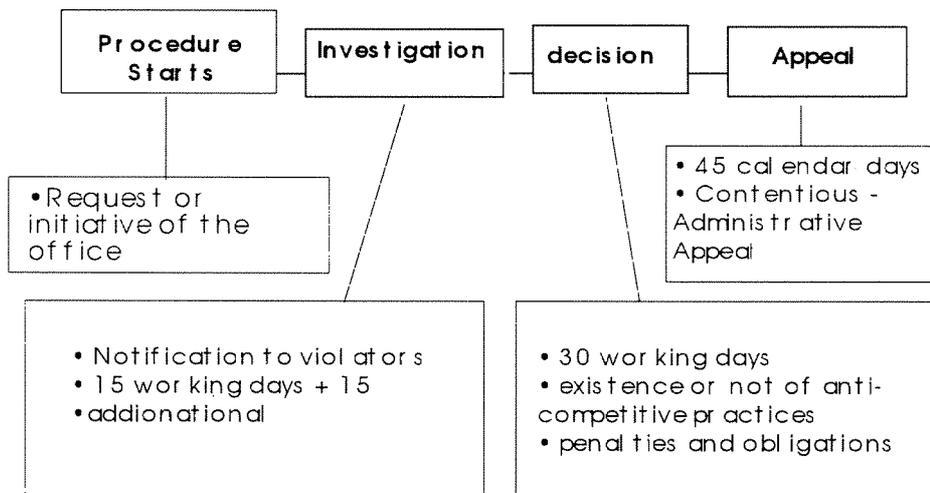
punished them; propose to the Executive Branch the regulations necessary for the application of the law; to issue an opinion on matters within its competence when so requested by the judicial or administrative authorities; etc. A Superintendent, who shall be appointed by the President of the Republic, shall administer the Office. The Superintendent has an Assistant Superintendent who is also appointed by the president. Both will exercise their office for four years and may be appointed for other periods. The Superintendent has a Tribunal (named Sala de Sustanciación) which has powers to: summon any person to appear to testify on pertinent matters; to require a person to present any documents or information that could be related to the alleged violation; to examine ledgers and documents during the investigation; to subpoena a person through the national press; to appear who may be able to furnish information with respect to the alleged violation; etc. In this sense, all persons and firms conducting business in the country, public or private must furnish the information and documentation required of them by the Office. The information provided is confidential. The Tribunal is under the Assistant Superintendent. The Tribunal, as we call it for translation purpose is a substantiation chamber that instructs the files and co-ordinates all the defence and offence arguments and proofs in order to give to the Superintendent the complete file for him to decide.



The Procedure

Regarding to the procedure in case of prohibited practices, they could be initiated by request of a concerned party or at the initiative of the Office. The Superintendent orders the initiation, and he orders the investigation to be held by the Tribunal. Once the case is open, the Tribunal notifies the alleged violators that the respective administrative enquiry has been opened, and indicates the violations that are being investigated. The parties have fifteen (15) working days period within to present their evidence and put forward their arguments. The period could be extended for fifteen (15) additional days if the tribunal deems it necessary. Once this period of time has elapsed, the Superintendent has thirty (30) working days to issue a decision in which he determines whether the existence or not of anti-competitive practices. The decisions adopted by the Office exhaust the administrative route, and the only remedy that may be undertaken is the Contentious —Administrative appeal within a period of forty — five (45) calendar days since the decision and then it shall be appeal at the Supreme Tribunal of Justice. Persons who are involved in the prohibited practices and conducts may be punished by the Office, with a fine of up to twenty percent (20%) of the value of the violators' sales.

In the case of mergers' authorisation (ex ante) or other practices, and for the resolution of this matters the procedure that applies is the regular one established in the Organic Law of Administrative Proceedings.



The protection of the free competition that is one of the objectives of the law is possible by prosecuting anti competitive practices and punishing them. In other hand the Office has another main activity that is the promotion of the competition. This activity is held by the office among different ways as presentations in academic and business forums, sectorial investigations, public policies analysis and opinions, revision of the laws or projects of new laws that will be approved by the National Conference (Congress), and others.

Unclassified

CCNM/GF/COMP/WD(2002)40



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

28-Mar-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

COMMENTS BY GEORGE K. LIPIMILE, ZAMBIA COMPETITION COMMISSION

These comments were submitted at the second meeting of the Global Forum on Competition, held on 14-15 February 2002.

JT00123372

Document complet disponible sur OLIS dans son format d'origine
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CCNM/GF/COMP/WD(2002)40
Unclassified

English text only

COMMENTS BY GEORGE K. LIPIMILE, ZAMBIA COMPETITION COMMISSION

I. HOW COMPETITION AUTHORITIES PROMOTE COMPLIANCE WITH COMPETITION LAW

In developing countries, promoting compliance to the competition law is still unattainable task because business is generally reluctant to comply with it, governments ignore it and in some cases do not want to know what it is and the public at large do not understand what it is all about. Most companies only see the need for a competition policy when they suffer personal or direct injury as a result of the behaviour of their competitors.

Promoting compliance with the competition law is made worse when there is an absence of a culture of competition in business. Zambia and many other developing countries are just emerging out of centrally controlled economies where government was the major player in business. In Zambia for instance, the state-owned enterprises accounted for about 80% of the country's economic activity. There was at the time no need for a competition law as the government was the only major player in the economy. There is still an absence of a competition culture despite the privatisation of the economy into the hands of the private sector entrepreneurs. The culture of none compliance extends to almost all business related laws inclusive of the competition laws and this remains a serious obstacle to a fully developed private sector driven economy.

As a result of the unfavourable competitive environment, the Zambia Competition Commission found itself, on its establishment, with a formidable task of creating a "competition culture" within the country. Our efforts to create public awareness and promote compliance have however started to bear fruits.

1. The Commission activities have come highly quoted and reported in the national press. Further, press inquiries on competition matters have been frequent both from the journalists and the public at large.
2. The number of matter being referred to the Commission by both government and non-governmental institutions has continued to increase. The Commission as a result has continued to offer advice and opinion on various economical matters.
3. The Commission has become an integral part of the policy formulation process at the Ministry of Commerce, Trade and Industry and other line ministries.

Despite the meagre resources and the lukewarm support the Commission has received from the government, the Commission is determined to promote and bring about the culture of competition. The Commission among other activities continued to carry out the following promotion strategies:

- The Commission has continued to participate and organise conferences, seminars and workshops in order to promote the understanding of the role of competition in a market economy. Various trade and professional association have continued to invite the Commission to participate and present papers at their events. The Commission has also taken such events as an opportunity for it to circulate its various publications. The Commission has demonstrated and publicised how it makes its decisions at such forums.

- The Commission has made attempts in creating public support for competition enforcement, by demonstrating how consumers and the public benefit from an effective competition policy. The Commission made interventions in the poultry, agro-processing (maize meal processing, fresh vegetables and flowers), oil marketing, beverages, constructions (cement), and alcohol beverages sectors among others. Following the interventions by the Commission, the companies in the sector made various undertakings and signed a compliance programme with the Zambia Competition Commission. In some cases, the dominant firms in these sectors had entered into various restrictive agreements with the weaker parties to ensure that they continue to dominate the relevant markets. In such cases, the Commission nullified the anti-competitive provisions of the agreements and opened up the sectors to more competition by so doing. The compliance programmes agreed with the Commission became the basis for interventions by the Commission whenever hold anti-competitive habits relapse.
- The Commission has on various occasions used institutions outside the Commission to develop competition expertise. The Commission has also used government channels to contribute towards the awareness of the parameters of the Act such as contributions in speeches of senior government officials in their address to the trade and business associations. For example, the speech by the President of the Republic of Zambia at the occasion of opening the 2001 International Trade Fair made competition and competitiveness, the theme of this speech. The Minister of Commerce, Trade and Industry has on many occasions used speeches with much inputs from the Zambia Competition Commission. The use of public officials is very effective for free and maximum media coverage.

Above all, the Commission has continued to publish its enforcement decisions. These are sent to the press, to all interested parties, and are accessible to the public. In addition, summaries of decisions are published in the Commission's Annual Report which is widely circulated. We have continued almost at every event taking place in the country to describe through statements, speeches and articles the government policy approach on competition.

The Commission has continued to develop a better understanding of its procedures. There is greater transparency in the application of the competition principles. We have enhanced transparency and certainty in our procedures by the publication of our guidelines and notices explaining the manner in which we analyse competition matters.

II. THE EFFECTS OF CARTELS

There has been studies carried out on the effect of international cartel activities on developing countries. The conclusions and findings arising from these studies are of important relevance to developing countries.

The important questions to ask are:

4. What are the developing countries doing about it? Do they have a say?
5. Are the developing countries in a position to challenge and contain the cartel activities in their markets?
6. Are developing countries better equipped in terms of resources and logistics to prohibit cartel activities in their markets?

There are some of the important questions which show how vulnerable the markets in developing countries are exposed to. I am really very doubtful whether a developing country at national level or individually can stand up against cartel activity. Developing countries need the assistance and support of developed countries. Why do I say so? I will pose some of the problems faced by developing countries:

- There is still lack of competition legislation in most developing countries. Where there is such legislation, the effective enforcement is still lacking, in some cases non-existence e.g. in the COMESA we have only three out of 22 operational Competition Authorities.

On the other hand, there is also greater doubt whether the existing legislation is adequately framed to deal with cartel investigation, prohibition and prosecution.

- As African countries, we lack information on international cartel activity. It is common to find out that even Competition Authorities will be unaware of the investigations being conducted in Europe. Where you have a trickle in of information, such information is not enough to trigger a meaningful national investigation. This makes it difficult even to know whether the subsidiaries of these companies in developing countries have been involved in international cartels or not.
- Developing countries lack the resources and the experience to deal with the huge complex and often well hidden cartel and other anticompetitive practices of multinationals. We have in our domestic markets cartels which have been active for a long time. Given the oligopolistic nature of our domestic markets, cartels behaviour has been very predominant.

It is now evident that the negative impact of cartelisation has been more on developing countries, especially in those countries still without competition law or without an effective national competition policy. Although the impact of cartelisation on developing countries is difficult to qualify, what we are certain of is that most of the many companies in Europe which have been investigated and prosecuted are well established in Africa and have very strong and long trading ties with governments in developing countries. In some cases, major development contracts have been awarded through bilateral and multilateral agreements with donor agencies to some of these companies. The establishment of institutions like the Global Competition Forum and the International Competition Network offers an opportunity for

developing countries to develop a mechanism where their concerns shall be addressed in international enforcement of antitrust laws.

III. CHALLENGES FOR COMPETITION AUTHORITIES IN TRANSITIONAL ECONOMIES

1. Background

Prior to 1990, economic activity in most developing countries was socialist oriented thus characterised by highly concentrated industries (monopolies, duopolies and oligopolies). Economies and politics were sides of the same coin and socialist policies were fused in both the academia and intelligentsia. However, with the transformation that began in the Soviet Union in the late 1980s, most developing countries embraced market-oriented reforms that culminated in the commercialisation and privatisation of state owned corporations.

2. Transition to a Market Economy

The 1990s witnessed an unprecedented process of economic and social transformation in most developing countries. The central theme of this process was the switch from the system of central planning or control of the economy to the use of market forces as the means to allocate resources. It was anticipated that the "free-play" of supply and demand would, in the long run, determined market prices throughout the economy, allowing productive resources to be allocated in an efficient manner. Structural adjustment programs were adopted that included market oriented reforms notably in the areas of deregulation of prices, including the reduction or elimination of subsidies, administrative allocation of key product inputs, privatisation of public enterprises or state companies, as well as the liberalisation of trade policy and investment regimes. The common aspiration underlying these reforms was the reduction of government's direct involvement or intervention in economic activity would, by providing enterprises with more freedom and stronger incentives, stimulate entrepreneurial activity, business efficiency, productive investment and economic growth well as enhance consumer welfare through improved quantity and quality of goods and services at prices determined by the market rather than administrative decision.

There is still no consensus on the ideal competition law which can be used as a model for countries in transition. There is no "one size fits all". However, certain characteristics have started to emerge:

- competition policy needs differ according to levels of economic development of each individual country;
- competition law is just one of the various public policies that impinge on the competitive environment of the economy. Hence, there is need for linkage with other economic policies.

3. Policies and Institutions for Competition

After the transition to market economies, developing countries realised that the benefits of market oriented reforms were likely to be fully realised only if enterprises acted under the spur of competition, so that consumer wishes and opinions were reflected in market performance. It was further recognised that, a country that has undertaken trade liberalisation measures has every interest in ensuring that the welfare and efficiency benefits arising from such measures are not lost due to anti-competitive practices by firms. A well functioning market mechanism is essential in this respect. For example, price liberalisation in the market dominated by monopolies in form of parastatal companies, unless specific efforts are made to

ensure the existence of competition, will end up in monopolistic price rises without corresponding competitive price equilibrium.

The private sector consistent complaint is that competition legislation prevents them from achieving economies of scale required to be internationally competitive. This is more pronounced in the competitive assessment of mergers/take-overs or other forms of acquisitions.

In recognition of the major role of competition law and policy in the success of the policy reforms, governments adopted competition policies and enacted competition laws. Competition rules set down minimum standards and allow enterprises to penetrate markets and establish themselves thereby facilitating inter-market trade. The role of Competition Policy was therefore seen to:

- i) enhance market access of new investors;
- ii) protect the competition from restrictive business practices;
- iii) foster economic efficiency and consumer welfare.

However, despite establishing relevant institutions to enforce competition laws, these institutions lack sufficient degree of independence largely due to the fact that governments remain the major financiers and influence major appointments. Other constraints the new institutions have face include:

- i) entrenched business interest that possess significant political power supersede competition concerns;
- ii) decisions by competition authorities are influenced by political expediencies and not sound competition principles;
- iii) lack of funds to participated at various international competition for a;
- iv) non-existence of positive comity among the developing competition authorities.

One may question whether competition law is still necessary in the face of trade liberalisation policy, deregulation and privatisation policies undertaken by countries in transition.

The arguments used are as follows:

- i) Promotion of competition may not always be conducive to industrial growth and international competitiveness;
- ii) liberalisation of international trade is sufficient to promote competition;
- iii) for developing countries, there are added risks of :
 - probability of improper enforcement;
 - misuse of bureaucratic power;
 - high possibilities of regulatory capture.

4. Law Enforcement

Until the enactment of the competition law, there was no formal enforcement of competition rules and policy in most developing countries. The creation of competition authorities in these countries was the first attempt by the respective governments to enforce competition rules. However, enforcement of competition law by these competition authorities has been marred by obstacles such as the following:

- i) the existence of Exceptions and Exemptions from Competition Law is an important factor that can limit their overall effectiveness. This is particularly seen in the taxation system where new investors are given tax incentives that work towards the advancement of a dominant position of market power to the disadvantage of existing or local firms. Competition authorities find themselves unable to correct such unfair incentives that prevent, restrict or distort the effective working of the competitive process. Enforcement has also been negated by the existence of non-application of competition rules to important sectors of national economies. There are also problems associated with confusing jurisdiction problems between competition authorities and Industry specific regulator;
- ii) competition authorities have also been faced with problems with interpretation and application of the law, in view of the different attitudes towards competition rules by the business community. The rich but confusing terminology and perhaps ambiguity of some clauses in the law makes the job of a competition authority strenuous and time consuming. This is coupled by the fact that most of the technical staff are still undergoing appropriate training in requisite rigorous analysis and application of relevant clauses of a particular competition legislation;
- iii) lack of political will and support at top government levels, largely due to ignorance of the competition law and appreciation of its place in economic development. Greater efforts have been placed on privatisation of state owned enterprises and attraction of largely foreign investors without regard to the long-term post privatisation effects on competition;
- iv) Competition laws of developing countries have often been modelled on those of developed countries, without being adopted to the special needs of emerging market economies;
- v) it has been experienced by developing countries that these laws are costly to administer and enforce. Reliance on governments grants has also made suspect the independence of such institutions especially in matters that appear to satisfy government pronouncements or policies;
- vi) most developing economies have immature market systems while at the same time their competition authorities lack technical resources to conduct appropriate economic analysis;
- vii) most developing economies are built around historically national or state owned corporations that are now in private hands. There are a lot of national sentimental concerns tied to such corporations. In case of deciding on a competition matter, competition authorities find themselves caught walking on a tight rope of defending national industrial policy over competition policy;

- viii) competition rules are a new concept to policy makers and the business community. Although legislation is precipitated by a lot of publicity, it has been rightly observed that laws are only understood when offences are committed and then the appropriate law is applied. As has been experienced in Zambia, although the business community and government officials were involved in the enactment of the competition law, enforcement of the provisions of the same law by the competition authority is often met with mixed feelings.
- ix) the challenge of enforcement of the law is also made difficult by the lack of a "culture of competition" among existing firms. Most firms continue to express ignorance to the existence of competition legislation and allude to the fact that all their competitors do not observe the provisions of the competition legislation.

Further to the above, effective enforcement is reduced by:

- weak capacity to review and decide on complaints concerning anti-competitive behaviour;
- weak capacity to investigate predatory mergers and acquisitions;
- weak capacity to co-ordinate regulatory bodies to enhance "competition for the market" in the provision of infrastructure services;
- weak institutional capacity to develop procedures for alternative methods as well as use of courts for solving conflicts arising from anti-competitive behaviour.

5. Powers of Enforcement

Competition authorities in developing countries face a daunting task of applying the law and at the same time explaining their powers to business and community. Although the powers as enshrined in the various competition laws are sufficient for enforcement, problems are encountered in the process due to the following:

- the Court system does not comprehensively understand competition policy, largely due to the fact that competition legislation is new. In addition, court cases are rare and therefore the regular court system is not exposed to making decisions concerning competition issues;
- there are capacity and analytical problems in dealing with transnational mergers and take-overs, as transnational corporations (TNCs) have long operated in the complex global economy and have a wider understanding of the dynamics of global economics. Developing competition authorities therefore find themselves using complex data from TNCs that is not easy to understand;
- Insufficient information on what is happening to parent companies in Europe but affecting subsidiaries in developing countries, which ultimately affect the quality of analysis and final decision;
- total disregard of domestic laws or reluctance to accept domestic laws by international companies, which in many cases has been caused by the nature of investment incentives that were originally negotiated with government officials - sidelining competition aspects.

6. Competition Advocacy

The lack of reliable sources of finance have compounded the problems of competition advocacy to politicians, businesspersons, government officials, parliamentarians, professionals and the general public. This is further impaired by the fact that competition policy is not a priority in many developing countries as compared with Foreign Direct Investment (FDI). The scramble for state owned companies under privatisation led in many instances to a narrow-minded view of economic growth and development, with greater emphasis placed on privatisation and not on the economic efficiencies to be created thereafter. This view appears to have continued in most developing countries and, competition authorities, though established by an act of parliament, have continued to strive for recognition by the major stakeholders in the economic and political spheres.

A competition authority in a developing country therefore faces a major challenge of justifying its relevance to the business community and general public in their every day economic lives. The result normally is to arrive at decisions that re biased towards so-called "public interest" and in this way hope to raise public appreciation to the existence and work of the competition authority.

7. Public Awareness

Developing public awareness to the existence of both the law and the work of an enforcement institution on competition is very crucial to the success of competition policy. Public awareness helps to develop a culture of competition that in turn leads to understanding of competition legislation and appreciation to the work and operations of a competition authority. The lack of resources to undertake nation-wide public campaigns has led to continued ignorance of the public to the existence of competition legislation and work of the competition authority. This scenario has led to continued restrictive business practices and unfair trading practices by the business community. In Zambia, goods have continued to be sold without any warranty or guarantee, with no option for refund or retention of goods when they are discovered to be defective. When confronted, members of the business community retort that "everybody is doing it" and they express ignorance of the existence of competition legislation.

Educating people is an on-going and costly exercise that has continued to elude competition authorities in developing countries. Therefore, despite the legislation, competition authorities have the double and taxing task of enforcing the law while at the same time educating offenders of the existence of competition law.. Although brochures can be made and circulated, very few people have the time and perhaps even the interest of reading about competition law, unless they have once before come into contact with the competition authority. There is therefore need to supplement brochures with seminars, workshops and other interactive forms of education campaigns targeted at political and government leaders, the business community and consumers. This require technical and material resources that are not readily at the disposal of the competition authorities in developing countries.

8. Concluding Remarks

Competition authorities in developing countries need relevant and sustainable assistance from similar authorities in developed countries, as well as that from multilateral organisations such as the World Trade Organisation, UNCTAD, OECD and the European Union. The globalisation of business has stretched further the analytical demands on the competition authorities and they need constant technical support. In addition, the role of a competition authority in ensuring that there is effective competition for the benefit of business and the consumer is the foundation upon which the developed countries have derived their efficiencies. Similarly, a number of developing countries have introduced competition

legislations and they will need as much support as possible in order for them to help bring about efficiencies in the economy of their respective countries.

Unclassified

CCNM/GF/COMP/WD(2002)32



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

13-Feb-2002

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION BY CONSUMERS INTERNATIONAL

This note is submitted by Consumers International for the second meeting of the Global Forum, to be held on 14-15 February 2002.

JT00120789

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CCNM/GF/COMP/WD(2002)32
Unclassified

English text only

Consumers International

Consumers International is a federation of consumer organisations dedicated to the protection and promotion of consumers' interests worldwide through institution-building, education, research and lobbying of international decision-making bodies. It was founded in 1960 as a non-profit organisation, and currently has over 250 members in 115 countries. (Consumers International is registered in the UK, Reg. No. 4337865)

In addition to working with global bodies such as WTO, UNCTAD, UNESCO, FAO, WHO and ISO, Consumers International has a long standing relationship with the OECD. Most recently it has worked with the:

- Directorate for Science Technology And Industry - Consumer Policy Committee especially on Guidelines for E-Commerce and Privacy Committee
- Trade Directorate – Trade Committee
- Directorate For Financial, Fiscal And Enterprise Affairs - Committee. On International Investment & Multinational Enterprises on the OECD Guidelines For MNEs and Competition Committee
- Directorate For Food, Agriculture And Fisheries (FAF) mainly the Agriculture

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Introduction

The effective implementation of competition policy is critical to the world's consumers. The elimination of tariff and non-tariff trade barriers as a result of progressive trade liberalisation, has increasingly exposed the restrictive trade practices of national or transnational enterprises. These practices appear to be multiplying and are leading to fewer players in the global marketplace giving greater scope still for anti-competitive practices. Such practices can lead to prohibitively expensive goods and services - even those which are essential for survival. Consumers are therefore interested in devising laws and institutions to control the anti-competitive behaviour of private enterprises to assure the full operation of markets for the benefit of all.

Within a market economy, competition laws should help to make the operation of the market more transparent and efficient. The regulation of anti-competitive practices should facilitate a stronger application of consumer protection. The operation of competition laws in countries can allow consumers to take investigative action regarding their rights. Yet, competition regulations cannot be automatically assimilated along with consumer protection.

Competition policy is one tool to enhance people's access to their basic needs as well as safe and appropriate goods and services. There is, however, a package of policies which can be used to influence markets. These include trade policy, industrial policy, investment regulations, employment laws, environmental protection and, of course, consumer policy. Regional or multilateral trade agreements also alter the range and type of products available on the market and the origin and size of the companies which have produced them.

The particular dilemma that competition presents, especially in the developing world, is that although these tools may exist, they are not applied with due effectiveness. After all, despite the existence of competition laws and the influence of organisations such as the UNCTAD and the OECD, anti-competitive practices continue to exist and indeed multiply.

A recent European Bank for Reconstruction and Development report found that in economies of transition, without long term competition advocates, the implementation of competition policy is severely limited. In Consumers International own findings from studying competition policy in seven developing and transition economies, the urgent need for more proactive competition regimes - at the national, regional and international levels - is clear.

For countries with limited institutional capacity in particular, effective competition policy needs vigorous, independent and skilled consumer organisation to act as pro-competition agents. Members of Consumers International (CI) the world wide federation of consumer groups, have dismantled cartels, campaigned for competition legislation, taken cases to court, carried out price surveys, forced competitive tendering, exposed market sharing arrangements, evaluated mergers, and drafted competition laws. Whilst some CI members are competition agencies, others have acted as neutral forums to bring together business, academics, governments and consumers to develop and further competition regimes.

To build on the consumer movement's natural role in encouraging a competition culture, Consumers International launched Consumers and the Global Market in 2001.

Consumers and the Global Market (CGM)

Consumers and the Global Market is a three-year trade and competition programme of research, capacity building and advocacy with activities at the national, regional and global levels implemented by Consumers International.

Strategy behind CGM

In 1995, Consumers International (CI) called for the inclusion of competition into the World Trade Organisation (WTO) workplan and hence welcomed the establishment of the Competition Working Group at the Singapore Ministerial Conference. As the worldwide consumer body which includes competition agencies in its membership, CI is uniquely placed to contribute to the debate at the multilateral level and encourage competition policy development and enforcement at the national level.

However consumers are interested not just in policy tools for the sake of them but how they affect the price, range and quality of goods on the market. It is critical to be able to assess the interaction between trade liberalisation, sectoral developments, competition policy, national regulatory frameworks and consumer policies. It is this interaction which affects people's access to their basic needs, poverty reduction and ultimately, sustainable development. It is through a better understanding of this nexus that will ensure that trade reaches its full potential as an engine for growth.

Trade agreements are often negotiated by trade ministers seeking to protect their domestic business from competition whilst expanding the opportunities of their export sector elsewhere. It is assumed that through the negotiation process, all parties can benefit. However, the market access drive often leads to the bigger companies of the richer countries winning vis-à-vis smaller producers and indeed consumers, the presumed ultimate beneficiary of trade liberalisation. To ensure a wider distribution of the benefits of liberalisation, the consumer voice and interest must be heard as loudly as that of business. For this, in addition to greater research and analysis, stronger consumer advocates are needed to improve decision making and governance.

To simultaneously meet both of these needs, Consumers International designed the Consumers and Global Market Programme.

The Programme

The programme focuses on competition policy, and the agreements related to agriculture and services. The three areas for initial priority have been chosen because of their significance to developing country consumers, poverty alleviation and food security as well as the fact that they are currently subject to international negotiation.

The programme is realised through activities in three modules:

A: Research and Case Studies

B: Building Capacity for Advocacy and Market Monitoring

C: Representation and Advocacy on Trade and Competition Issues

Each module is implemented regionally through Consumer International's regional offices for Latin America and the Caribbean, Africa, Asia and the Pacific and Economies in Transition. Consumers International's Head Office co-ordinates the work and international advocacy.

Sixteen priority countries have been selected where detailed research and analysis are being carried out and training activities implemented. These countries are Bolivia, Brazil, Chad, Chile, Fiji, Ghana, Indonesia, Kenya, Mali, Nicaragua, Pakistan, Poland, Slovenia, South Korea, Ukraine and Zambia.

Consumers International works with consumer organisations, academics, research institutes, media, government officials and international organisations in implementing this programme.

Some of the Envisaged Impact

- Detailed analysis of the state of competition, agriculture and services will provide consumer organisations as well as broader civil society with greater knowledge and information on the impact, effect and weaknesses of competition policy and the agreements in their country and region. It will set out the necessary actions they need to take. It will strengthen their ability to act and engage in debate and policy making in this area.
- From the analysis, there will be advocacy to create better competition laws at the national level and regional and international agreements, which incorporate developing country, consumer concerns. Furthermore constituencies will be built to further this agenda.
- Enhanced market monitoring capacity of consumer organisations and other civil society organisations with evidence to back up recommendations made in relation to the WTO.
- Improved coherence in national, regional and global policy making.
- Greater flow of information between national, regional and international levels to strengthen civil society organisations in their attempts to balance corporate influences in the marketplace.
- Regional and global consumer and competition networks established and strengthened
- International decision makers exposed to a competition policy, AoA and GATS and relevant agreements influenced.

Progress So Far

Year One of the programme has seen a focus on agriculture and services as the modalities for their negotiation were being discussed at the WTO. **Year Two will see the focus shift to competition policy**, partly as a response to Doha and partly as the second stage of the CGM requires a deepening of the research work and emerging analysis. This means looking at the interaction between different policies and specifically in those sectors critical to development – agriculture and services.

The impact of Year One was significant - not in terms of publicity or radical changes in policy - but for raising the profile of consumer groups at the national, regional and international levels, awareness by governments and in bringing together academics, civil society groups and government in constructive dialogues.

1. In addition to national and regional assessments, CI produced Impact Assessments of the Agreement on Agriculture (AoA) and General Agreement on Trade in Services (GATS). (The Uruguayan delegation included CI's Impact Assessments in their briefing packs for Doha.)
2. A Training CD-ROM on Trade – Consumers and Trade: The Consumer Guide to Trade Issues and Agreements has been produced in English, French and Spanish. Due to demand it has now been translated into Polish and will soon be in Russian. The Catholic University of Santiago, Chile asked CI to facilitate a course on the WTO based on its CD-ROM for its students.
3. In each of the 16 countries, the research has brought together academics, civil society and government to both contribute to and assess the results. These national networks aim to build original constituencies for the promotion of these issues. In some countries national seminars have been held to disseminate the first year results. As a result of this process, 3 of the 16 governments invited consumer representatives to be on their official delegation to Doha. Four other governments held close consultations with consumer groups before leaving for Doha and whilst at Doha.
4. CI is one of the few NGOs invited to (and involved in) regional meetings such as COMESA, FTAA, Mercosur, ECOWAS, UEMOA, LDC Ministers and Africa Trade Ministers meetings.
5. CI organised four regional meetings focussing on trade and competition and two regional meetings with UNCTAD on consumer and competition policy.
6. CI spoke on the role of WTO in global governance at the South Centre, WTO, OECD and UNCTAD.
7. CI with the UK Consumers Association organised “Trade and Competition Policy Issues in the run up to Doha” attended by representatives from UKG, WTO, EC, UNCTAD and academia.
8. To disseminate CI research results, the WTO held its first ever seminar for an NGO to share its research with WTO Members. 22 governments and 15 WTO officials attended the seminar. (The interest by governments in CI's work was impressive.)
9. CI was the only NGO with a truly international delegation at Doha. The delegation participated in and furthered discussions on competition, agriculture, services and intellectual property.

Forthcoming Activities

As stated, Year Two will see a focus on competition policy – nationally, regionally and internationally. At the national level, case studies will be used to assess the implementation of competition policy especially in relation to agriculture and services.

It will look in more detail at the regulatory regimes and capacities for implementation of the laws or lack of laws.

National workshops will be organised and advocacy seed grants and technical assistance will be offered to encourage the development of competition law nationally. At the regional level, assessments will be made of competition elements on regional agreements (or the need for it).

At the global level, there will be a global report on assessing competition policy across some of the CGM countries. A discussion paper on what is needed within the WTO (bringing together CI's research and views of other parties) will be developed. Following discussion with academics, governments and civil society, CI will publicise and promote the core elements of an international competition agreement.

CI aims over the next year and a half to develop consumer organisations and government understanding of competition policy and its relation to consumer policy and their capacity to engage with the forthcoming negotiations at the WTO.

CI is organising a series of regional meetings examining competition policy in itself and in relation to other policies, in addition to the national meetings and regional training. Events being organised by CI in the next six months include:

- Brainstorming with African consumer leaders in Harare in January, focus particularly on COMESA and UEMOA regional groupings.
- Meeting of Latin American competition and consumer protection officials in Santiago in January. (The meeting will launch a permanent regional network with CI as the Secretariat.)
- Meeting between consumer organisations and Latin America consumer protection and competition officials, Costa Rica, February
- Regional Conference on Public Utilities in Latin America, Argentina, March
- Meeting between EU and Latin America consumer organisations as part of the Euro-Latin America Dialogue in Madrid in April
- Roundtable on Competition and Consumer Policy in Moscow in May,
- Meeting of Utility Regulators in Panama, May
- Competition Seminar within regional meeting of CI's meeting for members in Developed and Transition Economies in Rome in June.

Further events will be organised later in the year and will be finalised in this period within Asia and Africa.

Consumers International is continually seeking to expand and develop its work in relation to national, regional and international competition policy.

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**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

Forum mondial de l'OCDE sur la concurrence

**RELATIONS DE L'OCDE AVEC LES ECONOMIES ET ACTIVITES
D'ASSISTANCE TECHNIQUE DES PAYS MEMBRES EN 1999-2000**

- Session II -

Le présent document reprend des extraits de la note du Secrétariat qui a été initialement discutée lors de la réunion du Groupe de travail n°3 du 13 février 2001. Il est soumis comme DOCUMENT DE TRAVAIL pour être discuté à la Session II de la deuxième réunion du Forum mondial sur la concurrence qui doit se tenir les 14-15 février 2002.

JT00128364

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RELATIONS DE L'OCDE AVEC LES ECONOMIES NON MEMBRES ET ACTIVITES D'ASSISTANCE TECHNIQUE DES PAYS MEMBRES EN 1999-2000

II. Définition des termes et résumé des réponses

7. La présente note et ses annexes portent sur l'assistance technique telle qu'elle est fournie sous différentes formes ; chacune des formes définies ci-dessous a été utilisée par un ou plusieurs Membres :

- Les conférences sont généralement des réunions brèves largement ouvertes destinées à permettre un échange de vues, généralement entre experts de haut niveau, décideurs politiques, etc. Elles peuvent être efficaces pour la prise de contacts ainsi que pour l'instauration d'un dialogue politique de nature à faire prendre conscience des problèmes et à favoriser une compréhension mutuelle ; en fait, elles ne contribuent que rarement à apporter une assistance technique.
- Les séminaires et ateliers sont généralement des réunions de moindre envergure, destinées à accroître les compétences des participants. Pour ses activités d'ouverture, l'OCDE recourt principalement à ce type de manifestation, souvent en fondant le travail sur des études de cas.
- Les conseillers résidents à long terme passent au moins un mois à travailler dans les locaux de l'organisme chargé de la concurrence dans un pays bénéficiaire. Les séjours plus longs sont encore plus bénéfiques, parce que le conseiller parvient alors à bien comprendre la situation juridique et économique du pays. D'après les Etats-Unis, "c'est peut-être la forme d'assistance la plus efficace"¹. (Du début jusque vers le milieu des années 1990, les autorités américaines ont envoyé des équipes de conseillers sur des périodes de 6 à 9 mois dans des pays d'Europe centrale, notamment la Pologne. Les actions de jumelage de l'Union européenne, au titre du programme PHARE, impliquent le financement du détachement d'experts de la concurrence originaires de pays Membres de l'UE en qualité de conseillers résidents à long terme auprès des organismes de la concurrence de pays d'Europe centrale et orientale). Toutefois, des séjours plus longs entraînent un coût d'opportunité pour l'organisme chargé de la concurrence qui fournit un conseiller.
- Les services de consultants à court terme, c'est-à-dire des visites pouvant aller de quelques jours à un mois, sont une forme courante d'assistance et peuvent être très efficaces pour résoudre des problèmes précis.
- Les stages sont des séjours longs, d'au moins un mois, d'experts de la concurrence venant de pays bénéficiaires, dans les locaux d'un organisme expérimenté dans l'application de règles de la concurrence. Pour être efficaces, ces stages exigent une longue préparation de la part du pays d'accueil ; par ailleurs, ils reviennent généralement cher. Parfois, les coûts sont partagés par le pays d'accueil et le pays bénéficiaire. Par exemple, dans sa réponse, le Mexique mentionne que "l'assistance technique fournie par [l'organisme mexicain chargé de la concurrence] est financée soit par [l'organisme] lui-même lorsqu'il s'agit de séminaires, soit par les pays bénéficiaires lorsqu'il s'agit surtout de stages"².
- Les visites d'étude sont de brèves visites de fonctionnaires chargés de la concurrence de pays bénéficiaires dans des organismes expérimentés dans l'application de règles de la concurrence. Ces visites d'étude sont un moyen moins coûteux de prendre des contacts

professionnels et d'échanger des points de vue avec des bénéficiaires, surtout lorsque les coûts sont partagés entre le pays d'accueil et le pays bénéficiaire. Pour permettre la prise de contacts et l'échange de vues, elles ne nécessitent qu'une préparation limitée et peuvent se faire à la demande au profit de toute une série de bénéficiaires. Cependant, pour avoir un effet de formation, il faut que les visites d'étude soient longuement préparées par le pays d'accueil. L'expérience de l'Australie montre que "des délégations restreintes, plus que les délégations nombreuses, constituent les meilleurs forums pour un apprentissage interactif"³.

8. Un autre modèle d'assistance technique – création d'un institut qui offrirait sur une assez longue période des cours à des fonctionnaires appartenant à des pays en transition et en développement – a été proposé, mais le Secrétariat n'a connaissance d'aucun programme opérationnel fondé sur ce modèle.

III. Besoins et caractéristiques d'une bonne assistance technique

16. Ce chapitre analyse les informations reçues sur les besoins et les caractéristiques de l'assistance technique.

Besoin accru d'une assistance technique

17. Comme cela a déjà été dit, des demandes d'assistance technique de plus en plus nombreuses au profit de pays en développement ont été formulées lors de la conférence de l'OCDE sur les échanges et la concurrence de juin 1999, des réunions de la CNUCED et du Groupe de travail de l'OMC, et de plusieurs autres forums. Les réponses au questionnaire qui portent sur la question indiquent toutes qu'il y a un besoin accru d'assistance technique. En s'appuyant sur son expérience directe, l'organe italien chargé de la concurrence "partage l'opinion, récemment reprise sur des forums internationaux tels que l'OMC et la CNUCED⁴, qu'est apparue ces dernières années une plus forte demande d'[assistance technique]"⁵. De même, le Japon souligne qu'il faudrait mener davantage d'activités d'assistance technique tant dans le domaine politique que dans le domaine de la formation⁶. L'organe mexicain chargé de la concurrence est également "d'accord pour dire qu'il faut mener davantage d'activités d'assistance technique en matière tant de politique que de formation"⁷. Le Canada⁸ et la Commission européenne⁹ soutiennent également une augmentation de l'assistance technique.

18. Comme cela a également déjà été dit, les réponses au questionnaire n'indiquaient pas grand chose sur l'origine possible des ressources qui seraient nécessaires pour accroître l'assistance technique. Les pourvoyeurs de fonds pour de tels travaux doivent évidemment évaluer la priorité relative de la politique de la concurrence et d'autres objectifs importants. Il ressort des discussions informelles avec des responsables de la Banque mondiale que l'évaluation actuelle par la Banque de ses différents objectifs a abouti à un tel ciblage sur les projets visant directement à réduire la pauvreté que les financements disponibles pour des travaux concernant la politique de la concurrence risquent d'être réduits.

19. Même si le classement des priorités qui se fait au sein des pouvoirs publics et d'autres organes de financement va au-delà de la compétence des organismes chargés de la concurrence, le déséquilibre apparent entre les besoins et les moyens offerts conduit à se demander si les organismes chargés de la concurrence et les autres fonctionnaires concernés par ce domaine peuvent et doivent faire davantage pour sensibiliser les décideurs politiques de leur gouvernement et d'autres organismes à l'importance de cette assistance. A cet égard, la Division du Comité du droit et de la politique de la concurrence (CLP) a été en contact avec le Secrétariat du Comité de l'OCDE sur l'aide au développement, et il semble que ce groupe important soit intéressé à accorder une plus grande priorité à la politique de la concurrence. Il serait utile d'en savoir plus sur les positions des délégués sur l'importance relative qui est accordée par les organismes publics de financement de leur pays à la politique de la concurrence ainsi que sur les perspectives

d'augmentation de ce financement. La Banque mondiale ainsi que d'autres organisations internationales sont invitées à faire part de leurs remarques à ce sujet.

Caractéristiques d'une bonne assistance technique

20. Indépendamment des perspectives d'augmentation de financement, il est important de s'efforcer dans toute la mesure du possible de contenir les coûts et de maximiser les avantages de l'assistance technique. Une des principales visées du questionnaire était de montrer dans quelle mesure le travail fait par le passé pour fournir une assistance donne des informations sur l'efficacité des différentes formes d'assistance. Les principaux éléments apportés dans les réponses sont évoqués ci-dessous, mais les différences de précision et de terminologie empêchent d'en tirer des conclusions. Après la discussion de février, l'Unité des économies non membres de la Division CLP a l'intention de poursuivre l'étude de cette question en prenant de nouveaux contacts par courrier électronique et par téléphone avec des fonctionnaires compétents des gouvernements des pays Membres et avec le personnel d'organisations internationales.

21. Les réponses évoquent l'efficacité de l'assistance technique en fonction du niveau de développement du régime de la concurrence dans les pays bénéficiaires, abordent l'efficacité de l'assistance régionale et par pays, et envisagent l'apport d'une assistance à des individus qui ne sont pas des fonctionnaires des services de la concurrence.

Régime de la concurrence du pays bénéficiaire

22. Pour être efficace, l'assistance technique doit être adaptée aux besoins et aux conditions des pays bénéficiaires. Tout comme le Japon¹⁰ et le Canada,¹¹ l'Australie a trouvé "que l'efficacité des activités de coopération varie en fonction du stade de développement du régime de la concurrence du pays"¹². Dans sa réponse, le Japon déclare que "en général, il est indispensable de fournir des connaissances juridiques de base aux pays qui n'ont pas de droit de la concurrence, tandis que l'apport d'une expérience pratique semble être plus utile aux pays qui ont leur propre droit de la concurrence"¹³. La CE précise que la nature des demandes varie selon le stade auquel est parvenu le pays demandeur :

Certains pays demandent de l'aide pour rédiger les textes fondateurs d'un droit de la concurrence ou pour modifier les textes existants afin d'élargir leur portée ou d'améliorer leur application. D'autres pays plus expérimentés demande de l'aide pour résoudre des problèmes particuliers, notamment au niveau de l'analyse micro-économique ou des techniques d'enquête adaptées aux types de problèmes et aux secteurs d'activité concernés par le problème. Une plus grande catégorie de demandes porte sur la participation de juristes ou d'économistes expérimentés à des séminaires ou à des ateliers portant sur des questions de réforme de réglementations ou de dispositions anti-trust particulières¹⁴.

23. Dans les trois types d'assistance que l'Italie juge les plus efficaces, transparaissent implicitement les différences de stade de développement du régime de la concurrence du pays demandeur : (i) "aide à la conception d'un droit de la concurrence et des réglementations d'application"¹⁵; (ii) "formation des fonctionnaires directement chargés de leur application"¹⁶; et (iii) "activités visant à amener les fonctionnaires d'administrations autres que les organismes chargés de la concurrence à prendre davantage conscience de la nécessité d'effectuer des réformes des réglementations qui soient de nature à promouvoir la concurrence"¹⁷.

24. La réponse de l'Australie comporte la présentation la plus précise des meilleures formes d'assistance pour les pays parvenus à différents niveaux. Pour "les pays qui en sont au stade exploratoire d'une politique de la concurrence, l'Australie a jugé que le plus efficace est de faire venir en

Australie des fonctionnaires pour étudier de façon directe les structures législatives et réglementaires"¹⁸. D'autre part, "les pays qui disposent d'un cadre institutionnel et d'une politique de la concurrence plus développés semblent tirer le meilleur parti de services de consultants et d'échanges de personnels"¹⁹. En fait, dans sa réponse, l'Australie trouve que "la formation dans le pays... semble être la plus efficace dès lors qu'un droit de la concurrence est en place. [...] Ces dispositions permettent de fournir une formation pratique ciblée et d'aller très au-delà des problèmes théoriques"²⁰.

25. L'Australie donne aussi son point de vue sur le niveau de compréhension des problèmes de concurrence parmi les pays en développement :

Nous commençons maintenant à observer un mouvement vers une deuxième génération d'activités d'assistance technique, en particulier dans le domaine de la politique et du droit de la concurrence dans la région Asie-Pacifique. La première phase a comporté une discussion de la théorie, des fondements et des modèles de la politique et du droit de la concurrence. L'ACCC est d'avis que la plupart des pays en développement en sont désormais à un stade où ils ont besoin d'aide pour dépasser ce niveau théorique, apprendre à mettre réellement en application un droit de la concurrence, à mener des enquêtes, à définir des marchés, à mettre en place des mécanismes de respect des règlements, à fixer les priorités, à élaborer et utiliser au mieux une stratégie médiatique efficace, etc.²¹.

26. Avec une terminologie quelque peu différente, le Canada souligne que la plupart des demandes qu'il reçoit concernent une aide à la mise en application d'un nouveau droit de la concurrence, mais il existe un grand nombre de pays qui ne sont pas encore convaincus des avantages d'une politique de la concurrence, tandis que d'autres ont besoin d'être conseillés sur la manière de rédiger et de mettre en application un droit de la concurrence. En conséquence, il est véritablement nécessaire d'apporter une assistance technique visant à construire une culture de la concurrence, rédiger un droit de la concurrence, indiquer des procédures de consultation, instaurer un organisme chargé de la concurrence, et mettre en place des processus publics intérieurs d'information/formation²².

27. Dans sa réponse, le Mexique trouve que "les pays d'Amérique latine, pour la plupart, demandent une aide pour (i) concevoir des institutions et un droit de la concurrence ; (ii) comprendre la rationalité économique des règles de la concurrence ; (iii) prendre en compte les aspects économiques de la politique et du droit de la concurrence ; et (iv) s'informer des aspects de la réglementation sectorielle qui concernent la concurrence"²³.

Assistance régionale et par pays

28. Dans une certaine mesure, le stade de développement de la politique et du droit de la concurrence des pays bénéficiaires est aussi un paramètre qui entre en compte dans la détermination de l'efficacité relative des manifestations régionales et par pays. L'Australie souligne que l'assistance plus pratique dont ont besoin les pays bénéficiaires disposant d'un régime de la concurrence plus développé est plus efficace si elle est fournie pays par pays :

L'Australie a trouvé que, à un stade exploratoire, les programmes regroupant des délégués de différents pays sont les plus efficaces pour faciliter l'échange d'informations et d'expériences. Cependant, une fois que les pays disposent d'une législation en place et qu'ils ont besoin d'une assistance technique ciblée, une aide propre au pays et apportée dans le pays s'est révélée être l'action la plus efficace²⁴.

29. Le Canada confirme ce point de vue :

Des séminaires régionaux peuvent apporter à certains pays une présentation utile des possibilités de politique et de droit de la concurrence. Cependant, ils ne sont pas aussi efficaces que d'autres moyens lorsque le pays a besoin d'être aidé pour mettre en application un droit de la concurrence dans ce domaine²⁵.

30. Par ailleurs, la CE déclare qu'une approche régionale peut être à la fois moins coûteuse et plus efficace, et sa réponse ne semble pas exclure des manifestations destinées à améliorer les compétences en matière d'enquête ainsi que d'autres compétences des fonctionnaires chargés de faire respecter le droit. Elle explique que :

on pourrait parvenir à un emploi plus efficace des ressources en fournissant une assistance technique, par exemple sous forme d'activités de formation, à plusieurs pays ou à une région donnée présentant des besoins similaires/comparables, plutôt qu'en s'adressant à un seul pays à la fois. Cela présenterait aussi l'avantage de sensibiliser les fonctionnaires chargés de la concurrence venant de ces pays aux problèmes de leurs homologues venant d'autres pays²⁶.

31. Tout comme la CE, le Secrétariat de l'OCDE a trouvé que des manifestations s'adressant à plusieurs pays constituent un moyen très efficace de traiter les questions de mise en application du droit. Par exemple, son séminaire annuel de deux semaines à Vienne s'adressant aux fonctionnaires chargés de faire appliquer le droit provenant de tous les pays en transition attire des fonctionnaires de niveau relativement élevé et porte presque entièrement sur des cas réels se présentant dans ces pays. Tous les pays de la CEI qui disposent d'un droit de la concurrence sont invités à envoyer au moins un représentant à son séminaire annuel en Russie, et les manifestations dans le cadre de son Programme régional pour les Pays baltes réunissent des représentants des trois Etats baltes, des territoires russes contigus et du CAM de Russie (Comité d'Etat antimonopole de la Fédération de Russie).

32. Le Secrétariat considère que ces points de vues apparemment divergents ne sont pas véritablement contradictoires. Nous considérons en effet que pour dire si une manifestation doit plutôt s'adresser à un seul pays ou à plusieurs pays, il faut plutôt voir si les participants en sont encore à envisager ou à élaborer un droit de la concurrence ou bien s'ils cherchent à apprendre des techniques d'application plus pratiques. Certes, une manifestation s'adressant spécifiquement à un pays est probablement le moyen le plus efficace d'assurer une formation à l'application du droit si les participants sont demandeurs et sont véritablement prêts à accepter cette formation, mais la question n'est pas tant de savoir quelle somme de connaissances les participants sont susceptibles d'absorber, mais quel avantage cet apport de connaissances est susceptible d'avoir. Deuxièmement, il y a toujours des participants qui considèrent que certains principes valables en théorie pour les pays développés ne sont pas applicables à leur situation, et pour convaincre ces participants, il peut être utile de les réunir avec des participants d'autres pays en développement qui sont un peu plus avancés sur la courbe d'apprentissage. En outre, les études de cas sont non seulement utiles pour enseigner les techniques d'enquête, mais elles sont aussi des moyens concrets d'illustrer l'impact des bonnes et des mauvaises politiques d'application du droit. Pour ces discussions d'ordre politique, il est très utile de réunir des représentants de différents pays (et de régions différentes de grands pays).

33. Dans sa réponse, le Japon ajoute une autre considération lorsqu'il souligne que l'exemple et le développement d'un pays peuvent avoir un effet de "retombée" sur des pays voisins de même situation : "dans le programme APEC, la Thaïlande est extrêmement importante, en particulier en ce qu'elle constitue un modèle pour les pays de la région et qu'elle accueille la réunion"²⁷. Selon les circonstances, si l'on veut tirer parti de l'influence d'un pays bénéficiaire sur d'autres pays, il peut être nécessaire d'organiser des manifestations spécifiquement pour un pays pour lui permettre de jouer un rôle de modèle, ou des manifestations régionales dans lesquelles ce pays peut jouer un rôle de modèle.

Participation de représentants autres que des fonctionnaires chargés de la concurrence

34. Au sens le plus large, il apparaît clairement qu'une assistance en matière de politique de la concurrence doit concerner un public plus large que seulement les fonctionnaires chargés de la concurrence. A cet égard, l'Australie souligne qu'il est "extrêmement utile de faire participer des membres d'organismes judiciaires, académiques, industriels et commerciaux et d'associations de consommateurs, par exemple, pour développer toute "une culture de la concurrence" qui soit comprise et acceptée dans l'ensemble de la communauté²⁸. Le Canada semble être de cet avis²⁹. D'une manière générale, les activités d'assistance technique menées par la CNUCED sont également "ouvertes aux autres [c'est-à-dire, des responsables et des fonctionnaires autres que ceux qui sont chargés de la concurrence, notamment] des représentants d'autres ministères, des milieux universitaires et d'affaires, d'associations de consommateurs, du secteur privé"³⁰. La plupart des conférences de la Banque mondiale sont également ouvertes à une grande diversité de participants.

35. Certaines activités qui s'adressent à des participants autres que des fonctionnaires chargés de la concurrence relèvent nettement de l'assistance technique telle qu'elle est définie (de façon large) dans la présente note. Par exemple, la Finlande mentionne à quel point il est important d'apporter une assistance technique aux autorités judiciaires³¹ ; d'ailleurs, l'OCDE a travaillé avec la Cour suprême d'arbitrage de Russie. Cependant, certaines autres activités représentent une sorte de "promotion de la concurrence" généralisée qui constitue un dialogue ou un appui politique plus qu'une assistance technique. Même si elle ne dit rien sur la valeur relative de ces deux formes différentes d'assistance, cette distinction est utile lorsqu'on s'intéresse par exemple à l'efficacité des différents moyens d'apporter une assistance. Cette distinction est également utile lorsqu'on s'intéresse au type de manifestation que les donateurs ont tendance à privilégier.

Qualifications des fournisseurs d'assistance technique

36. Outre l'expérience de l'application du droit, ce qui est tellement important que ce thème est traité séparément ci-dessous, le Secrétariat a précédemment suggéré qu'il serait utile qu'au moins un membre d'une équipe d'assistance technique ait une expérience approfondie de l'apport d'une assistance à un pays dont l'économie, la culture et le système juridique sont très différents de ceux de son pays. Par expérience, le Secrétariat sait que les experts en matière de concurrence qui n'ont pas une véritable expérience de l'ouverture vers l'extérieur ont souvent une interprétation logique mais incorrecte du droit, des cas, des déclarations et des problèmes qu'ils rencontrent. Dans les missions à relativement long terme, les protagonistes ont le temps de résoudre les éventuels malentendus, mais s'il s'agit de missions ou de séminaires d'une semaine ou moins, ces problèmes de communication risquent d'être extrêmement coûteux. Une personne ayant une expérience de l'ouverture à l'extérieur peut souvent servir de "facilitateur de communication" pour les experts qui ne savent pas, par exemple, que les participants à un séminaire emploient le terme "dumping" pour désigner la fixation déloyale des prix, qu'il peut exister des barrières à l'entrée sur des marchés que l'on considère généralement comme d'entrée facile, ou que des aspects "tels que la corruption ou la publicité mensongère" que l'on ne considère généralement pas comme un problème de concurrence (puisque ce type de problème est couvert par des lois que d'autres organismes sont chargés de faire appliquer) constituent en réalité des problèmes de concurrence dans les pays où ils ne sont pas traités par une administration³².

37. Dans leurs réponses, les Membres montrent qu'ils considèrent aussi qu'il est déterminant de bien connaître le pays bénéficiaire ainsi que l'expérience générale des économies en transition et en développement. Le Canada, qui dresse une longue liste des caractéristiques que doivent avoir ceux qui fournissent une assistance technique dans le domaine du droit et de la politique de la concurrence, souligne aussi ces qualités :

- habitude et de préférence expérience du traitement des problèmes et des besoins particuliers des économies émergentes et en développement ;
- capacité de transmettre des connaissances susceptibles de répondre aux besoins, au niveau et aux attentes des destinataires ;
- expérience des contacts avec des institutions gouvernementales et non gouvernementales tant nationales qu'internationales ; et
- expérience d'un environnement multiculturel³³.

38. En outre, tout comme le Mexique³⁴, l'Australie reconnaît que :

les consultants et les experts en politique de la concurrence doivent aussi être très informés des différences culturelles, politiques et sociales qui existent et être en mesure de les évaluer. Ces facteurs exercent un impact énorme sur la conduite des affaires dans d'autres pays. Ce qu'on peut considérer comme l'approche type ou le "cas d'école" pour traiter les questions de concurrence en Australie (ou dans d'autres pays développés) peut tout simplement ne pas fonctionner dans des économies en développement. En conséquence, les consultants doivent adopter des stratégies et des approches de la politique de la concurrence qui soient plus souples et plus créatives que ce qui serait nécessaire autrement³⁵.

39. Outre les qualités ci-dessus, le Mexique précise que "l'expérience des échanges et des difficultés industrielles que rencontrent les petites économies ouvertes est aussi d'une grande utilité"³⁶.

IV. Rôle des autorités de la concurrence et des sociétés privées sous-traitantes

40. Comme il l'a souligné dans sa note au CLP en octobre 1999³⁷, le Secrétariat considère que l'expérience qu'ont les fonctionnaires chargés de la concurrence en matière d'application du droit, de questions d'institutions et de procédures fait qu'ils sont tout particulièrement qualifiés pour apporter une assistance technique. Les réponses des Membres montrent que pour l'essentiel ils partagent l'opinion du Secrétariat sur ce point. En outre, il apparaît clairement que la majeure partie de l'assistance technique fournie par les grands pays donateurs de l'OCDE (et la Banque mondiale) est conçue par des fonctionnaires qui n'ont pas d'expérience de la politique de la concurrence et est fournie par des sociétés privées sous-traitantes, qui dans certains cas, mais pas dans tous, comptent dans leur équipe d'anciens fonctionnaires de la concurrence. La question évidente qui se pose est de savoir comment les autorités de la concurrence, qui travaillent dans leur bureau implanté dans la capitale ou par l'intermédiaire du CLP, pourraient améliorer la qualité de l'assistance technique – et, par voie de conséquence, la qualité de la réglementation et de l'application du droit de la concurrence dans les pays non membres – en fournissant une plus grande partie de l'assistance ou en jouant un rôle accru dans la conception des projets d'assistance et la sélection des sociétés privées sous-traitantes.

41. Le principal avantage qu'ont indiqué les Membres pour justifier le recours à des sociétés privées sous-traitantes est tout simplement de pallier ainsi la limitation des ressources dont disposent les autorités de la concurrence. Le Canada a répondu que, d'une manière générale, "il peut être plus facile d'apporter une assistance technique en recourant à des sociétés privées sous-traitantes compte tenu des contraintes gouvernementales concernant le mandat principal ainsi que les limitations juridiques, réglementaires et/ou financières qui peuvent empêcher ou freiner la fourniture d'une assistance et la couverture des coûts"³⁸. Le Japon³⁹ et l'Australie ont fait des commentaires comparables, ce dernier pays soulignant que "les principaux avantages [que présente le recours à des sociétés privées sous-traitantes] sont la possibilité de surmonter les limitations des ressources, et la possibilité de faire appel aux compétences et à l'expertise de consultants dans d'autres domaines, notamment dans les domaines réglementaires, académiques ou juridiques"⁴⁰. D'après la Finlande, des conférences données par des sociétés privées sous-traitantes peuvent

être utiles en ce qu'elles donnent "une bonne idée de la manière dont le secteur privé traite les questions de concurrence"⁴¹, mais cet avantage est une retombée du fait de faire appel à des participants appartenant au secteur privé, et non de sous-traiter l'assistance technique en général.

42. Les inconvénients que présente le fait de faire appel à des sociétés privées sous-traitantes, tels que les Membres les ont décrits, sont essentiellement les mêmes que ceux que le Secrétariat a mentionnés précédemment. Par exemple, le Canada attire l'attention sur la capacité limitée des sociétés privées sous-traitantes de fournir une assistance technique finement adaptée aux besoins des bénéficiaires, en particulier pour ceux qui se heurtent à des problèmes complexes d'application du droit :

L'un des grands inconvénients tient au fait qu'une grande partie de l'assistance technique demandée a trait au renforcement des moyens d'action et au fonctionnement d'une administration de la concurrence, mission pour laquelle le Bureau est mieux placé pour fournir des conseils. En outre, toutes les sociétés privées sous-traitantes qui apportent une assistance technique en matière de politique de la concurrence ne sont pas en mesure de fournir le type d'expérience pratique et réelle que recherchent les administrations de la concurrence récemment créées ou en cours de création⁴².

43. D'autres Membres tels que la Finlande⁴³, l'Italie⁴⁴, les Etats-Unis⁴⁵ et la CE⁴⁶ ont fait des commentaires du même ordre. L'Australie a mentionné un autre inconvénient éventuellement important que présente le recours à des sociétés privées sous-traitantes :

L'ACCC ne reçoit pas toujours de retour d'informations sur l'efficacité ou les réalisations des actions d'assistance technique qui ont été externalisées. De même, les contacts utiles pris par le consultant ne sont pas automatiquement mis à la disposition de l'ACCC⁴⁷.

44. Il semble que, d'une manière générale, les organismes publics spécialisés dans le financement ne coopèrent que de façon limitée avec leur administration nationale de la concurrence. Par exemple,

l'ACCC ne joue généralement pas un grand rôle dans les activités qui sont autrement déléguées par le gouvernement australien à des tiers. L'ACCC est occasionnellement sollicité par l'Agence australienne pour le développement international (AusAID) pour discuter du cadre d'une action d'assistance technique, ou invité à suggérer ou à recommander des consultants compétents pour une activité, ou bien à pré-informer le consultant avant le lancement d'une activité.

45. La situation du Bureau canadien de la concurrence est comparable⁴⁸. En ce qui concerne les Etats-Unis, "l'US Agency for International Development (USAID) a financé de l'assistance technique par l'intermédiaire de sociétés privées sous-traitantes ou d'universitaires, mais cela s'est fait sans l'appui ou la participation du DOJ et de la FTC"⁴⁹.

46. En conséquence, tout comme le Canada⁵⁰, l'Australie suggère une coopération accrue entre les autorités de la concurrence et les organismes de financement : "il est indispensable de continuer à nouer des liens plus étroits entre l'ACCC et AusAID, de sorte que chaque administration soit pleinement informée des activités d'assistance technique fournie par l'autre dans le domaine du droit et de la politique de la concurrence, et que l'on puisse tirer le plus grand avantage possible de ces activités"⁵¹.

47. Compte tenu de ce qui précède, le Secrétariat est convaincu qu'il serait utile que les délégués discutent des manières possibles de permettre aux autorités de la concurrence de jouer un rôle accru dans l'apport d'une assistance technique sans épuiser leurs ressources limitées :

- les législateurs pourraient accorder davantage de ressources financières pour que les autorités de la concurrence apportent une assistance technique, y compris des ressources destinées à couvrir les coûts du personnel travaillant spécifiquement à l'apport de l'assistance technique ;
- des contrats passés avec des organismes publics de financement pourraient couvrir le total des coûts encourus par les administrations pour apporter l'assistance technique ;
- les autorités de la concurrence pourraient bénéficier d'une plus grande part des fonds disponibles, et avoir la possibilité de demander à leur personnel soit de fournir eux-mêmes l'assistance, soit de mettre leur expertise au service de l'élaboration de projets d'assistance technique et de la sélection de sociétés privées sous-traitantes qualifiées ; et
- les autorités de la concurrence pourraient conseiller les organismes de financement sur la conception de leurs projets d'assistance technique et la sélection de sociétés privées sous-traitantes qualifiées⁵².

V. Coordination internationale de l'assistance technique

Formes courantes et niveaux de coordination internationale

48. D'une manière générale, les pays Membres ne coordonnent pas de façon active leur assistance technique, ni entre eux, ni avec les organisations internationales. Par exemple, le Canada a déclaré que "en l'absence d'un mécanisme efficace à cet effet, le Canada ne coordonne généralement pas l'assistance technique qu'il fournit avec d'autres pays Membres de l'OCDE ou des organisations internationales"⁵³. Cependant, on observe une certaine coordination du fait que des pays Membres peuvent cofinancer ou envoyer des représentants à des séminaires de l'OCDE ainsi que d'autres séminaires qui font appel à des panels internationaux. La Corée et les Etats-Unis, par exemple, ont co-organisé des manifestations avec l'OCDE.

49. Les autorités de la concurrence sont généralement réceptives aux demandes de coopération si le financement n'est pas un problème, mais la coopération devient problématique, voire impossible si le pays sollicité fournit toute l'assistance ou la majeure partie de l'assistance en faisant appel à des sociétés privées sous-traitantes. Pour les séminaires de l'OCDE fondés sur des études de cas, nous préférons généralement ne pas faire appel à des sociétés privées sous-traitantes à cause de conflits d'intérêt (et généralement de manque d'expertise pertinente). Pour des manifestations moins sensibles, souvent les sociétés privées sous-traitantes ne sont pas prêtes à coopérer, et une fois seulement un organisme de financement a eu suffisamment d'emprise sur une société sous-traitante pour l'amener à coopérer. Un problème particulier se pose dans le cas de l'UE, qui dispose de fonds considérables destinés à l'assistance, mais qui est apparemment incapable de financer la participation de la Direction générale de la concurrence à des opérations d'assistance organisées par d'autres.

50. Au niveau régional, les Etats membres de l'UE apportent une assistance pour le compte de l'UE. Plusieurs autres pays, tels que le Japon, participent à une coopération régionale pour fournir une assistance technique⁵⁴.

51. Il semble qu'il n'y ait guère de coordination entre les organisations mondiales qui apportent une assistance technique (OCDE, CNUCED, Banque mondiale, OMC) et les organisations régionales, même s'il existe une certaine coordination APEC/OCDE (principalement entre les pays de l'APEC qui sont Membres de l'OCDE et le Secrétariat de l'OCDE).

52. D'après les informations recueillies récemment et l'expérience du Secrétariat, la coordination est sensiblement plus forte entre l'OCDE, la CNUCED, la Banque mondiale et l'OMC. Comme cela a déjà été dit, les organisations évitent généralement que leurs actions fassent double emploi en prenant des contacts informels et en adoptant des critères et des moyens différents pour fournir de l'assistance. Nous sommes convaincus que les trois programmes se complètent, et une coopération active s'intensifie. Avant d'aborder les points de vue des Membres sur les manières possibles d'accroître la coordination internationale, il pourrait être utile de s'attarder sur la coordination passée et présente des actions qui s'inscrivent dans ces quatre programmes internationaux.

Coordination actuelle entre organisations internationales

53. Comme cela a déjà été dit, l'OCDE et plusieurs de ses Membres ont fourni une importante assistance technique aux autorités de la concurrence des pays d'Europe centrale et orientale (PECO) ainsi qu'aux pays de l'ex-Union soviétique. D'une manière générale, la CNUCED n'a pas été très active dans ce domaine, et s'est plutôt intéressée aux pays moins développés. La Banque mondiale semble avoir beaucoup travaillé dans ce domaine sur les questions qui ont trait au fonctionnement d'une économie de marché, mais n'a pas fourni beaucoup d'assistance technique spécifique aux autorités de la concurrence de ces pays en transition. Ce domaine n'a pas non plus été retenu par l'OMC pour ses travaux.

54. L'initiative d'assistance internationale la plus récente dans cette zone géographique est le Contrat d'investissement pour l'Europe du sud-est qui a été signé par les pays du G-7 et la CE. L'OCDE est le "chef de file" officiel en ce qui concerne les travaux sur le droit et la politique de la concurrence menés dans le cadre de ce Contrat, et à ce titre a coopéré avec l'USAID dans l'évaluation du régime de la politique de la concurrence en Croatie. L'une des "initiatives régionales phare" du Contrat a trait à des programmes "d'achat, d'exploitation et de transfert" ainsi qu'à d'autres moyens novateurs d'encourager l'investissement privé dans l'infrastructure. Ce projet a été orchestré par la Commission économique des Nations Unies pour l'Europe (CEE-ONU) qui a demandé à l'OCDE de fournir une assistance sur les questions de politique de la concurrence à prendre en compte dans l'élaboration et la mise en application de ces programmes. Nous avons accepté d'intervenir et, à son tour, la CEE-ONU a accepté de participer à l'action concernant le droit et la politique de la concurrence que le Secrétariat est en train de préparer.

55. Comme l'intérêt à l'égard de la politique de la concurrence s'est diffusé à l'échelle de la planète, cela a donné lieu à des occasions plus nombreuses tant de coordination que de conflits et de double emploi. Ces occasions ont probablement été les plus grandes en Asie du sud-est peu après la crise économique de 1997, et la coordination s'est certainement intensifiée dans cette zone. Par exemple, le FMI et la Banque mondiale ont été impliqués en Indonésie et en Thaïlande, et leur participation a comporté un travail en matière de droit et de politique de la concurrence. En conséquence, le Secrétariat de l'OCDE a maintenu un contact avec ces pays par le biais d'une participation à des manifestations régionales organisées par la Japanese Fair Trade Commission (JFTC) et avec la Korea Fair Trade Commission (KFTC), mais n'est pas intervenu dans les commentaires formulés sur les projets de loi d'Indonésie et de Thaïlande. En réalité, le Secrétariat de l'OCDE a davantage cherché à stimuler l'intérêt pour un droit de la concurrence en Malaisie et aux Philippines. Il y a également eu une coordination entre membres du Secrétariat de l'OCDE et de la CNUCED qui sont intervenus dans les manifestations organisées par l'une ou l'autre de ces instances. Par ailleurs, l'OCDE a coopéré avec la Banque mondiale dans l'organisation de deux manifestations – une conférence de haut niveau à Bangkok en 1999 et un court intensif d'une semaine sur le droit de la concurrence à Singapour en 2000 – et le Secrétariat de l'OCDE a participé à une conférence de la Banque mondiale à Djakarta.

56. En Asie comme ailleurs, on continue d'observer une division naturelle du travail fondée sur la relation particulière que la CNUCED et la Banque mondiale ont avec les pays moins développés. En outre,

l'OMC a commencé assez récemment à fournir une assistance technique, également par l'intermédiaire de grandes manifestations régionales. Jusqu'à une période récente, tous les travaux menés par le Secrétariat de l'OCDE en Afrique se sont limités à des communications orales dans des programmes organisés par la CNUCED ou d'autres organisations. En Amérique du Sud, l'OCDE a commencé à travailler en 1995 et 1996 par l'intermédiaire d'opérations conjointes menées avec la Banque mondiale, et depuis lors des discussions informelles – tant avec les bénéficiaires qu'avec d'autres donateurs en puissance – ont contribué à éviter des conflits qui auraient pu résulter des approches quelque peu différentes adoptées par les quatre organisations pour fournir de l'assistance.

57. Ces approches différentes peuvent être décrites dans les grandes lignes de la manière suivante. La CNUCED organise des séminaires de formation, mais préfère un dialogue politique moins long, de plus haut niveau, impliquant un très grand nombre de pays. La Banque mondiale organise aussi des séminaires de formation, mais son approche quasi-systématique – surtout ces dernières années – a été l'apport d'une assistance en profondeur et à long terme à un petit nombre de pays. L'OMC a organisé un certain nombre de grandes conférences. Les opérations d'ouverture de l'OCDE consistent presque exclusivement en séminaires de formation qui exploitent l'expérience de ses Membres en matière d'application des règlements, et s'adressent à une gamme de pays plus étroite que celle que ciblent la CNUCED ou l'OMC, mais plus large que celle de la Banque mondiale.

Avantages potentiels d'une coopération dans la fourniture de l'assistance technique

58. Les réponses des pays Membres à la question relative aux avantages potentiels d'une coordination accrue sont analysées ci-dessous en détail. Toutefois, avant d'aborder ce sujet, il est important de souligner un point distinct mais qui néanmoins s'y rattache : quel que soit le contexte, un certain nombre de réponses évoquent les avantages qui résulteraient de l'organisation d'opérations conjointes plus nombreuses avec des intervenants de plusieurs pays différents. Toutes les manifestations organisées par des instances internationales comportent ce type de panel, mais ce n'est apparemment pas le cas pour d'autres manifestations. L'Australie souligne que les opérations conjointes réunissant plusieurs donateurs pourraient contribuer à permettre "aux pays bénéficiaires de recevoir des conseils de sources différentes, ce qui rendrait possible une comparaison des différentes méthodes et approches"⁵⁵. De même, le Mexique souligne qu'une "plus grande coordination internationale des programmes d'assistance technique rendrait mieux compte de l'expérience internationale"⁵⁶. La CNUCED partage ce point de vue, et précise que c'est par "une coopération entre fournisseurs [d'assistance technique]"⁵⁷ qu'on pourrait le mieux réaliser cette coordination.

Avantages et coûts potentiels d'une coordination accrue

59. Tous les Membres qui se sont intéressés à la question ont été d'accord pour dire que, d'une manière générale, une coordination accrue de l'assistance technique devrait ou pourrait présenter certains avantages (Cf. par exemple Australie⁵⁸, Canada⁵⁹, République tchèque⁶⁰, Danemark⁶¹, Italie⁶², Japon⁶³ et Norvège⁶⁴). Les avantages indiqués reflètent les différents types et niveaux de coopération. D'une manière générale, on a pu relever quatre différents couples coordination/avantage : l'un implique le partage de matières ressources, deux impliquent des niveaux différents selon le partage d'informations relatives à des plans futurs, et un autre combine un niveau élevé de partage des plans futurs avec un certain degré de planification centralisé.

- Premièrement, on pourrait avancer vers l'objectif de réduction des coûts d'organisation en créant une sorte de "bibliothèque" virtuelle. C'est ce qu'on appellera le "concept de bibliothèque".

- Deuxièmement, on pourrait avancer vers l'objectif de minimiser les chevauchements et les doubles emplois en partageant davantage et plus tôt l'information sur les manifestations prévues. C'est ce qu'on appellera la "coordination pour réduire le double emploi".
- Troisièmement, on pourrait avancer vers l'objectif de fournir une meilleure assistance par des opérations conjointes volontaires impliquant des panels internationaux en partageant encore davantage et encore plus tôt l'information, ce qui pourrait se traduire par des formes plus solides de coopération volontaire et permettre ainsi de réaliser des économies de ressources à d'autres égards. C'est ce qu'on appellera le "concept de l'opération conjointe".
- Quatrièmement, on pourrait avancer vers l'objectif de rationaliser l'assistance technique en combinant un large partage de l'information avec la création d'un organe central de conseil sur la meilleure manière dont les donateurs peuvent répondre aux besoins des destinataires. C'est ce qu'on appellera le "concept de la coordination centrale".

60. Chacune de ces formes de coordination est discutée séparément ci-dessous. Dans leurs réponses, les Membres ne donnent pas beaucoup d'informations sur les avantages ou les coûts de ces activités. En fait, les avantages ne sont généralement abordés qu'en termes théoriques, sans que soient considérés les problèmes courants ou l'utilité que pourraient présenter en pratique certaines formes de coordination. Par exemple, le fait de réduire au minimum les chevauchements et les doubles emplois est décrit comme un avantage sans que soit pour autant indiquée la fréquence de ces chevauchements. De même, il est supposé qu'une plus grande coordination s'accompagnerait d'un recours accru à des panels internationaux sans que soient analysées les raisons pour lesquelles certains donateurs ne font pas appel à l'heure actuelle à ces panels. En outre, aucune analyse n'indique si, ni dans quelle mesure, ces formes de coordination pourraient être utilisées pour l'assistance technique qui est fournie par des sociétés privées sous-traitantes.

61. Les réponses comportent des remarques sur les coûts et les obstacles à la coordination, qui sont de nature technique et politique. La nature et l'importance de ces coûts et obstacles dépendent bien entendu de l'ampleur de la coordination envisagée, mais il est néanmoins possible de faire quelques généralisations.

62. Sur le plan technique, les Membres signalent qu'une coordination pourrait coûter très cher. De fait, toutes ces formes de coordination imposeraient des coûts en termes de ressources humaines et financières. Ainsi, la République tchèque reconnaît que "la mise en place d'une coordination internationale demandera beaucoup de temps et d'efforts, et exigera des ressources humaines et financières considérables"⁶⁵. Dans sa réponse, le Canada considère que "les problèmes de financement (c'est-à-dire, réunir et attribuer les fonds)"⁶⁶ est l'un des obstacles les plus difficiles à surmonter pour stimuler une coordination de l'assistance technique.

63. Certaines réponses expriment aussi l'inquiétude de voir une coordination entraîner des coûts du fait des délais dus à la coordination elle-même. A cet égard, le Danemark considère que "le plus grand obstacle à [une coordination] pourrait être une contrainte de temps"⁶⁷. D'après le Canada, les périodes plus longues rendues nécessaires par une intensification de la coordination se solderaient aussi par "un délai de réaction plus long aux demandes"⁶⁸. La CNUCED souligne que le processus de coordination pourrait nuire à l'efficacité de l'assistance technique en nécessitant des "décisions de dernière minute résultant souvent d'une incertitude des financements"⁶⁹. Néanmoins, il faut dire que la mise en application du concept de bibliothèque ou du partage d'information nécessaire pour réduire au minimum les chevauchements injustifiés ne devrait entraîner aucun délai. Apparemment, les délais ne se solderaient par un coût que dans le cas d'une coordination impliquant la mise en application du concept d'opération conjointe ou du concept de coordination centrale ; en effet, ni la bibliothèque ni le calendrier ne sont susceptibles d'entraîner des retards dans la prise de décisions.

64. L'Australie met en évidence un autre problème lié aux coûts qui pourrait se poser dans le cas où il serait fait appel à un coordinateur central :

Le choix d'une autorité ou d'une organisation centrale chargée de jouer ce rôle de coordination pourrait aussi poser un problème : il n'existe pas d'entité à qui cette responsabilité puisse être naturellement dévolue. Cela signifie-t-il qu'il faudrait créer une nouvelle instance ? Cela entraînerait évidemment des coûts⁷⁰.

65. En outre, la coordination de l'assistance technique pourrait soulever de graves questions d'ordre politique, là encore selon qu'il s'agit de promouvoir une coopération dans la fourniture de l'assistance et selon la manière de s'y prendre. Tout d'abord, "on peut craindre que la coordination centrale des activités d'assistance technique n'aboutisse à un abandon du contrôle des programmes d'assistance technique et d'aide internationale d'un pays"⁷¹. En particulier, en ce qui concerne le financement, l'Australie souligne que "la plupart des pays, comme l'Australie, souhaitent pouvoir surveiller où va l'argent de l'aide"⁷².

66. Deuxièmement, il pourrait être aussi difficile de se mettre d'accord sur les moyens de fournir une assistance technique plus intégrée. Comme le Canada le fait remarquer,

plusieurs obstacles à une coordination internationale accrue se dessinent, notamment : la prise de décisions sur les forums, la collecte des fonds promis et l'assurance de la poursuite du financement, la fixation d'objectifs communs entre les pays participants, la prise en compte des différentes approches de la politique de la concurrence, [...] d'éventuels conflits sur le rang de priorité à accorder à différents projets si les fonds sont limités, le débat sur la manière de fournir effectivement l'assistance (la conception même des projets dans la mesure où chaque Membre peut avoir des points de vues divergents sur la politique de la concurrence), les problèmes de juridiction (quel pays doit fournir l'assistance)⁷³.

Création d'une bibliothèque de matériel ressource

67. Le Canada fait remarquer que le partage du savoir/expertise pourrait éviter "d'avoir à réinventer la roue" chaque fois qu'un projet d'assistance technique est lancé, ce qui se traduirait par un emploi plus efficace des ressources (temps, personnel et fonds)⁷⁴. Le Canada poursuit avec la suggestion suivante :

Etant donné qu'une grande partie de l'assistance technique fournie à ce jour provient de pays Membres de l'OCDE, l'OCDE pourrait constituer une ressource d'informations sur l'assistance technique en matière de politique de la concurrence qui pourraient être utiles pour des projets futurs. Cela pourrait comporter des éléments tels que des discussions d'expériences passées de pays Membres concernant des projets d'assistance technique, une base de données des projets passés, présents ou futurs, une liste d'experts du domaine qui ont travaillé sur des projets par le passé et toutes sortes d'autres outils qui pourraient se révéler utiles à des instances gouvernementales dans le cadre de l'élaboration ou de la mise en application d'un programme d'assistance technique⁷⁵.

68. D'autres réponses portaient moins directement sur la création d'une bibliothèque de ce type, mais la collecte d'au moins certains éléments de cette information est implicite dans les concepts d'opération conjointe et de coordination centrale. Selon le Secrétariat, l'un des "autres outils" les plus intéressants que pourrait contenir ce type de bibliothèque serait du matériel ressource qui aurait été utilisé pour des opérations d'assistance technique.

69. Les coûts, les avantages potentiels, et le rapport probable coût/avantage du concept de bibliothèque dépendent dans une grande mesure du type d'information qu'il est censé inclure, et du fait que le "bibliothécaire" est censé ou non gérer cette information, ainsi que la mesure dans laquelle il est censé le faire, par exemple en incitant activement les fournisseurs à se procurer du matériel et/ou à organiser/faire la synthèse des soumissions. Les coûts pourraient être sensiblement réduits si les Membres mettaient cette information sur leur site Internet, et si la bibliothèque centrale se composait pour l'essentiel de liens avec ces sites. En outre, l'information telle que la documentation relative aux manifestations passées pourrait être conservée dans un site central, à moindre coût, parce qu'elle n'exigerait pas de gestion. Les coûts et les avantages de la collecte et de la maintenance de l'information sous forme d'une base de données complète concernant les manifestations passées, présentes et futures seraient très supérieurs ; ces aspects sont évoqués ci-dessous de manière générale.

Réduire les chevauchements injustifiés

70. L'Australie remarque que "l'absence de coordination entraîne de graves risques de chevauchement, de double emploi et, donc de gaspillage de ressources"⁷⁶. Un chevauchement qui gaspille des ressources est par définition injustifié, mais cette remarque vise à réduire les chevauchements injustifiés pour bien marquer le fait qu'un chevauchement n'est pas nécessairement du gaspillage. Tout d'abord, deux manifestations concernant la politique de la concurrence ayant lieu au même endroit durant des mois consécutifs n'impliquent pas nécessairement un chevauchement parce que l'une peut être une conférence internationale qui s'adresse à des fonctionnaires de haut niveau et l'autre peut être un séminaire de formation pour les hommes de dossier. Pour les pays qui envoient des représentants aux deux manifestations, il pourrait être plus efficace que ces deux manifestations soient adossées l'une à l'autre, mais ce n'est pas nécessairement le cas, et il faut aussi prendre en compte d'autres facteurs d'efficacité. Même si les deux manifestations sont deux séminaires de formation pour des hommes de dossier, le chevauchement n'est pas nécessairement injustifié.

71. En principe, la seule forme de coordination nécessaire pour éviter un chevauchement injustifié devrait être l'annonce précoce des manifestations que les fournisseurs envisagent. L'annonce précoce devrait différer des informations requises pour établir un calendrier public des manifestations prévues, parce que les donateurs peuvent parfois préférer maintenir l'information confidentielle jusqu'à ce que les projets soient plus avancés. Le Secrétariat étudie ce qu'il serait possible de faire comme "panneau d'affichage" à accès restreint sur lequel les Membres pourraient directement faire connaître leurs projets avant qu'ils ne soient suffisamment développés pour pouvoir figurer dans un calendrier public.

72. Etablir un calendrier public des manifestations prévues contribuerait aussi à réduire le risque de chevauchement inutile. La Finlande a soulevé l'idée d'un site Internet de l'OCDE spécialement destiné à la coordination de l'assistance technique. Ce pays avance l'argument suivant :

Etant donné que l'aide profite à des pays non membres et provient de plusieurs pays, l'OCDE pourrait peut-être consacrer une de ses pages d'accueil à l'assistance technique, chaque pays pouvant y faire figurer ses activités d'assistance technique : les pays destinataires, la description du contenu et les dates à retenir⁷⁷.

73. A l'heure actuelle, le site Internet de la CNUCED présente probablement le calendrier le plus complet, mais le calendrier de l'OCDE est en cours d'élaboration. A cet égard, les coûts semblent dépendre en grande partie de l'importance que les pays Membres sont prêts à conférer au fait que ce calendrier soit complet. La tenue à jour d'un calendrier ne coûterait pas très cher s'il ne renfermait que les informations soumises par les pays Membres et d'autres pays, mais les coûts augmenteraient rapidement si le coordinateur était censé rechercher lui-même activement ce type d'information.

Promotion des opérations conjointes

74. Le concept d'opération conjointe correspond à un niveau intermédiaire de coordination. Pour qu'une chambre de compensation aide effectivement les donateurs à localiser d'autres donateurs susceptibles d'être intéressés dans une opération conjointe pour une manifestation portant sur un sujet particulier ou un domaine particulier, il faudrait qu'un grand nombre de donateurs communiquent une somme considérable de données sur leurs activités passées et leurs intérêts présents. Il serait utile, mais non indispensable, que cette chambre de compensation dispose aussi d'informations provenant des pays et des régions qui demandent de l'assistance. En outre, pour aider les opérations conjointes à fournir une assistance technique, cette chambre de compensation pourrait aussi aider les donateurs individuels à concevoir des projets adaptés aux besoins des destinataires⁷⁸. La République tchèque répertorie plusieurs types d'informations qui pourraient être collectées et partagées :

- un répertoire des opérations d'assistance technique déjà effectuées ou en cours d'exécution ;
- un catalogue des conditions prévalant dans les pays individuels qui ont besoin d'une assistance technique; et
- une liste d'experts capables de fournir une assistance technique spécialisée⁷⁹.

75. Cependant, une chambre de compensation de ce type coûterait cher à créer et à maintenir, et on ne sait pas quels avantages elle pourrait apporter sur le plan pratique.

Instauration d'une coordination centrale

76. Dans sa réponse, le Canada préconise explicitement la mise en place d'un nouvel organisme de coordination de l'assistance technique, composé de représentants de fournisseurs d'assistance technique⁸⁰. La réponse précise :

l'organisme de coordination ne fournirait pas lui-même une assistance technique, et ses tâches de fond seraient les suivantes :
tenir à jour un catalogue des besoins des destinataires avec leur stade de développement ;
surveiller les divers projets d'assistance technique risquant de faire double emploi ;
encourager chez les parties intéressées, tant destinataires que donateurs, le développement d'une approche plus ciblée et intégrée et résultant d'une planification stratégique pour la fourniture d'une assistance technique internationale en matière de politique de la concurrence ; et
si possible, évaluer périodiquement l'avancement de la fourniture de l'assistance technique en suivant l'élaboration de lois, de politiques et d'institutions saines en matière de concurrence dans les économies en développement⁸¹.

77. En outre, l'organisme de coordination

pourrait enregistrer les diverses initiatives en cours et en informer les responsables de la concurrence dans le monde entier. Cet organisme pourrait aussi recevoir des demandes d'assistance technique et les répercuter de façon appropriée. Cela n'empêcherait pas que des pays adressent leur demande à des pays individuels, qui à leur tour informeraient l'organisme de coordination de ces activités⁸².

[...]

L'organisation de coordination pourrait enregistrer les projets, les demandes d'intervention sur le terrain et se mettre en contact avec d'autres organisations pour apporter aux pays destinataires une assistance technique présentant la bonne orientation stratégique en vue de réduire les chevauchements et les doubles emplois. Un organisme de coordination serait aussi mieux à même d'élaborer un plan à plus long terme pour la fourniture de l'assistance technique. Ce plan pourrait prendre en considération les différents stades de développement des pays destinataires de sorte que la conception des projets d'assistance technique réponde aux différents besoins⁸³.

78. Dans leurs communications au Groupe de travail de l'interaction du commerce et de la politique de la concurrence de l'OMC, la Communauté européenne et ses Etats membres demandent aussi un système comportant une coordination assurée par un organisme central, dans ce cas un futur Comité de la politique de la concurrence de l'OMC :

Il faudrait donc élaborer une approche plus adaptée et mieux coordonnée parallèlement aux négociations relatives à l'accord-cadre de l'OMC. Ce travail devrait reposer sur une coopération plus étroite entre les organisations internationales compétentes – en particulier la CNUCED et la Banque mondiale – et un partenariat véritable avec les pays en développement. Lorsque cet accord-cadre sera en place, le Comité de la politique de la concurrence qu'il est prévu de créer au sein de l'OMC devrait jouer un rôle important en assurant la promotion et le suivi des programmes d'assistance technique intégrés. Ainsi, l'accord-cadre devrait avoir un important effet catalyseur pour la promotion de l'assistance technique dans le domaine de la concurrence (domaine qui n'a pas toujours été considéré comme prioritaire auparavant), et il permettra de s'assurer que l'assistance fournie répondra à des objectifs définis d'un commun accord en fonction des besoins spécifiques du pays considéré⁸⁴.

79. Dans le cadre d'un tel système,

une approche plus ciblée et mieux coordonnée de l'assistance technique et du renforcement des moyens d'action pourrait aussi se dessiner avec la conception et la formulation d'un programme plus complet d'assistance à un pays donné. Un ou plusieurs pays ou organisations pourraient alors assumer la responsabilité de certaines parties du programme allant des études jusqu'à la formation des fonctionnaires en passant par l'élaboration ou l'amendement de la législation, au lieu de répondre de façon fragmentaire aux besoins d'un pays donné comme c'est actuellement le cas⁸⁵.

80. On peut penser que l'instauration d'un système de coordination centrale coûterait très cher à créer et à maintenir, et il serait intéressant de savoir si le Canada ou l'UE a tenté de chiffrer cette approche. En outre, s'il est vrai qu'un système centralisé permettrait d'offrir une efficacité évidente, la négociation d'approches intégrées pourrait coûter cher et se heurter au fait que les pays préfèrent généralement attribuer des fonds pour aider certains pays de leur choix, et non pas les pays qui pourraient bénéficier le plus efficacement de cette aide aux yeux d'un groupe international. Or, il faudrait procéder à une négociation de ce type, car comme le signale la CNUCED "il n'apparaît pas toujours possible de confier à une organisation donnée le soin de décider des activités [d'assistance technique] que d'autres peuvent assurer"⁸⁶.

Caractéristiques d'un coordinateur international d'assistance technique

81. Les caractéristiques indispensables d'un coordinateur international d'assistance technique dépendent du type et du niveau de coordination. La mise en application du concept de bibliothèque exige une certaine expertise si le bibliothécaire doit gérer l'information, mais il est possible de créer une

bibliothèque utile sans nécessairement y inclure des informations sensibles. Un programme modeste visant à réduire les chevauchements injustifiés n'exige pas une expertise particulière en matière de concurrence. La Finlande a indiqué que le site Internet de l'OCDE peut servir de cadre à un calendrier et tant la République tchèque⁸⁷ que le Danemark⁸⁸ ont fait état d'un rôle que l'OCDE pourrait jouer.

82. Par ailleurs, si la coordination internationale doit comporter la gestion des types d'information que pourrait nécessiter la mise en application du concept d'opérations conjointes ou la mise en place d'un coordinateur central proactif, des problèmes plus sensibles et complexes vont se poser. L'Australie signale que "l'organisation devrait aussi avoir conscience des sensibilités et des priorités à prendre en compte dans les programmes d'aide des pays individuels"⁸⁹. Le corollaire est qu'il faudrait que les donateurs aient l'impression de pouvoir partager les informations sensibles sur les budgets et les priorités avec le secrétariat du coordinateur. Cet aspect tendrait à mettre en avant l'OCDE, mais ce n'est pas le cas des autres aspects. En effet, si le système prévoit que des pays en développement adressent leur demande au coordinateur, le critère évoqué par la CNUCED – "l'expérience la plus vaste possible de la plus grande diversité possible de pays destinataires"⁹⁰ – jouerait plutôt en faveur de la CNUCED. Si le coordinateur est censé étudier les propositions, évaluer les besoins et jouer un véritable rôle de coordination, il faudrait que le secrétariat ait à la fois (a) une expérience de l'application de règlements et de l'assistance en matière de concurrence, et (b) la confiance des donateurs et des bénéficiaires.

83. Le Canada demande qu'un coordinateur central du type qu'il recommande présente les caractéristiques suivantes :

- reconnaissance, respect et appui international ;
- engagement de la part des pays Membres à l'égard d'une assistance technique coordonnée à l'échelle internationale ;
- visée à long terme (de façon à pouvoir assurer un suivi) ;
- réservoir de personnel qualifié/experts à disposition (ayant une expérience dans les domaines énumérés précédemment – économie, droit, développement) ; et
- engagement ferme à l'égard d'un financement à long terme⁹¹.

Conclusions

Coopération dans la fourniture de l'assistance

84. Indépendamment de l'efficacité que peut apporter un système de coordination, le Secrétariat est d'accord avec les pays qui affirment dans leurs réponses que davantage d'"opérations conjointes" avec un plus grand nombre de panels internationaux contribuerait à améliorer l'assistance technique. Comme cela a été dit précédemment, le Secrétariat a co-parrainé des manifestations avec des pays Membres, non membres et des organisations internationales, et chacune de ces opérations conjointes a été source de résultats efficaces. En outre, toutes les manifestations organisées par l'OCDE comportent des panels internationaux, ce qui, à notre avis, rend l'assistance à la fois plus crédible et plus valable. Les avantages de cette coopération ont été soulignés lors des réunions de la CNUCED de septembre dernier :

Les pays qui n'étaient pas dotés d'une loi sur la concurrence, ou disposant d'une telle loi mais ayant peu d'expérience dans ce domaine, pourraient bénéficier d'une aide substantielle des

organisations internationales dans le cadre de leurs programmes d'assistance technique. Chaque organisation internationale déployant des activités dans le domaine de la concurrence avait des partenaires et des missions différentes. Toutefois, leurs activités, loin de s'exclure mutuellement, étaient complémentaires. A cet égard, l'OCDE notait avec satisfaction que le Secrétaire général de la CNUCED s'était félicité de la coopération entre la CNUCED et l'OCDE dans le domaine de l'assistance technique. L'OCDE estimait que cette coopération devait encore progresser, dans la mesure où les ressources et d'autres facteurs le permettaient⁹².

Coordination de l'assistance technique

85. Le Secrétariat est convaincu qu'il est de plus en plus nécessaire de coordonner l'assistance technique, et que la marge de progression est grande. Parallèlement, il ne faut pas sous-estimer les obstacles à une telle coordination. Comme le font remarquer les pays Membres, une coordination accrue va nécessiter d'importantes ressources financières et humaines et va prendre beaucoup de temps.

86. En outre, indépendamment de l'appui général des pays Membres à l'égard d'une plus grande coordination, les liens économiques⁹³, historiques, culturels, politiques et géographiques⁹⁴ restent des facteurs décisifs dans les décisions des pays Membres quant au type et à l'intensité de l'assistance technique à porter et aux pays qui doivent en bénéficier. En fait, de nombreux Membres apportent une assistance technique en grande partie, voire exclusivement, dans le cadre d'accords bilatéraux⁹⁵ ou multilatéraux⁹⁶. Par exemple, le Bureau de la concurrence du Canada

favorise principalement les relations dans le cadre de ses accords actuels de libre-échange et de coopération. Sinon, l'assistance technique est généralement fournie au coup par coup. Le Bureau répond aux demandes en fonction des ressources disponibles et de la nature de la demande⁹⁷.

87. En outre, avant de lancer un nouveau système coûteux, il faudrait procéder à une analyse coûts/bénéfices plus approfondie que celle que permettent les informations que nous avons recueillies jusqu'à présent. Nous sommes convaincus qu'une initiative qui consisterait à mettre en place une coordination modeste pour réduire les chevauchements injustifiés, ce qui contribuerait en fait également à promouvoir les opérations conjointes, présenterait un rapport coût-efficacité intéressant. D'après les informations dont nous disposons à l'heure actuelle, nous pensons qu'il n'est pas certain que d'autres formes de coordination présentent un bon rapport coût-efficacité, et nous ne savons pas quelles autres formes de coordination pourraient être à privilégier. A cet égard, un des points que les délégués pourraient être amenés à traiter est le fait de savoir si, comment, et avec quels coûts et avantages, un système de coordination pourrait gérer la très grande quantité d'assistance technique qui est financée par des pouvoirs publics, mais fournis par des sous-traitants privés. On pourrait se poser la même question en ce qui concerne la quantité d'assistance certes plus faible mais néanmoins non négligeable qui est financée par des fondations et d'autres instances privées.

88. Pour présenter un bon rapport coût-efficacité, une coordination visant à réduire au minimum les chevauchements injustifiés doit être assurée par l'intermédiaire d'une ou plusieurs chambres de compensation qui soient "virtuelles" et aussi automatisées que possible. Une chambre de compensation devrait probablement se composer d'une sorte de tableau d'affichage non public qui présenterait les manifestations au stade de prévision, et d'un calendrier qui, lui, serait public. Les donateurs devraient s'engager à fournir rapidement des informations, parce qu'il serait très coûteux que ce soit le coordinateur qui soit chargé de faire la démarche active d'aller chercher l'information et d'assurer le suivi nécessaire pour maintenir une seule et unique chambre de compensation centrale, complète et à jour.

89. Enfin, le Secrétariat se demande si une seule chambre de compensation destinée à réduire les chevauchements injustifiés et à promouvoir les opérations conjointes est préférable à plusieurs chambres de compensation, ce qui évidemment exigerait que ces dernières soient reliées entre elles. Il vaut mieux une source unique pour les utilisateurs si l'on peut avoir une certitude raisonnable de son exactitude et de son caractère complet, mais comme cela a été dit précédemment, cela pourrait coûter très cher de confier à une seule institution la charge de rechercher activement l'information. Si plusieurs organisations existantes – éventuellement l'APEC, la CNUCED et l'OCDE – ont des chambres de compensations liées entre elles, l'ensemble pourrait fournir une information plus précise et à jour avec des coûts d'exploitation moindres et des coûts de recherche seulement légèrement plus élevés pour les utilisateurs.

VI. Questions à discuter

90. Le Secrétariat propose que soient discutés les points suivants à la prochaine réunion :

1. Est-ce que l'offre et la demande d'assistance technique s'équilibrent à l'heure actuelle ? Si le besoin d'assistance est supérieur à l'offre, quelles mesures peuvent être prises pour faire prendre conscience aux donateurs de ce besoin ?
2. Quels sont les avantages et les inconvénients de la fourniture d'une assistance technique par des administrations chargées de la concurrence par opposition à des sociétés privées sous-traitantes ?
3. Est-il souhaitable et possible de confier à des administrations de la concurrence un plus grand rôle dans la fourniture de l'assistance technique sans épuiser leurs ressources limitées ? Le cas échéant, quels sont les points de vue des délégués à l'égard des possibilités suivantes ?
 - les législateurs pourraient accorder des ressources financières importantes aux administrations chargées de la concurrence pour fournir l'assistance technique, notamment des ressources destinées à couvrir les coûts de personnel chargé spécifiquement de s'occuper de l'assistance technique ;
 - des contrats signés par des organismes publics de financement pourraient couvrir l'ensemble des coûts de fourniture d'assistance technique assumés par les administrations ;
 - les administrations de la concurrence pourraient bénéficier d'une plus grande part des fonds disponibles, et avoir le choix entre faire appel à leur propre personnel pour fournir directement l'assistance ou utiliser leurs compétences pour élaborer des projets d'assistance technique et sélectionner des sous-traitants privés qualifiés ; et
 - les administrations de la concurrence pourraient donner des conseils aux organismes de financement sur l'élaboration de leurs projets d'assistance technique et sur la sélection de sous-traitants privés qualifiés.
4. Quels sont les coûts et avantages probables des formes de coordination suivantes ?
 - réduire le coût de l'organisation d'opérations d'assistance technique et fournir des conseils en créant une sorte de "bibliothèque" virtuelle ;

- réduire au minimum les chevauchements injustifiés et les doubles emplois par un partage plus systématique et plus précoce des informations relatives aux manifestations prévues ;
- promouvoir une meilleure assistance par le biais d'opérations conjointes volontaires comportant des panels internationaux avec un partage encore plus systématique et précoce de l'information sur les zones géographiques et les domaines d'intérêt du donateur individuel et peut-être aussi de l'information sur l'assistance demandée par des bénéficiaires potentiels particuliers ;
- rationaliser l'assistance technique en combinant un vaste partage des informations avec la création d'un organisme central chargé de conseiller les donateurs sur la manière de répondre au mieux aux besoins des bénéficiaires.

ANNEXE A

RESUME DES REPONSES AU QUESTIONNAIRE

Ce chapitre présente un résumé des réponses au questionnaire sur les activités d'assistance technique des pays Membres [DAFFE/CLP/WP3(2000)8] qu'ont apportées les pays Membres et les autres grands fournisseurs d'assistance technique, à savoir, l'Australie, le Canada, la République tchèque, le Danemark, la Finlande, l'Italie, le Japon, le Mexique, les Pays-Bas, la Norvège, la Pologne, la Suisse, la Turquie, les Etats-Unis, la Commission européenne, la CNUCED, la Banque mondiale et l'Organisation mondiale du commerce.

Australie

L'Australie a principalement apporté une assistance technique par l'intermédiaire de l'ACCC, en grande partie avec l'aide financière de l'AusAID – Agence du gouvernement australien pour le développement international. Le personnel de l'ACCC qui est chargé des activités internationales a aussi coordonné l'assistance technique apportée par l'ACCC. Les activités d'assistance technique menées par l'ACCC recouvrent l'organisation et l'accueil de conférences et d'ateliers en Australie et dans d'autres pays, l'organisation et la réception de visites de délégations en Australie, la participation à des ateliers, des conférences et des programmes de formation spécifique à l'échelle internationale, l'organisation de programmes d'échange de personnel à l'échelle internationale et la réponse à des demandes d'assistance provenant de nos homologues internationaux. De nombreux Commissaires de l'ACCC ainsi que le personnel de cette instance ont participé à l'exécution réelle et à la fourniture du travail d'assistance technique de l'ACCC⁹⁸.

Le programme d'aide outre-mer du gouvernement australien s'adresse surtout à la région Asie-Pacifique, la Papouasie Nouvelle Guinée, les îles du Pacifique et les régions les plus pauvres d'Asie de l'est étant les secteurs géographiques qui bénéficient de la plus haute priorité. Le programme répond aussi de façon sélective à des besoins de développement en Asie du sud, en Afrique et au Moyen-Orient.

Le gouvernement australien reconnaît que la promotion et le développement de véritables régimes de concurrence font partie intégrante de la mise en place d'une "gouvernance" effective. A ce titre, près de 15 % du total du budget d'aide de l'Australie, soit 1,5 milliard de dollars australiens en 1999/2000 est consacré à des projets visant à améliorer la "gouvernance" effective dans les pays en développement.

Canada

Le Bureau de la concurrence du Canada est la principale administration publique qui fournit une assistance technique dans le domaine du droit et de la politique de la concurrence. Le Bureau favorise surtout des relations dans le cadre des accords actuels de libre-échange et de coopération. Sinon, l'assistance technique est généralement fournie au coup par coup. Le Bureau répond aux demandes en fonction des ressources disponibles et de la nature de la demande.

Le Bureau ne bénéficie dans son budget courant d'aucune ligne consacrée à l'assistance technique. En conséquence, sa capacité à financer directement des réponses à des demandes d'assistance est très limitée. Quelques fonctionnaires de la Direction de l'économie et des affaires internationales du Bureau consacrent une petite partie de leur temps à coordonner les réponses à des demandes d'assistance

technique. D'autres fonctionnaires du Bureau, ayant une expérience spécifique dans les domaines concernés, sont sollicités de façon ponctuelle pour apporter une assistance technique.

Des représentants du Bureau ont rencontré à plusieurs reprises des représentants d'autres administrations de la concurrence pour discuter différentes questions. Les activités d'assistance technique du Bureau sont généralement menées au Canada, mais il y a eu un petit nombre de cas dans lesquels des représentants du Bureau se sont déplacés dans le pays bénéficiaire. Ces activités sont généralement des manifestations ponctuelles à court terme et sont destinées à un seul pays à la fois. Le Bureau a proposé une assistance technique tant à des fonctionnaires chargés de la concurrence qu'à d'autres personnes ; toutefois, les demandes adressées au Bureau émanent le plus souvent d'administrations chargées de la concurrence.

Outre le Bureau, d'autres administrations et services gouvernementaux participent à l'organisation et à la coordination de visites, de missions et de programmes de formation qui peuvent comporter une composante de politique de la concurrence.

Les projets traités en-dehors du Bureau sont généralement à plus long terme et impliquent un financement plus important. Par exemple, les projets concernant la Thaïlande ou l'Indonésie exigent des sommes importantes fournies par l'Agence canadienne de développement internationale (ACDI) sur une longue période. Dans le cadre de ces projets, seule une partie du financement concerne la politique de la concurrence. C'est un cas très différent des projets à court terme que le Bureau prend en charge, qui n'impliquent aucun financement important.

République tchèque

Fondé en 1991, le Bureau tchèque pour la protection de la concurrence profite largement de l'assistance technique fournie par des pays Membres de l'OCDE et des organisations internationales telles que l'OCDE et la Banque mondiale. Dans le cadre d'une coopération avec la Commission européenne et de sa préparation à l'accession à l'UE, le Bureau s'est considérablement informé de la politique de l'UE en matière de concurrence. Le Bureau est très désireux de partager son expérience et son savoir avec d'autres administrations de la concurrence récemment constituées. Cependant, il ne dispose que de ressources humaines très limitées pour l'assistance technique. En conséquence, jusqu'à présent, l'assistance technique n'a été proposée que de façon ponctuelle.

Conformément aux accords de coopération avec les administrations de la concurrence d'Europe de l'est, le Bureau a reçu des fonctionnaires d'administrations russes et roumaines pendant de brèves périodes. Le Bureau a également accueilli des fonctionnaires chargés de la concurrence venus de Croatie et d'Estonie. En 1999, le Bureau a organisé le Forum sur le nouveau droit de la concurrence et ses implications pour les entreprises en Europe centrale et orientale en coopération avec la Commission économique des Nations Unies pour l'Europe et le ministère tchèque de l'industrie et du commerce. Plusieurs administrations de la concurrence d'Etats membres de l'UE ayant accepté la proposition du Bureau, des visites bilatérales de fonctionnaires chargés de la concurrence devraient débuter en 2001.

Danemark

L'administration danoise de la concurrence étant le seul fournisseur d'assistance technique dans le domaine du droit et de la politique de la concurrence, une assistance technique générale dans ce domaine par le Danemark est nécessairement limitée. La plupart de l'aide danoise a été au profit des îles Féroé, du Groenland et de l'Europe centrale et orientale, et principalement sous la forme de l'accueil de fonctionnaires étrangers chargés de la concurrence pour de brèves visites d'étude (une journée).

L'administration de la concurrence a fourni toute l'assistance technique sur son budget courant et sans disposer de ressources humaines spécifiquement chargées de l'assistance technique.

Finlande

L'administration finlandaise de la concurrence a fait porter ses activités d'assistance technique sur des zones géographiques proches, telles que l'Estonie et les régions proches de la Russie. Elle a signé des accords bilatéraux avec ses homologues en Estonie et en Russie et a apporté une assistance technique dans le cadre de ces conventions.

L'administration finlandaise de la concurrence a organisé plusieurs séminaires, stages et autres programmes de formation pour l'Estonie, notamment pour les fonctionnaires et les magistrats chargés de la concurrence. L'assistance technique apportée à la Russie a revêtu la forme de stages et de visites de haut niveau. Une personne à temps partiel a coordonné toute l'assistance technique apportée par l'administration de la concurrence. La fourniture réelle de l'assistance technique a été assurée par des fonctionnaires de l'administration de la concurrence chargés des dossiers ponctuels.

Allemagne

Le Bundeskartellamt a apporté une assistance technique surtout à des pays bénéficiaires d'Afrique, d'Asie et d'Europe centrale et orientale. Les activités d'assistance technique menées par le Bundeskartellamt ont été l'organisation de brèves visites d'étude et de quelques séminaires ainsi que l'envoi d'anciens membres du personnel et de membres actuels à des manifestations organisées par d'autres fournisseurs d'assistance. Le Bundeskartellamt n'a pas de ressources spécifiquement destinées à l'assistance technique, et ses activités dans ce domaine sont coordonnées par son personnel chargé des affaires internationales.

On remarquera qu'un certain nombre d'institutions allemandes, tant publiques que privées, s'occupent de fournir une assistance technique, y compris dans le domaine du droit et de la politique de la concurrence. Ces activités sont principalement financées par les ministères fédéraux et sont menés en coopération avec le Bundeskartellamt.

Italie

Jusqu'à présent, toute l'assistance technique apportée par l'Italie dans le domaine du droit et de la politique de la concurrence était fournie exclusivement par l'administration italienne de la concurrence. Au sein de cette administration, il n'y a pas de ressources humaines spécialement chargées de mener des activités d'assistance technique ; ces dernières sont assurées par chacun à tour de rôle. Etant donné que les ressources financières de l'administration de la concurrence destinées à l'assistance technique sont aussi assez limitées, cette administration a déposé des demandes de financement extérieur, par exemple à la CE, pour détacher un conseiller résident à long terme auprès de l'administration roumaine de la concurrence.

En ce qui concerne la couverture géographique de l'assistance technique, l'administration italienne de la concurrence n'a pas de priorité explicite, et ses activités répondent généralement à une demande. Néanmoins, en raison de la proximité géographique, l'administration de la concurrence reçoit souvent des demandes d'assistance technique de pays de la Méditerranée ou d'Europe centrale et orientale.

L'administration italienne de la concurrence a apporté une assistance technique sous différentes formes : stages, séminaires, proposition de commentaires écrits sur des projets de loi, etc. Les formes les plus courantes d'assistance technique ont été les stages de fonctionnaires étrangers et la participation de fonctionnaires de l'administration de la concurrence à des séminaires de formation. Toutes les activités menées en matière d'assistance technique l'ont été à court terme.

Japon

La JFTC a un très vaste programme d'assistance technique axé sur l'Asie, mais qui couvre aussi beaucoup d'autres pays du monde, notamment des pays d'Afrique, de la Baltique, d'Asie centrale et d'Amérique latine. La JFTC compte trois fonctionnaires à plein temps chargés de coordonner l'assistance technique. Pour les manifestations, les experts sont recrutés tant à l'intérieur qu'à l'extérieur de la JFTC, selon les besoins. Le gouvernement japonais ne prend sous contrat des experts privés pour assurer une assistance technique que dans des cas particuliers.

La JFTC a surtout apporté une assistance technique en coopération avec, et avec l'appui financier de, divers autres administrations et services du gouvernement japonais. La JFTC a participé à de brefs ateliers et conférences de quelques jours, des séminaires de formation à plus long terme (jusqu'à un mois) et à l'accueil de conseillers en visite pour des périodes allant d'une semaine à six mois.

La JFTC n'a pas fourni d'assistance technique avec d'autres pays de l'OCDE et/ou organisations internationales, bien que dans le cadre de l'APEC le gouvernement japonais ait un programme auquel des pays de l'OCDE et le Secrétariat de l'OCDE contribuent de façon régulière. Au sein du programme de l'APEC, la JFTC considère qu'il est "extrêmement important de soutenir la Thaïlande.... surtout en lui conférant un rôle de modèle pour les pays de la région et en y organisant la réunion"⁹⁹. La JFTC a aussi participé à des séminaires de formation de la CNUCED au Costa Rica et en Inde, a coopéré avec l'OMC dans un atelier et a participé à des opérations d'ouverture sur l'extérieur de l'OCDE en Chine (deux fois) et à Séoul.

Corée

La principale opération d'assistance technique de la KFTC a été l'Atelier international annuel sur la politique de la concurrence organisé en coopération avec l'OCDE depuis 1996. Parmi les participants à ces ateliers, il y avait des économies membres de l'APEC étroitement liées à la Corée sur les plans tant économique que géographique ainsi que des économies en transition d'autres régions, telles que la Roumanie. Les ateliers ont été une excellente occasion pour la KFTC de partager ses expériences sur la mise en place et le respect du droit de la concurrence. D'une manière générale, les ateliers ont servi à former le personnel de la KFTC et d'autres administrations coréennes.

Les activités d'assistance technique de la KFTC ont été entièrement financées sur le budget de cette administration. Du personnel chargé à plein temps de l'assistance technique à la Division des affaires internationales de la KFTC a coordonné l'assistance.

Mexique

Pratiquement toute l'assistance technique du Mexique sur des questions de concurrence est assurée par la Commission fédérale de la concurrence (CFC). Les activités d'assistance technique sont coordonnées par la Division des affaires internationales de la CFC. C'est elle qui prend contact avec les administrations étrangères de la concurrence et coordonne la fourniture de l'assistance technique en interne.

Le personnel chargé des dossiers assure une assistance technique pendant les stages et les séminaires, s'il y a lieu. La CFC a fourni de l'assistance technique sous les formes suivantes : envoi de représentants à des séminaires et aux conférences organisées et parrainées par d'autres et accueil de stagiaires venant de pays bénéficiaires.

En 1999 et 2000, la majeure partie de l'assistance technique mexicaine a bénéficié à des pays d'Amérique latine et de la Caraïbe par le biais de la participation de fonctionnaires mexicains à des séminaires et par le biais de stages. Les séminaires se sont déroulés selon le principe des études de cas, et aussi sur des thèmes relevant de la concurrence et intéressant des secteurs spécifiques. Les stages ont profité à des fonctionnaires de la concurrence venus du Costa Rica, de Panama et du Pérou.

L'assistance technique fournie par la CFC est financée soit par la CFC elle-même lorsqu'il s'agit des séminaires, soit par les pays bénéficiaires comme dans le cas de la plupart des stages. L'un des stages a été financé conjointement par le gouvernement du Costa Rica et par le gouvernement du Mexique dans le cadre d'une convention générale de coopération technique, dont les ressources sont indépendantes du budget courant de la Commission. Aucun autre financement complémentaire distinct provenant d'administrations n'est disponible pour des activités d'assistance technique.

La CFC a largement contribué aux activités d'assistance technique organisées par des organisations internationales et d'autres membres de l'OCDE. Des fonctionnaires mexicains ont joué le rôle d'experts dans deux séminaires et un atelier organisé par l'OCDE et des administrations de la concurrence d'Amérique latine (Brésil, Pérou et bientôt le Venezuela) pour présenter des études de cas et discuter de la politique de la concurrence dans certains secteurs. L'expérience mexicaine a également été présentée dans deux séminaires de la CNUCED, l'un traitant du rôle de la concurrence dans la mondialisation des marchés auxquels ont participé des pays des Nations unies, et l'autre qui s'est tenu au Costa Rica a porté sur les expériences de pays d'Amérique latine et de la Caraïbe en matière de politique de la concurrence. La CFC a participé à un séminaire de formation co-organisé par l'administration de la concurrence sud-coréenne et l'OCDE ainsi qu'à un séminaire de l'APEC/PFP sur la politique de la concurrence.

Pays-Bas

L'administration néerlandaise de la concurrence a été créée le 1er janvier 1998, et jusqu'à présent n'a accordé qu'une priorité relativement faible à la fourniture d'une assistance technique. L'administration de la concurrence a accueilli des fonctionnaires de l'USFTC et de la CTFTC (Taipei chinois) pour des échanges d'expériences.

Norvège

Conformément à une convention entrée en vigueur en 2000, l'administration norvégienne de la concurrence a fourni une assistance technique à la Commission de la concurrence d'Afrique du sud et a stimulé la concurrence dans la Communauté du développement de l'Afrique australe (SADC) en formant du personnel. Dans le cadre de cette convention, l'administration norvégienne de la concurrence a détaché sur de brèves périodes des consultants en Afrique du sud pour former le personnel de la Commission de la concurrence et des fonctionnaires de pays de la SADC ainsi que des conseillers sur une période plus longue auprès de la Commission de la concurrence. Le programme d'assistance technique avec l'Afrique du sud a été financé par l'Agence norvégienne de coopération pour le développement.

L'administration norvégienne de la concurrence a aussi envoyé un expert à la conférence sur la concurrence organisée dans le cadre du Programme régional de la Baltique de l'OCDE. Les déplacements

et les frais de l'expert à la Conférence de la Baltique ont été financés par l'administration norvégienne de la concurrence.

Malgré l'assistance technique indiquée ci-dessus, dans sa réponse la Norvège précise qu'elle "ne recherche pas de façon proactive des occasions de fournir une assistance technique"¹⁰⁰ et qu'elle "aura toujours des ressources limitées et que ces ressources seront normalement attribuées de façon ponctuelle"¹⁰¹.

Pologne

La Pologne a conclu des accords de coopération bilatérale avec la Russie, la Lituanie et l'Ukraine, qui ont aussi servi de cadre à la fourniture d'une assistance technique¹⁰². La plupart des activités d'assistance technique menées par la Pologne ont bénéficié à la Russie. Suite à une visite en Russie du Président de l'administration polonaise de la concurrence pour signer un programme de coopération avec le ministère russe de la politique antimonopole et de la promotion de l'esprit d'entreprise pour 2000-2001, plusieurs experts russes en matière de concurrence ont payé des visites d'étude à l'administration polonaise de la concurrence, et des experts polonais se sont rendus dans le ministère russe de la concurrence.

En outre, l'administration polonaise de la concurrence a envoyé un expert à la conférence de l'OCDE qui s'est tenue dans le cadre du Programme régional de la Baltique de l'OCDE en octobre 2000.

Suisse

En décembre 1999, l'administration suisse de la concurrence a envoyé un expert à un séminaire de l'OCDE traitant de la concurrence sur le marché russe des services bancaires. Les activités d'assistance technique ne bénéficient d'aucune ligne budgétaire spécifique et l'administration suisse de la concurrence n'a pas eu d'autres activités en matière d'assistance technique, mais la Suisse s'est lancée dans des travaux préparatoires pour évaluer les possibilités de fournir une assistance technique.

Turquie

Conformément à un accord de coopération signé avec l'EKETIB le 14 février 2000, l'administration turque de la concurrence a organisé des conférences internationales avec la participation de fonctionnaires de haut niveau chargés de la concurrence dans les pays bénéficiaires et un séminaire de formation qui comportait des conférences théoriques sur la politique de la concurrence faites par des universitaires turcs et des études de cas présentées par des fonctionnaires turcs chargés de la concurrence. Les pays concernés par l'accord avec l'EKETIB sont les Républiques d'Asie centrale et les pays d'Europe du sud-est. Les activités d'assistance technique menées dans le cadre de cet accord sont financées par l'administration de la concurrence et l'EKETIB.

Etats-Unis

L'US Federal Trade Commission et l'Antitrust Division de l'US Department of Justice ont un très vaste programme d'assistance technique, qui fonctionne sur un plan bilatéral, multilatéral et régional. L'assistance technique bilatérale revêt la forme de visites à long et à court terme d'experts des deux administrations dans des administrations étrangères de la concurrence. Des visites d'étude de fonctionnaires d'administrations étrangères de la concurrence sont également organisées. L'assistance technique

multilatérale et régionale revêt la forme d'une participation du personnel des administrations américaines à des manifestations parrainées par, ou organisées en coopération avec, diverses organisations internationales telles que l'OCDE, la Banque mondiale et la CNUCED¹⁰³.

Parmi les conseillers envoyés pour des missions courtes et brèves, il y a pratiquement en nombre égal des juristes et des économistes. Les missions brèves ont été au profit des États membres du MERCOSUR et de la Communauté des Caraïbes (CARICOM), des pays des Balkans, de l'Ukraine et de la Russie. Au cours des exercices 1999 et 2000, des conseillers résidents sur de plus longues périodes ont été détachés en Roumanie, en Argentine et en Afrique du sud. Des visites d'étude de fonctionnaires étrangers chargés de la concurrence ont duré pendant des périodes allant de quelques jours à six semaines. Ces visites ont été offertes à des fonctionnaires venant de Croatie, d'Israël, du Panama, de Roumanie et du Venezuela.

A l'USFTC, il y a un fonctionnaire professionnel à plein temps qui est chargé de la coordination de l'assistance technique apportée par l'USFTC. L'assistance technique apportée par l'USDOJ est coordonnée par l'Executive Office, l'Economic Analysis Group, et la Foreign Commerce Section de l'Antitrust Division. Les programmes d'assistance technique auxquels participent les autorités américaines antitrust ont été principalement financés par l'Agence américaine pour le développement international (USAID).

Les autorités américaines antitrust ont participé à plusieurs activités d'assistance technique de l'OCDE, telles que des conférences et des séminaires se déroulant selon le principe des études de cas. L'USFTC a financé une série de séminaires de ce type en Ukraine, conjointement avec l'OCDE. "Les administrations américaines considèrent que ces activités sont bien conçues et organisées, et correctement menées. [Elles] sont favorables à la poursuite des séminaires de l'OCDE se déroulant selon le principe des études de cas. [Elles] sont également favorables à une poursuite de l'assistance apportée par les États-Unis aux nations qui demandent à être aidées par ces séminaires"¹⁰⁴.

Commission européenne

La Commission européenne fournit son assistance technique à trois régions : (i) les pays d'Europe centrale et orientale (PECO) ; (ii) la CEI et les pays d'Asie centrale (Arménie, Azerbaïdjan, Bélarus, Géorgie, Kazakhstan, Kirghizstan, Moldavie, Mongolie, Russie, Tadjikistan, Turkménistan, Ukraine et Ouzbékistan) ; et (iii) 77 États d'Afrique, des Caraïbes et du Pacifique (Groupe ACP). Ces trois régions bénéficient d'une assistance technique dans le cadre de régimes d'aide spécifiques et complexes. Le programme PHARE de l'UE finance une assistance technique aux PECO, tandis que son programme TACIS vient en aide à la CEI et aux pays d'Asie centrale. En outre, un nouvel accord de partenariat signé avec les pays de l'ACP en juin 2000 a pour objet de répondre aux besoins d'assistance technique des pays de l'ACP.

Au titre du programme PHARE, 4,2 milliards d'euros ont été alloués pour la période de 1990 à 1994, et 6,693 milliards d'euros pour la période de 1995 à 1999. TACIS avait un budget de 4,226 milliards d'euros entre 1991 et 1999, et 3,138 milliards d'euros ont été engagés pour la période 2000-2006. L'assistance technique apportée aux pays de l'ACP est financée par le 9^{ème} Fonds européen de développement (FED). Les ressources du FED sont acheminées par deux instruments : une enveloppe pour la fourniture de subventions et une autre pour l'apport de capital-risque et de prêts au secteur privé. Le 9^{ème} FED représente 13,5 milliards d'euros. Avec les prêts de la Banque européenne d'investissement qui représentent 1,5 milliard d'euros supplémentaire, le total s'élève à 15,2 milliards d'euros.

Le droit et la politique de la concurrence font partie des programmes d'assistance technique mentionnés ci-dessus. Pour les PECO, dont la plupart ont demandé leur adhésion à la CE, les stratégies renforcées de pré-accession servent de cadre à l'assistance apportée à chacun des pays. Ces stratégies sont ciblées sur des partenariats de nature à faciliter l'accession et une aide accrue préalable à l'accession. Ces partenariats, qui sont réexaminés régulièrement, réunissent dans un seul et même document les domaines prioritaires dans lesquels chaque pays candidat à l'accession doit faire des progrès. Parmi les toutes premières priorités identifiées par la Commission européenne dans les divers partenariats de nature à faciliter l'accession, on trouve l'harmonisation de la législation, le respect du droit, la mise en place d'institutions et la transparence dans le domaine de l'antitrust et de l'aide publique.

Au titre du programme PHARE, des actions spécifiques ont été entreprises, notamment des opérations de "jumelage". Dans ces opérations, des experts d'Etats membres de l'UE fournissent une assistance à long terme dans le pays aux administrations de la concurrence des PECO. La Commission a également organisé des conférences annuelles à haut niveau pour les fonctionnaires chargés de la concurrence dans les pays candidats. Le Bureau d'information sur l'assistance technique de la Commission européenne a organisé des visites d'étude et des ateliers pour les fonctionnaires de la concurrence des PECO. La Direction générale de la concurrence a contribué au bon déroulement de ces visites et ateliers.

CNUCED

La CNUCED a fait porter son assistance technique sur les types d'activité suivants : "séminaires spécifiquement adaptés à un pays, ateliers de formation, séminaires régionaux et infrarégionaux, missions de conseil sur la rédaction de lois antitrust et commentaires sur des projets de législation"¹⁰⁵. D'une manière générale, elle fournit une assistance tant nationale que régionale, sous la forme de manifestations qui se tiennent généralement dans le pays bénéficiaire pendant deux à cinq jours. La CNUCED a fourni une assistance budgétaire avec "un financement extrabudgétaire, en plus d'heures de personnel permanent chargé de ces activités [d'assistance]"¹⁰⁶. Les ressources humaines concernées sont le personnel permanent à plein temps et une aide administrative supplémentaire, si besoin est.

BANQUE MONDIALE

La Banque mondiale a financé des grands projets d'assistance technique s'adressant principalement à des pays individuels.

Dans certains cas, par exemple pour la Croatie, le projet a couvert un vaste champ de développement du secteur privé, dont le renforcement des moyens d'action dans le domaine de la politique de la concurrence était une composante. Dans certains autres cas, c'est tout le projet d'assistance qui est axé sur la politique de la concurrence, comme dans le cas du projet d'assistance au Guatemala.

Qu'il s'agisse d'une composante d'un plus large projet d'assistance ou d'un projet d'assistance à part entière, l'aide apportée dans le domaine de la concurrence a généralement impliqué un financement pour toute une série d'activités. Dans le cas du projet d'assistance à la Croatie, la composante concurrence a couvert les types d'assistance suivants au profit de l'administration croate de la concurrence :

- préparation de la législation primaire et secondaire de procédures et de fonds (amendements de lois, décrets d'application et réglementations, recommandations administratives et interprétation du droit et de la politique) ;

- élaboration d'un programme de formation et relations avec des administrations étrangères de la concurrence et des organisations internationales ;
- renforcement de l'expertise des institutions (conseiller résident à long terme) ;
- mise en application d'une stratégie d'information et de sensibilisation du grand public visant à créer une culture de la concurrence et à susciter le respect du droit ; et
- définition des profils des organisations et du personnel.

L'assistance technique apportée au Guatemala a comporté notamment les types suivants d'activité concernant l'administration guatémaltèque de la concurrence :

- constitution de ressources d'information, d'une bibliothèque ;
- formation interne (conseiller résident à long terme) et externe (stage) ;
- études sectorielles, préparation d'un manuel d'enquêtes et de procédures ;
- développement des universités et de la recherche ; et
- préparation d'un programme d'assujettissement des entreprises.

ORGANISATION MONDIALE DU COMMERCE

L'Organisation mondiale du commerce s'est occupée de questions de politique de la concurrence, et a apporté une assistance aux pays n'ayant qu'une expérience limitée du droit et de la politique de la concurrence, principalement par l'intermédiaire de son Groupe de travail de l'interaction du commerce et de la politique de la concurrence constitué par la Conférence ministérielle de Singapour en décembre 1996. Ce Groupe de travail a organisé plusieurs conférences avec la participation des pays bénéficiaires. Ces conférences ont été d'excellentes occasions d'instaurer un dialogue fructueux en matière de politique. Etant donné que les conférences portaient moins sur la fourniture d'une assistance technique telle qu'elle est définie au présent document, les tableaux figurant aux Annexes B à D ne les répertorient pas .

ANNEXE B

**PROJETS D'ASSISTANCE TECHNIQUE POUR 2001 DES PAYS
AYANT REPONDU AU QUESTIONNAIRE**

D'après les réponses apportées au questionnaire, les activités d'assistance technique prévues pour 2001 par les fournisseurs d'aide ne diffèrent pas considérablement des orientations de politique générale concernant l'assistance technique. Plusieurs administrations de la concurrence, notamment la tchèque¹⁰⁷, la danoise¹⁰⁸, la finlandaise¹⁰⁹, la mexicaine¹¹⁰ et la norvégienne¹¹¹, ne prévoient pas de modifier sensiblement leurs futures activités d'assistance technique ni quant au type d'activité, ni quant aux pays bénéficiaires.

Les changements apportés aux activités d'assistance technique de la Commission européenne vont suivre l'évolution de ses accords commerciaux internationaux. La Commission européenne va maintenir son niveau actuel d'assistance technique à ses bénéficiaires courants, mais conformément au nouvel accord de partenariat signé avec les pays de l'ACP en juin 2000 à Cotonou, au Bénin, elle va renforcer son assistance aux pays de l'ACP¹¹². En outre, conformément à ses accords commerciaux existants ou envisagés avec le Mercosur, le Chili et la Communauté des Andes, la Commission européenne prévoit d'étendre son assistance technique à des pays d'Amérique latine¹¹³.

Pour répondre à la demande accrue d'assistance technique, l'administration italienne de la concurrence a commencé à rechercher un financement extérieur pour pouvoir apporter davantage d'assistance technique, en particulier aux administrations de la concurrence des pays candidats à l'accession à l'UE. Récemment, l'administration de la concurrence a soumis une demande à l'Union européenne pour qu'elle finance un programme de conseiller résident à long terme à mettre en oeuvre conjointement avec l'administration allemande de la concurrence en Roumanie en 2001.

Répondant à des demandes accrues d'assistance technique, la Suisse s'est lancée dans des travaux préparatoires, en évaluant les possibilités d'apporter une assistance technique dans le domaine du droit et de la politique de la concurrence¹¹⁴.

Les Etats-Unis précisent que

les projets des administrations pour l'exercice 2001, outre les programmes déjà financés, attendent d'être approuvés par les autorités compétentes, les dotations budgétaires n'étant pas encore votées par le Congrès à la date de la présente réponse. Les programmes qui bénéficient d'un financement pour être exécutés au cours de l'exercice 2001 comportent une extension de nos activités au Mercosur, ainsi qu'un programme régional au profit des Etats des Balkans. En outre, nos activités en Afrique du Sud, y compris des conseillers résidents et pour des missions brèves, se poursuivront¹¹⁵.

En ce qui concerne ces projets pour 2001, la CNUCED souligne que

l'orientation générale des travaux de la CNUCED dans le domaine du droit et de la politique de la concurrence est fixée par la Conférence des Nations unies chargée de revoir tous les aspects de l'ensemble de principes et de règles équitables convenus au niveau multilatéral pour le contrôle des pratiques commerciales restrictives, l'IGE sur le droit et la politique de la concurrence et le Groupe de travail sur les moyens termes. Elle a été subdivisée entre les quatre grands domaines suivants, comme le stipulait la Résolution de la 4ème Conférence des Nations unies chargée de

revoir tous les aspects de l'ensemble de principes et de règles et spécifiés par la CNUCED dans son Plan d'action de Bangkok :

- A. Renforcement des moyens d'action institutionnels, y compris élaboration du droit de la concurrence ;
- B. Promotion de la concurrence et éducation du grand public ;
- C. Etudes de la concurrence, de la compétitivité et du développement ;
- D. Préparation d'éventuels accords internationaux sur la concurrence¹¹⁶.

Les activités d'assistance technique prévues par les fournisseurs pour 2001 se trouvent résumées dans un tableau joint à la présente note en Annexe E.

ANNEXE C

INVENTAIRE DES ACTIVITES D'ASSISTANCE TECHNIQUE DES PAYS MEMBRES D'AUTRES FOURNISSEURS ET DU PROGRAMME D'OUVERTURE SUR L'EXTERIEUR DE L'OCDE EN 1999-2000, PAR FOURNISSEUR ET TYPE D'ACTIVITE

(L'assistance parrainée et/ou organisée par le fournisseur est en caractères gras, la participation à une opération d'assistance organisée et parrainée par d'autres est en caractères normaux. Les chiffres figurant entre parenthèses après le nom d'un pays bénéficiaire indiquent le nombre d'activités pour la période 1999-2000)

TYPE D'ACTIVITE FOURNISSEURS ↓	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
Australie	<ul style="list-style-type: none"> • 18 pays d'Asie et d'Océanie • Bangladesh • Inde • Afrique du sud • ANASE • Asie du sud et du sud-est 	<ul style="list-style-type: none"> • Afrique du sud • ANASE • APEC (6) • Afrique du sud (2) • Pays de la zone Asie-Pacifique (2) • Indonésie • République populaire de Chine (OCDE) 	<ul style="list-style-type: none"> • Taipei chinois (2) • Fiji • Hong Kong • Malaisie • Papouasie Nouvelle Guinée • Afrique du sud 	<ul style="list-style-type: none"> • Afrique du sud (3) • Thaïlande • Indonésie (3) • Thaïlande 	<ul style="list-style-type: none"> • Taipei chinois (2) • Samoa 	<ul style="list-style-type: none"> • Afrique du sud (3) • République populaire de Chine (2) • Papouasie Nouvelle Guinée (2) • Barbade • Taipei chinois • Fiji • Kenya • Malaisie • Zimbabwe • République populaire de Chine (16) • Vietnam (5) • Fiji (3) • Taipei chinois (2) • Indonésie (2) • Malaisie (2) • Philippines (2) • Singapour (2) • Afrique du sud (2) • Egypte • Hong Kong • Pakistan • Bangladesh • Cambodge • Papouasie Nouvelle Guinée • Thaïlande 	

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
FOURNISSEURS ↓							
Canada		<ul style="list-style-type: none"> • Brésil (2) • Pays de l'APEC (OCDE) • Vietnam • Pays de la zone Asie-Pacifique 		<ul style="list-style-type: none"> • République dominicaine • Nicaragua 		<ul style="list-style-type: none"> • République populaire de Chine (2) • Taipei chinois • Jamaïque • Maroc • Afrique du sud • Thaïlande • Vietnam 	<ul style="list-style-type: none"> • Indonésie (2 brèves visites préparatoires à un programme à long terme)
République tchèque	<ul style="list-style-type: none"> • Pays d'Europe centrale et orientale 					<ul style="list-style-type: none"> • Croatie • Estonie • Roumanie • Russie 	
Danemark		<ul style="list-style-type: none"> • Slovénie • Russie 	<ul style="list-style-type: none"> • Groenland 			<ul style="list-style-type: none"> • Slovénie (2) • Bulgarie • Lituanie • Malaisie 	

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
FOURNISSEURS ↓							
Commission européenne		<ul style="list-style-type: none"> • Russie (plusieurs) • Slovénie (formation à la politique de la concurrence de la CE assurée par une société privée autrichienne sous-traitante) • CEI, PECO, pays d'Europe du sud-est 	<ul style="list-style-type: none"> • Lettonie (en partie sur les aides de l'Etat) • Lituanie • Roumanie (assurée par l'Allemagne et l'Italie) • Slovénie (sur les aides de l'Etat assurée par la France et l'Autriche) 	<ul style="list-style-type: none"> • Estonie (assurée par l'administration suédoise de la concurrence pour conseiller sur les amendements à apporter aux réglementations sur les fusions) 	<ul style="list-style-type: none"> • Estonie (sur le contrôle des fusions) • Russie (plusieurs) 		<ul style="list-style-type: none"> • Russie (assistance à la rédaction de textes de loi, études, projets concernant le secteur de l'acier avec des composantes d'aide de l'Etat et d'aide à la concurrence) • Bulgarie (projet de création d'une institution chargée des aides à l'Etat et à la concurrence, y compris activités de formation et d'information) • Estonie (traduction des réglementations de la CE en matière de fusions) • Slovénie (assistance à la formation pour la transposition du droit de la CE, assurée par une société privée allemande sous-traitante)
Finlande	<ul style="list-style-type: none"> • Russie 	<ul style="list-style-type: none"> • Estonie (6) • Russie (OCDE) 			<ul style="list-style-type: none"> • Estonie 	<ul style="list-style-type: none"> • Estonie (5) • Russie (3) 	

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
FOURNISSEURS ↓							
Italie	<ul style="list-style-type: none"> • Pays d'Afrique du nord 	<ul style="list-style-type: none"> • Bulgarie • Estonie, Slovénie • Lituanie • République populaire de Chine (OCDE) • Pays d'Europe centrale et orientale 			<ul style="list-style-type: none"> • Kenya • Mozambique 		<ul style="list-style-type: none"> • Roumanie (réunions préparatoires à l'envoi d'un conseiller résident à long terme dans le cadre du programme de jumelage de la CE) • Russie (travail préparatoire)
Japon	<ul style="list-style-type: none"> • Indonésie • République populaire de Chine 	<ul style="list-style-type: none"> • République populaire de Chine (2) • APEC (2) • Azerbaïdjan, Estonie, Indonésie, Kenya, Laos, Malaisie, Maroc, Sri Lanka, Thaïlande, Zambie (formation à la JFTC) • Chili, Honduras, Inde, Kazakhstan, Kenya, Pérou, Sri Lanka, Tanzanie, Ouzbékistan (formation à la JFTC) • Russie • Asie • Taipei chinois (2) • Costa Rica • Inde • République populaire de Chine (OCDE) 	<ul style="list-style-type: none"> • Malaisie (2) • Thaïlande (2) • Lettonie 	<ul style="list-style-type: none"> • Vietnam • Taipei chinois 			

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
FOURNISSEURS ↓							
Corée	<ul style="list-style-type: none"> • APEC (Banque mondiale) • APEC 	<ul style="list-style-type: none"> • APEC, Roumanie (2) (OCDE) 					
Mexique	<ul style="list-style-type: none"> • Costa Rica 	<ul style="list-style-type: none"> • Costa Rica • Argentine, Brésil, Chili, Jamaïque, Mexique, Panama, Pérou, Afrique du sud • Argentine, Brésil, Chili, Equateur, Jamaïque, Panama, Pérou, Uruguay, Venezuela • APEC 			<ul style="list-style-type: none"> • Nicaragua • Panama • Pérou 		
Norvège		<ul style="list-style-type: none"> • Afrique du sud • Estonie, Lettonie, Lituanie, Russie (OCDE) 	<ul style="list-style-type: none"> • Afrique du sud 				
Pologne		<ul style="list-style-type: none"> • Estonie, Lettonie, Lituanie, Russie (OCDE) 		<ul style="list-style-type: none"> • Russie 	<ul style="list-style-type: none"> • Russie 	<ul style="list-style-type: none"> • Russie 	
Suisse		<ul style="list-style-type: none"> • Russie 					
Turquie	<ul style="list-style-type: none"> • Asie centrale, Europe du sud-est (Albanie, Azerbaïdjan, Bosnie Herzégovine, Chypre, Géorgie, Kazakhstan, Kirghizstan, Ex-République yougoslave de Macédoine, Moldavie, Mongolie, Turkménistan, Ouzbékistan) • divers pays (2) 	<ul style="list-style-type: none"> • Asie centrale, Europe du sud-est (Albanie, Azerbaïdjan, Bosnie Herzégovine, Chypre, Géorgie, Kazakhstan, Kirghizstan, ex-République yougoslave de Macédoine, Moldavie, Mongolie, Turkménistan, Ouzbékistan) 					

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
FOURNISSEURS ↓							
Etats-Unis	<ul style="list-style-type: none"> • Inde (plusieurs) • Bosnie Herzégovine, Croatie, Ex-République yougoslave de Macédoine, Russie, Slovénie • Bulgarie, Roumanie • Russie • Afrique du sud • Ukraine • CARICOM • PECO et CEI 	<ul style="list-style-type: none"> • Ukraine (2) • (opération conjointes avec l'OCDE) • CEI (3) • PECO, CEI, pays d'Europe du sud-est (2) • Argentine, Brésil, Chili, Jamaïque, Panama, Pérou (OCDE) • APEC • CARICOM 	<ul style="list-style-type: none"> • Roumanie • Afrique du sud 	<ul style="list-style-type: none"> • Inde (plusieurs) • Afrique du sud (6) • Roumanie (5) • Brésil • Argentine • Lituanie 	<ul style="list-style-type: none"> • Roumanie 		
CNUCED	<ul style="list-style-type: none"> • CEI • CEI, PECO • CEI (2) • CEI, Bulgarie, Mongolie, Ex-République yougoslave de Macédoine, Inde 	<ul style="list-style-type: none"> • Zambie (2) • Asie du sud (2) • Burkina Faso • Asie du sud • Madagascar • Mali • Thaïlande • Vietnam • CARICOM • COMESA • COMESA, SADC • Amérique latine, Caraïbes • Afrique du nord • Guadeloupe • APEC 		<ul style="list-style-type: none"> • Botswana • Thaïlande 			

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
FOURNISSEURS ↓							
BANQUE MONDIALE	<ul style="list-style-type: none"> • Asie du sud et Asie du sud-est (2) (opération conjointe avec l'OCDE) 						Programmes d'assistance: <ul style="list-style-type: none"> • Croatie • Colombie • Guatemala • Indonésie • Nicaragua • Panama • Salvador • Thaïlande
OCDE	<ul style="list-style-type: none"> • Pays baltes (2) • 50 pays d'Europe, d'Amérique du nord et du sud, d'Asie et d'Océanie (commerce et concurrence) • Brésil, Taipei chinois, Inde, Indonésie, Malaisie, République populaire de Chine, Russie (opération conjointe avec la Banque mondiale) • Taipei chinois • Taipei chinois, divers • Russie • Afrique du sud • Ukraine • Afrique du nord (CNUCED) • Asie du sud-est • Inde, Indonésie, Malaisie, Pakistan, Singapour, Thaïlande (opération conjointe avec la Banque mondiale) 	<ul style="list-style-type: none"> • Russie (4) • Ukraine (3) (avec l'USFTC) • APEC (3) (avec la KFTC) • Etats baltes, Russie (2) • CEI (2) • CEI, PECO, Europe du sud-est (2) • Asie du sud-est (2) (avec CTFTC) • Brésil • Argentine, Brésil, Jamaïque, Panama, Pérou, Amérique du sud • Amérique latine • République populaire de Chine • APEC (2) • Thaïlande • Afrique du sud, SADC • Asie du sud-est 		<ul style="list-style-type: none"> • Afrique du sud • Vietnam • Croatie (rédaction d'une étude sur l'élaboration d'un droit de la concurrence) • Brésil (mission exploratoire) 			<ul style="list-style-type: none"> • Etats baltes (2 rapports annuels sur l'évolution de la politique de la concurrence de chacun des Etats baltes)

ANNEXE D

INVENTAIRE DES ACTIVITES D'ASSISTANCE TECHNIQUE DES PAYS MEMBRES, DES AUTRES GRANDS FOURNISSEURS ET DU PROGRAMME D'OUVERTURE SUR L'EXTERIEUR DE L'OCDE, EN 1999-2000, PAR BENEFICIAIRE ET TYPE D'ACTIVITE

(L'assistance partagée avec d'autres pays bénéficiaires figure en italiques. L'assistance parrainée et/ou organisée par le fournisseur est indiquée en caractères gras. Les chiffres entre parenthèses suivant le nom d'un fournisseur indiquent le nombre d'activités pour la période 1999-2000).

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
BENEFICIAIRES ↓							
Albanie	▪ <i>Turquie</i>	▪ <i>Turquie</i>					
Argentine		▪ <i>OCDE</i> ▪ <i>Mexique (2)</i> ▪ <i>Etats-Unis</i>		▪ Etats-Unis			
Azerbaïdjan	▪ <i>Turquie</i>	▪ <i>Japon</i> ▪ <i>Turquie</i>					
Bangladesh	▪ <i>Australie</i>	▪ <i>CNUCED</i>				▪ <i>Australie</i>	
Barbade						▪ Australie	
Bosnie Herzégovine	▪ <i>Turquie</i> ▪ <i>Etats-Unis</i>	▪ <i>Turquie</i>					
Botswana				▪ CNUCED			
Brésil		▪ OCDE ▪ <i>OCDE (2)</i> ▪ <i>Canada (2)</i> ▪ <i>Mexique (2)</i> ▪ <i>Etats-Unis</i>		▪ Etats-Unis ▪ OCDE (mission exploratoire)			
Bulgarie	▪ <i>Etats-Unis</i> ▪ <i>CNUCED</i>	▪ <i>Italie</i>				▪ Danemark	▪ Commission européenne (projet de création d'institutions chargées de la concurrence et des aides de l'Etat, y compris activités de formation et d'information)

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
BENEFICIAIRES↓							
Burkina Faso		▪ CNUCED					
Cambodge						▪ Australie	
Chili		▪ <i>Japon</i> ▪ <i>Mexique (2)</i> ▪ <i>Etats-Unis</i>					
Taipei chinois	▪ <i>OCDE</i> ▪ <i>OCDE</i> ▪ <i>OCDE</i>	▪ <i>Japon (2)</i> ▪ <i>Canada</i>	▪ Australie (2)	▪ <i>Japon</i>	▪ Australie (2)	▪ Australie ▪ Canada ▪ <i>Australie (2)</i>	
Costa Rica	▪ <i>Mexique</i>	▪ Mexique ▪ <i>Japon</i>					
Colombie							▪ Banque mondiale (programme d'assistance)
Croatie	▪ <i>Etats-Unis</i>			▪ OCDE (rédaction d'une étude sur l'évolution du droit de la concurrence)		▪ République tchèque	▪ Banque mondiale (programme d'assistance)
Chypre	▪ <i>Turquie</i>	▪ <i>Turquie</i>					
République dominicaine				▪ <i>Canada</i>			
Equateur		▪ <i>Mexique</i>					
Egypte						▪ Australie	
Estonie		▪ Finlande (6) ▪ OCDE (2) ▪ <i>Japon</i> ▪ <i>Norvège</i> ▪ <i>Pologne</i>	▪ <i>Italie</i>	▪ Commission européenne (assurée par l'administration suédoise de la concurrence pour conseiller sur les amendements à apporter à la règlement sur les concentrations)	▪ Finlande (5) ▪ Commission européenne (sur le contrôle des fusions)	▪ Finlande (5) ▪ République tchèque	▪ Commission européenne (traduction des règlements de la CE sur les concentrations)
Fidji			▪ Australie			▪ Australie ▪ <i>Australie (3)</i>	
Géorgie	▪ <i>Turquie</i>	▪ <i>Turquie</i>					
Groenland			▪ Danemark				
Guadeloupe		▪ CNUCED					

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
BENEFICIAIRES↓							
Guatemala							▪ Banque mondiale (programme d'assistance)
Honduras		▪ <i>Japon</i>					
Hong Kong		▪ <i>CNUCED</i>	▪ Australie			▪ Australie	
Inde	▪ Etats-Unis (plusieurs) ▪ Banque mondiale ▪ Australie ▪ <i>OCDE</i> ▪ <i>CNUCED</i>	▪ <i>Japon</i> ▪ <i>CNUCED (2)</i> ▪ <i>Japon</i>		▪ Etats-Unis (plusieurs)			
Indonésie	▪ Japon ▪ Banque mondiale ▪ <i>OCDE</i>	▪ <i>OCDE</i> ▪ <i>Japon</i> ▪ Australie		▪ Australie (3)		▪ Australie(2)	▪ Banque mondiale (programme d'assistance) ▪ Canada (2 brèves visites préparatoires à un programme à long terme)
Jamaïque		▪ <i>OCDE</i> ▪ <i>Mexique (2)</i> ▪ <i>Etats-Unis</i>				▪ Canada	
Kazakhstan	▪ <i>Turquie</i>	▪ <i>Japon</i> ▪ <i>Turquie</i>					
Kenya		▪ <i>Japon (2)</i>			▪ Italie	▪ Australie	
Kirghizstan	▪ <i>Turquie</i>	▪ <i>Turquie</i>					
Laos		▪ <i>Japon</i>					
Lettonie		▪ <i>OCDE (2)</i> ▪ <i>Norvège (OCDE)</i> ▪ <i>Pologne (OCDE)</i>	▪ Commission européenne (jumelage en partie sur les aides de l'Etat) ▪ Japon				

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
BENEFICIAIRES↓							
Lituanie		<ul style="list-style-type: none"> ▪ OCDE (2) ▪ Norvège (OCDE) ▪ Pologne (OCDE) 	<ul style="list-style-type: none"> ▪ Commission européenne (jumelage, y compris assistance pour la rédaction de la législation, le respect des règles administratives et judiciaires, les technologies de l'information et de la documentation) ▪ Italie 	<ul style="list-style-type: none"> ▪ Etats-Unis 		<ul style="list-style-type: none"> ▪ Danemark 	
Ex-République yougoslave de Macédoine	<ul style="list-style-type: none"> ▪ Turquie ▪ Etats-Unis ▪ CNUCED 	<ul style="list-style-type: none"> ▪ Turquie 					
Madagascar		<ul style="list-style-type: none"> ▪ CNUCED 					
Malaisie	<ul style="list-style-type: none"> ▪ OCDE 	<ul style="list-style-type: none"> ▪ OCDE ▪ JAPON ▪ Canada 	<ul style="list-style-type: none"> ▪ Japon (2) ▪ Australie 			<ul style="list-style-type: none"> ▪ Australie ▪ Danemark ▪ Australie (2) 	
Mali		<ul style="list-style-type: none"> ▪ CNUCED 					
Moldavie	<ul style="list-style-type: none"> ▪ Turquie 	<ul style="list-style-type: none"> ▪ Turquie 					
Mongolie	<ul style="list-style-type: none"> ▪ Turquie ▪ CNUCED 	<ul style="list-style-type: none"> ▪ Turquie 					
Maroc	<ul style="list-style-type: none"> ▪ CNUCED ▪ France ▪ Allemagne ▪ Italie ▪ OCDE 	<ul style="list-style-type: none"> ▪ Japon 				<ul style="list-style-type: none"> ▪ Canada 	
Mozambique					<ul style="list-style-type: none"> ▪ Italie 		
Népal		<ul style="list-style-type: none"> ▪ CNUCED (2) 					

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
BENEFICIAIRES↓							
Nicaragua				▪ Canada	▪ Mexique		▪ Banque mondiale (programme d'assistance)
Pakistan		▪ <i>CNUCED (2)</i> ▪ <i>Canada</i>				▪ Australie	
Panama		▪ <i>OCDE</i> ▪ <i>Mexique (2)</i> ▪ <i>Etats-Unis</i>			▪ Mexique		▪ Banque mondiale (programme d'assistance)
Papouasie Nouvelle Guinée		▪ <i>OCDE (avec la KFTC)</i> ▪ <i>Canada (OCDE)</i>	▪ Australie			▪ Australie (2) ▪ Australie	
République populaire de Chine	▪ Japon ▪ <i>OCDE</i> ▪ Australie	▪ Japon (2) ▪ <i>OCDE</i> ▪ <i>CNUCED</i> ▪ <i>Canada</i>				▪ Australie (2) ▪ Canada (2) ▪ Australie (16)	
Pérou		▪ <i>OCDE</i> ▪ Japon ▪ <i>Mexique (2)</i> ▪ <i>Etats-Unis</i>			▪ Mexique		
Philippines		▪ <i>OCDE (avec la KFTC)</i> ▪ <i>Canada (OCDE)</i>				▪ Australie (2)	
Roumanie	▪ <i>Etats-Unis</i>	▪ <i>Canada</i>	▪ Commission européenne (jumelage assuré par l'Allemagne et l'Italie) ▪ <i>Etats-Unis</i>	▪ <i>Etats-Unis (5)</i>	▪ <i>Etats-Unis</i>	▪ République tchèque	▪ Italie (réunions préparatoires à l'envoi d'un conseiller résident à long terme conjointement avec l'Allemagne dans le cadre du programme de jumelage de la CE)

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
BENEFICIAIRES↓							
Russie	<ul style="list-style-type: none"> ▪ Finlande ▪ OCDE ▪ Etats-Unis ▪ OCDE ▪ <i>Etats-Unis</i> 	<ul style="list-style-type: none"> ▪ Commission européenne (plusieurs) ▪ OCDE (4) ▪ Japon ▪ OCDE (2) ▪ Danemark ▪ Finlande ▪ Suisse ▪ <i>Canada</i> ▪ <i>Norvège</i> ▪ <i>Pologne</i> 		<ul style="list-style-type: none"> ▪ Pologne 	<ul style="list-style-type: none"> ▪ Commission européenne (plusieurs) ▪ Pologne 	<ul style="list-style-type: none"> ▪ Finlande (3) ▪ République tchèque ▪ Pologne 	<ul style="list-style-type: none"> ▪ Commission européenne (assistance pour la rédaction de textes législatifs, des études, un projet dans le secteur de l'acier avec des composantes concurrence et aide de l'Etat) ▪ Italie (travail préparatoire à un futur programme)
Salvador							<ul style="list-style-type: none"> ▪ Banque mondiale (programme d'assistance)
Samoa					<ul style="list-style-type: none"> ▪ Australie 		
Singapour		<ul style="list-style-type: none"> ▪ OCDE ▪ <i>Canada</i> (OCDE) 				<ul style="list-style-type: none"> ▪ Australie (2) 	
Slovénie	<ul style="list-style-type: none"> ▪ <i>Etats-Unis</i> 	<ul style="list-style-type: none"> ▪ Danemark ▪ Commission européenne (formation au droit européen de la concurrence assurée par une société autrichienne privée sous-traitante) 	<ul style="list-style-type: none"> ▪ Commission européenne (jumelage pour les aides de l'Etat assuré par la France et l'Autriche) ▪ <i>Italie</i> 			<ul style="list-style-type: none"> ▪ Danemark (2) 	<ul style="list-style-type: none"> ▪ Commission européenne (assistance à la formation pour la transposition du droit européen assurée par une société allemande privée sous-traitante)
Afrique du sud	<ul style="list-style-type: none"> ▪ Australie ▪ Etats-Unis ▪ OCDE 	<ul style="list-style-type: none"> ▪ Australie ▪ Norvège ▪ Australie (2) ▪ <i>Mexique</i> ▪ OCDE 	<ul style="list-style-type: none"> ▪ Australie ▪ Norvège ▪ Etats-Unis 	<ul style="list-style-type: none"> ▪ Etats-Unis (6) ▪ Australie (3) ▪ OCDE 		<ul style="list-style-type: none"> ▪ Australie (3) ▪ Canada ▪ Australie (2) 	

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
BENEFICIAIRES↓							
Sri Lanka		<ul style="list-style-type: none"> ▪ <i>Japon (2)</i> ▪ <i>CNUCED (2)</i> ▪ <i>Canada</i> 					
Tanzanie		<ul style="list-style-type: none"> ▪ <i>Japon</i> 					
Thaïlande		<ul style="list-style-type: none"> ▪ CNUCED ▪ <i>Japon</i> ▪ <i>OCDE</i> ▪ OCDE ▪ <i>Canada</i> 	<ul style="list-style-type: none"> ▪ Japon (2) 	<ul style="list-style-type: none"> ▪ Australie ▪ Australie ▪ CNUCED 		<ul style="list-style-type: none"> ▪ Canada ▪ Australie 	<ul style="list-style-type: none"> ▪ Banque mondiale (programme d'assistance)
Turkménistan	<ul style="list-style-type: none"> ▪ <i>Turquie</i> 	<ul style="list-style-type: none"> ▪ <i>Turquie</i> 					
Ukraine	<ul style="list-style-type: none"> ▪ Etats-Unis ▪ OCDE 	<ul style="list-style-type: none"> ▪ OCDE (3) ▪ Etats-Unis (2) 					
Uruguay		<ul style="list-style-type: none"> ▪ <i>Mexique</i> 					
Ouzbékistan	<ul style="list-style-type: none"> ▪ <i>Turquie</i> 	<ul style="list-style-type: none"> ▪ <i>Japon</i> ▪ <i>Turquie</i> 					
Venezuela		<ul style="list-style-type: none"> ▪ <i>Mexique</i> 					
Vietnam		<ul style="list-style-type: none"> ▪ CNUCED ▪ Canada ▪ <i>Canada</i> 		<ul style="list-style-type: none"> ▪ Japon ▪ OCDE 		<ul style="list-style-type: none"> ▪ Australie ▪ Canada 	
Zambie		<ul style="list-style-type: none"> ▪ CNUCED (2) ▪ <i>Japon</i> 					
Zimbabwe						<ul style="list-style-type: none"> ▪ Australie 	
APEC	<ul style="list-style-type: none"> • Corée (Banque mondiale) • Corée 	<ul style="list-style-type: none"> ▪ OCDE (3) • Corée (2) (OCDE) ▪ Japon (2) ▪ Australie (6) ▪ OCDE (2) ▪ Mexique ▪ Etats-Unis ▪ CNUCED 					
ANASE	<ul style="list-style-type: none"> ▪ Australie 	<ul style="list-style-type: none"> ▪ Australie 					
Asie		<ul style="list-style-type: none"> ▪ Japon 					

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
BENEFICIAIRES↓							
Asie-Pacifique		<ul style="list-style-type: none"> ▪ Australie (2) ▪ Canada 					
Etats baltes	<ul style="list-style-type: none"> ▪ OCDE (2) 	<ul style="list-style-type: none"> ▪ OCDE (2) 					<ul style="list-style-type: none"> ▪ OCDE (2 rapports annuels sur l'évolution de la politique de la concurrence de chacun des pays)
Caraiïbes		<ul style="list-style-type: none"> ▪ CNUCED 					
CARICOM (communauté des Caraïbes)	<ul style="list-style-type: none"> ▪ Etats-Unis 	<ul style="list-style-type: none"> ▪ CNUCED ▪ Etats-Unis 					
Europe centrale et orientale	<ul style="list-style-type: none"> ▪ République tchèque ▪ CNUCED ▪ Etats-Unis 	<ul style="list-style-type: none"> ▪ OCDE (2) ▪ Etats-Unis (2) 	<ul style="list-style-type: none"> ▪ Italie 				
COMESA (Marché commun de l'Afrique de l'est et de l'Afrique australe)		<ul style="list-style-type: none"> ▪ CNUCED ▪ CNUCED 					
Communauté des Etats indépendants	<ul style="list-style-type: none"> ▪ CNUCED ▪ CNUCED ▪ CNUCED (2) ▪ Etats-Unis ▪ CNUCED 	<ul style="list-style-type: none"> ▪ OCDE (2) ▪ OCDE (2) ▪ Etats-Unis (3) ▪ Etats-Unis (2) 					
Amérique latine	<ul style="list-style-type: none"> ▪ OCDE 	<ul style="list-style-type: none"> ▪ CNUCED 					
Afrique du nord	<ul style="list-style-type: none"> ▪ Italie ▪ OCDE 	<ul style="list-style-type: none"> ▪ CNUCED 					
Amérique du sud		<ul style="list-style-type: none"> ▪ OCDE 					
Asie du sud et du sud-est	<ul style="list-style-type: none"> ▪ Australie ▪ OCDE 	<ul style="list-style-type: none"> ▪ OCDE (2) ▪ OCDE 					

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
BENEFICIAIRES↓							
Association sud-asiatique de coopération régionale (ASACR)		▪ <i>CNUCED</i>					
Europe du sud-est		▪ <i>OCDE (2)</i> ▪ <i>Etats-Unis (2)</i>					
Communauté du développement de l'Afrique australe (SADC)		▪ <i>CNUCED</i> ▪ <i>OCDE</i>					
50 pays d'Europe, d'Amérique du nord, d'Asie et d'Océanie (commerce et concurrence)	▪ <i>OCDE</i>						
18 pays d'Asie et d'Océanie	▪ <i>Australie</i>						
Divers pays	▪ <i>Turquie</i> ▪ <i>OCDE</i>						

ANNEXE E

**ACTIVITE PREVISIONNELLE D'ASSISTANCE TECHNIQUE DES PAYS MEMBRES, D'AUTRES FOURNISSEURS ET DU PROGRAMME
D'OUVERTURE SUR L'EXTERIEUR DE L'OCDE EN 2001, PAR FOURNISSEUR ET TYPE D'ACTIVITE**

(L'assistance parrainée et/ou organisée par le fournisseur est en caractères gras, la participation à une opération d'assistance organisée et parrainée par d'autres est en caractères normaux. Les chiffres figurant entre parenthèses après le nom d'un pays bénéficiaire indiquent le nombre d'activités en 2001)

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
FOURNISSEURS ↓							
Australie		<ul style="list-style-type: none"> • Egypte (plusieurs) • Indonésie (plusieurs) • Thaïlande (plusieurs) • APEC (2) 	<ul style="list-style-type: none"> • Taipei chinois • Papouasie Nouvelle Guinée 	<ul style="list-style-type: none"> • Egypte (plusieurs) • Indonésie (plusieurs) • Thaïlande (plusieurs) 	<ul style="list-style-type: none"> • Taipei chinois • Papouasie Nouvelle Guinée 	<ul style="list-style-type: none"> • Hong Kong 	<ul style="list-style-type: none"> • Afrique centrale et australe (étude de couverture et analyse des besoins)
République tchèque			<ul style="list-style-type: none"> • PECO 		<ul style="list-style-type: none"> • CEEC 		
Danemark			<ul style="list-style-type: none"> • Groenland 				
Commission européenne							<ul style="list-style-type: none"> • Ukraine (projet "Application du régime du commerce extérieur" avec un tiers consacré à la politique de la concurrence) • Ukraine (secteur de l'acier avec des composantes de politique de la concurrence)
Finlande							<ul style="list-style-type: none"> • Estonie (poursuite de l'assistance) • Russie (poursuite de l'assistance)
Italie			<ul style="list-style-type: none"> • Roumanie 				<ul style="list-style-type: none"> • Russie (projet d'assistance)
Corée		<ul style="list-style-type: none"> • APEC (OCDE) 					
Pays-Bas						<ul style="list-style-type: none"> • Estonie 	

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
FOURNISSEURS ↓							
Norvège					• Afrique du sud		
Etats-Unis			• Afrique du sud (plusieurs)	• Afrique du sud (plusieurs)			• MERCOSUR (activités non spécifiées) • Europe du sud-est
OCDE	• République populaire de Chine	• Russie (8) • Brésil • Asie du sud-est (avec la CTFTC) • Asie (avec la KFTC) • Etats baltes • CEI, Europe centrale et orientale et Europe du sud-est (2 semaines) • République populaire de Chine • APEC • Europe du sud-est(3) • Afrique du sud (4)		• Etats baltes • Russie		• République populaire de Chine	• Forum mondial sur la concurrence (bénéficiaires à définir par la CLP) • République populaire de Chine (étude des implications domestiques de la libéralisation des échanges et des investissements) • missions préparatoires et conférence pour lancer une initiative régionale phare sur la droit et la politique de la concurrence pour les pays d'Europe du sud-est

TYPE D'ACTIVITE	Conférence	Séminaire	Conseiller résident à long terme	Brève consultation	Stage	Visite d'étude	Divers
FOURNISSEURS ↓ CNUCED		<ul style="list-style-type: none"> • Azerbaïdjan • Burkina Faso, Mali • Cuba • pays africains • CEMAC • CEI • COMESA • APEC 					
BANQUE MONDIALE							<i>dialogue initial pouvant déboucher sur une assistance formelle :</i> <ul style="list-style-type: none"> • République dominicaine • Equateur • Vietnam • Communauté économique des pays d'Afrique de l'ouest • COMESA

Notes

¹ Réponse des Etats-Unis [DAFFE/CLP/WP3/WD(2001)9], p. 2.

² Réponse du Mexique [DAFFE/CLP/WP3/WD(2001)7], p. 2.

³ Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], p. 4.

⁴ La CNUCED confirme son appui à une assistance technique accrue "comme cela a été convenu au plan d'action adopté à la 10ème session de la conférence de la CNUCED et à la 4ème conférence des Nations Unies chargée de revoir tous les aspects de l'ensemble de principes et de règles" Réponse de la CNUCED [DAFFE/CLP/WP3/WD(2001)13], p. 3.

⁵ Réponse de l'Italie [DAFFE/CLP/WP3/WD(2001)5], p. 1.

⁶ Réponse du Japon [DAFFE/CLP/WP3/WD(2001)6], p. 1.

⁷ Réponse du Mexique [DAFFE/CLP/WP3/WD(2001)7], p. 2.

⁸ Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 2.

⁹ Réponse de la Commission européenne [DAFFE/CLP/WP3/WD(2001)12], pp. 3-4..

¹⁰ Réponse du Japon [DAFFE/CLP/WP3/WD(2001)6], p. 1.

¹¹ Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 4.

¹² Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], p. 4.

¹³ Réponse du Japon [DAFFE/CLP/WP3/WD(2001)6], p. 1.

¹⁴ Réponse de la Commission européenne [DAFFE/CLP/WP3/WD(2001)12], p. 5.

¹⁵ Réponse de l'Italie [DAFFE/CLP/WP3/WD(2001)5], p. 2.

¹⁶ Ibid., p. 2.

¹⁷ Ibid., p. 2.

¹⁸ Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], p. 4.

¹⁹ Ibid., p. 4.

²⁰ Ibid., p. 4.

²¹ Ibid., p. 7.

²² Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 4.

- 23 Réponse du Mexique [DAFFE/CLP/WP3/WD(2001)7], p. 2.
- 24 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], p. 4.
- 25 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 4.
- 26 Communication de la Communauté européenne et de tous ses Etats membres au Groupe de travail de l'interaction du commerce et de la politique de la concurrence de l'OMC [WT/WGTCP/W/140], 8 juin 2000, p. 11.
- 27 Réponse du Japon [DAFFE/CLP/WP3/WD(2001)6], p. 1.
- 28 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], p. 5.
- 29 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 5.
- 30 Réponse de la CNUCED [DAFFE/CLP/WP3/WD(2001)13], p. 4.
- 31 Réponse de la Finlande [DAFFE/CLP/WP3/WD(2001)10], p. 3.
- 32 Competition Policy Outreach Activities: Stocktaking, Challenges and Future Directions [DAFFE/CLP(99)30], para. 31. pp. 8-9.
- 33 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 5.
- 34 Réponse du Mexique [DAFFE/CLP/WP3/WD(2001)7], p. 3.
- 35 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], p. 5.
- 36 Réponse du Mexique [DAFFE/CLP/WP3/WD(2001)7], p. 3.
- 37 Competition Policy Outreach Activities: Stocktaking, Challenges and Future Directions [DAFFE/CLP(99)30], para. 28, p. 8.
- 38 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 6.
- 39 Réponse du Japon [DAFFE/CLP/WP3/WD(2001)6], p. 1.
- 40 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], pp. 5-6.
- 41 Réponse de la Finlande [DAFFE/CLP/WP3/WD(2001)10], p. 4.
- 42 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 6.
- 43 Réponse de la Finlande [DAFFE/CLP/WP3/WD(2001)10], p. 3.
- 44 Réponse de l'Italie [DAFFE/CLP/WP3/WD(2001)5], p. 2.
- 45 Réponse des Etats-Unis [DAFFE/CLP/WP3/WD(2001)9], p. 2.
- 46 Réponse de la Commission européenne [DAFFE/CLP/WP3/WD(2001)12], p. 7.

47 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], pp. 5-6.

48 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 6.

49 Réponse des Etats-Unis [DAFFE/CLP/WP3/WD(2001)9], p. 1.

50 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 2.

51 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], pp. 5-6.

52 Réponse de la Commission européenne [DAFFE/CLP/WP3/WD(2001)12], p. 7.

53 Le Canada tente de renforcer l'efficacité de l'assistance technique avec une plus grande coordination nationale des fournisseurs d'assistance technique. Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 8.

54 "Le gouvernement du Japon n'a pas fourni d'assistance technique avec d'autres pays de l'OCDE et/ou organisations internationales. Le gouvernement du Japon a un programme avec l'APEC, qui est un groupe régional de pays". Réponse du Japon [DAFFE/CLP/WP3/WD(2001)6], p. 1.

55 Réponse de l'Italie [DAFFE/CLP/WP3/WD(2001)5], pp. 2-3.

56 Réponse du Mexique [DAFFE/CLP/WP3/WD(2001)7], p. 4.

57 Réponse de la CNUCED [DAFFE/CLP/WP3/WD(2001)13], p. 6.

58 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], pp. 6-7.

59 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 8.

60 Réponse de la République tchèque [DAFFE/CLP/WP3/WD(2001)3], pp. 2-3.

61 Réponse du Danemark [DAFFE/CLP/WP3/WD(2001)4], p. 1.

62 Réponse de l'Italie [DAFFE/CLP/WP3/WD(2001)5], pp. 2-3.

63 Réponse du Japon [DAFFE/CLP/WP3/WD(2001)6], p. 1.

64 Réponse de la Norvège [DAFFE/CLP/WP3/WD(2001)14], p. 2.

65 Réponse de la République tchèque [DAFFE/CLP/WP3/WD(2001)3], pp. 2-3.

66 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], pp. 7-8.

67 Réponse du Danemark [DAFFE/CLP/WP3/WD(2001)4], p. 1.

68 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], pp. 7-8.

69 Réponse de la CNUCED [DAFFE/CLP/WP3/WD(2001)13], p. 6.

70 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], pp. 6-7.

- 71 Ibid., pp. 6-7.
- 72 Ibid., pp. 6-7.
- 73 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], pp. 7-8.
- 74 Ibid., pp. 7-8.
- 75 Ibid., p. 3.
- 76 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], pp. 6-7.
- 77 Réponse de la Finlande [DAFFE/CLP/WP3/WD(2001)10], p. 6.
- 78 Réponse de la République tchèque [DAFFE/CLP/WP3/WD(2001)3], pp. 2-3.
- 79 Ibid., pp. 2-3.
- 80 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 3.
- 81 Ibid., pp. 8-9.
- 82 Ibid., p. 3.
- 83 Ibid., pp. 8-9.
- 84 Communication de la Communauté européenne et de tous ses Etats membres au Groupe de travail de l'interaction du commerce et de la politique de la concurrence de l'OMC [WT/WGTCP/W/140], 8 juin 2000, p. 11.
- 85 Ibid., pp. 11-12.
- 86 Réponse de la CNUCED [DAFFE/CLP/WP3/WD(2001)13], p. 6.
- 87 Réponse de la République tchèque [DAFFE/CLP/WP3/WD(2001)3], pp. 2-3.
- 88 Réponse du Danemark [DAFFE/CLP/WP3/WD(2001)4], p. 1.
- 89 Réponse de l'Australie [DAFFE/CLP/WP3/WD(2001)1], pp. 6-7.
- 90 Réponse de la CNUCED [DAFFE/CLP/WP3/WD(2001)13], p. 6.
- 91 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 9.
- 92 Projet de rapport de la Quatrième Conférence des Nations Unies chargée de revoir tous les aspects de l'Ensemble de principes et de règles équitables convenus au niveau multilatéral pour le contrôle des pratiques commerciales restrictives, point 6 de l'ordre du jour TD/RBP/CONF.5/L.1/Add.2, p. 2.

93 "Le Mexique assure une formation aux fonctionnaires de la concurrence de certains pays d'Amérique latine, en particulier à nos principaux partenaires commerciaux d'Amérique centrale". Réponse du Mexique [DAFFE/CLP/WP3/WD(2001)7], p. 2.

94 "En 1999 et 2000, la plupart (8 sur 17) des activités d'assistance technique entreprises par le Mexique ont été adressées aux pays d'Amérique latine et des Caraïbes, par le biais de la participation de fonctionnaires mexicains en tant qu'experts à des séminaires et par l'organisation de stages. Les séminaires se sont déroulés selon le principe des études de cas, et d'autres séminaires ont traité des problèmes de concurrence qui se posent dans certains secteurs. Les stages étaient ouverts à des fonctionnaires chargés de la concurrence du Costa Rica, de Panama et du Pérou". Réponse du Mexique [DAFFE/CLP/WP3/WD(2001)7], p. 1. Voir aussi la réponse de l'Italie [DAFFE/CLP/WP3/WD(2001)5] et la réponse de la Finlande [DAFFE/CLP/WP3/WD(2001)10], p. 4.

95 Réponse de la République tchèque [DAFFE/CLP/WP3/WD(2001)3], p. 1., Réponse de la Finlande [[DAFFE/CLP/WP3/WD(2001)10], et réponse de la Pologne, e-mail by Ewa Soliwoda du 19 janvier 2001.

96 Réponse de la Turquie [DAFFE/CLP/WP3/WD(2001)15].

97 Réponse du Canada [DAFFE/CLP/WP3/WD(2001)2], p. 1.

98 Outre les nombreuses activités d'assistance technique de l'ACCC dans le domaine du droit et de la politique de la concurrence, l'AusAID finance aussi un vaste programme de coopération technique et de dialogue politique avec des pays en développement, dans le but de renforcer leurs capacités à participer à des dispositions commerciales mondiales et régionales et à exploiter de nouvelles possibilités d'échange. Les projets d'assistance au développement liés aux échanges (y compris des projets concernant le développement du droit et de la politique de la concurrence) représentant une valeur de l'ordre de 100 millions de dollars australiens, sont actuellement en cours, et on estime que près de 20 millions de dollars australiens ont été dépensés en 1999-2000

99 Réponse du Japon, p. 1.

100 Réponse de la Norvège [DAFFE/CLP/WP3/WD(2001)14], p. 1.

101 Ibid., p. 2.

102 Réponse de la Pologne, e-mail by Ewa Soliwoda du 19 janvier 2001.

103 International Competition Policy Advisory Committee (ICPAC) Final Report to the Attorney General and Assistant Attorney General for Antitrust, 2000 (www.usdoj.gov/atr/icpac/finalreport.htm), Annexe 6-A.

104 Réponse des Etats-Unis, p. 2.

105 Réponse de la CNUCED [DAFFE/CLP/WP3/WD(2001)13], p. 3.

106 Ibid., p. 4.

107 Réponse de la République tchèque [DAFFE/CLP/WP3/WD(2001)3], p. 2.

- 108 Le Danemark déclare explicitement que "il n'est guère probable qu'il y ait un changement de politique ou de priorités pour l'année 2001". Réponse du Danemark [DAFFE/CLP/WP3/WD(2001)4], p. 1.
- ¹⁰⁹ Réponse de la Finlande [DAFFE/CLP/WP3/WD(2001)10], p.3.
- 110 Réponse du Mexique [DAFFE/CLP/WP3/WD(2001)7], p. 1.
- ¹¹¹ Réponse de la Norvège [DAFFE/CLP/WP3/WD(2001)14], p. 1.
- ¹¹² Réponse de la Commission européenne[DAFFE/CLP/WP3/WD(2001)12], p. 3.
- ¹¹³ Ibid., p. 3.
- ¹¹⁴ Réponse de la Suisse [DAFFE/CLP/WP3/WD(2001)11], p. 1.
- ¹¹⁵ Réponse des Etats-Unis [DAFFE/CLP/WP3/WD(2001)9], p. 1.
- ¹¹⁶ Réponse de la CNUCED [DAFFE/CLP/WP3/WD(2001)13], p. 3.

**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

Forum mondial de l'OCDE sur la concurrence

**POLITIQUE DE LA CONCURRENCE ET CROISSANCE
ET DEVELOPPEMENT ECONOMIQUES**

-- Note du Secrétariat --

-- Session I --

La présente note est soumise par le Secrétariat POUR EXAMEN au cours de la Session I de la deuxième réunion du Forum mondial sur la concurrence, qui se tiendra les 14-15 février 2002.

JT00128381

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POLITIQUE DE LA CONCURRENCE ET CROISSANCE ET DEVELOPPEMENT ECONOMIQUES

Note du Secrétariat

1. Cette session du Forum mondial de l'OCDE sur la concurrence sera consacrée à l'étude du rapport entre la politique de la concurrence et la croissance et le développement économiques, vu sous différents angles. Les contributions des participants au Forum sont placées sur OLIS et sur le site web du Forum. L'annexe A contient l'introduction et le résumé du document qui sera présenté par le Département des affaires économiques de l'OCDE (ainsi qu'une citation sur le site web du Département). L'annexe B résume brièvement quelques-uns des documents les plus pertinents qui ont été publiés et dont certains ont été établis par des personnes qui interviendront en tant qu'orateurs au Forum. La présente note expose brièvement les thèmes relevés dans les divers documents et les questions que les participants voudront peut-être examiner. Elle porte sur les questions générales qui seront abordées au cours de la première moitié de la session ; ces questions, et d'autres connexes, seront examinées sous des angles différents au cours de la seconde moitié.

2. En général, la plupart des contributions écrites (a) traitent des effets de la concurrence sur la croissance économique, (b) recensent les obstacles à la concurrence dans les pays en développement et les mesures visant à les supprimer et (c) examinent les caractéristiques du droit, de la politique et des organismes de la concurrence et la façon dont ils pourraient être adaptés pour répondre aux besoins particuliers des pays. Le document du Département des affaires économiques ne traite pas directement du « développement », mais les conséquences de ses conclusions du point de vue des effets des marchés concurrentiels sur l'ensemble de l'économie dans les pays de l'OCDE méritent d'être examinées par les autorités chargées de la concurrence de tous les pays. Les documents sur les conséquences des ententes injustifiables pour les pays en développement donne une autre perspective sur ces questions -- une perspective particulièrement importante pour les responsables de la concurrence dans le monde entier et pour les pays qui n'ont pas de lois interdisant ces pratiques.

3. Les effets de la concurrence sur la croissance économique ont été mesurés empiriquement dans les divers documents de référence. On a utilisé des techniques économétriques et des données provenant d'un certain nombre de pays pour aborder des questions telles que :

- Dans quelle mesure la concurrence favorise-t-elle la croissance économique (et d'autres indicateurs économiques) ?
- Dans quelle mesure la *politique* de la concurrence favorise-t-elle la croissance économique ?
- Plus précisément, quels sont les effets des ententes sur les pays en développement ?
- En quoi une concurrence intérieure accrue influe-t-elle sur la compétitivité internationale ?
- Quelle est l'interaction entre une plus grande ouverture au commerce international et une politique intérieure favorable à la concurrence ? Ces politiques se substituent-elles l'une à l'autre ou se complètent-elles ? L'effet dépend-il de la taille du pays ?

4. Les contributions nationales et certains documents de référence identifient des types particuliers d'obstacles à la concurrence et des politiques qui peuvent aider à les surmonter ou à favoriser d'une autre manière la concurrence. Un thème commun est l'accès aux moyens de production essentiels. Tant dans les

pays développés que dans les pays en développement, les secteurs d'infrastructure comportent des « installations essentielles ». Cependant, dans les pays en développement, l'accès à une gamme plus étendue de moyens de production essentiels est parfois impossible ou limité. Les moyens de production peuvent être monopolisés ou carrément inexistant. On peut citer comme exemples les services de transport, les services financiers et divers services professionnels aux entreprises. De plus, les économies en développement n'ont pas toujours de marchés, par exemple pour les opérations foncières. L'insuffisance de l'offre de ces moyens de production de ce type est souvent imputable aux réglementations publiques, telles que les systèmes d'octroi de licences, ou à l'inaction des pouvoirs publics qui, par exemple, n'offrent pas une base juridique suffisante pour une forme ou une autre d'activité industrielle ou commerciale.

- Quelles sont les caractéristiques communes aux économies en développement qui font obstacle à une concurrence efficace ?
- Quelles sont les conséquences de ces caractéristiques en termes d'avantages et de coûts, et quels sont les moyens de renforcer la concurrence ?
- Quelles sont les mesures qui permettraient de surmonter les problèmes liés à l'absence partielle ou totale de moyens de production essentiels sur des marchés potentiellement concurrentiels ? Quel rôle le droit de la concurrence peut-il jouer ?
- Quelles sont les mesures qui permettraient de résoudre les problèmes économiques transitoires sans retarder indûment ou empêcher l'évolution vers une économie dans laquelle la société tout entière profite de l'efficacité liée au marché ?

5. La nature de la législation, de la politique et des organismes responsables dans le domaine de la concurrence est un thème majeur relevé dans bon nombre des contributions nationales et certains documents de référence. L'une des questions abordées est la fréquence des cas où l'action ou l'inaction des organismes publics ou des responsables gouvernementaux qui agissent de façon discrétionnaire pose problème dans les économies en transition ou en développement. Une autre est la façon dont l'hétérogénéité des pays se traduit par une hétérogénéité des conceptions et des priorités dans les domaines du droit, de la politique et des organismes responsables de la concurrence.

- Dans de nombreuses économies en transition, les lois relatives à la concurrence s'appliquent dans le contexte d'actions discrétionnaires des organismes publics ou des responsables gouvernementaux qui ont des effets anticoncurrentiels ou potentiellement anticoncurrentiels ou dans un contexte d'inaction totale des pouvoirs publics. Ces dispositions sont très rares dans les pays en développement qui ont une législation en matière de concurrence. Cette approche serait-elle utile dans les économies en développement ?
- Si un pays n'est pas certain des effets à attendre de l'adoption d'une loi relative à la concurrence concernant les monopoles, les fusions et les ententes, quels sont les avantages et les inconvénients de différents moyens de « commencer par des mesures limitées » ? Ces différents moyens pourraient être les suivants : (a) créer un petit bureau de la concurrence habilité seulement à « sensibiliser l'importance de la concurrence », (b) commencer par interdire les « pratiques commerciales déloyales » telles que la fraude, la publicité mensongère et l'appropriation de la propriété intellectuelle, (c) introduire certaines règles relatives au pouvoir de marché, telles que des interdictions de liaisons des services d'utilité publique, dans l'interdiction des pratiques commerciales déloyales, et (d) interdire seulement les ententes injustifiées, l'abus de position dominante ou les fusions anticoncurrentielles.

- Les objectifs et les priorités diffèrent-ils systématiquement entre pays développés et pays en développement ?
- Hors du contexte de l'UE et de son processus d'accession, dans quelle mesure les pays ayant de nouvelles lois en matière de concurrence ont-ils adopté la plupart ou la totalité des dispositions du droit de la concurrence d'un autre pays ? Quels ont été les avantages obtenus ? Quels sont les risques à éviter ?
- Y a-t-il des caractéristiques, telles que le degré d'indépendance des organismes chargés de la concurrence par rapport au reste des pouvoirs publics, qui sont fondamentales pour assurer l'efficacité du droit et de la politique de la concurrence ?

Annexe A : Résumé du document du Département des affaires économiques de l'OCDE

(document disponible sur le site web du Département des affaires économiques :

<http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-280-8-no-2-21578-0,FF.html>

EFFETS CROISES DES POLITIQUES SUR LES MARCHES DU TRAVAIL ET DES PRODUITS**Introduction et résumé**

Ces deux dernières décennies, les pays de l'OCDE ont mis en œuvre sur les marchés du travail et des produits des réformes visant à accroître l'emploi et à améliorer l'efficacité productive. Par exemple, pour réduire le chômage et stimuler le taux d'activité, ils ont ajusté leur législation en matière de protection de l'emploi et de salaire minimum, réformé leurs systèmes de transferts et modifié leurs politiques fiscales. En outre, un grand nombre d'entre eux ont engagé des réformes de la réglementation destinées à favoriser la concurrence sur les marchés de produits, qui ont eu des effets positifs sur la productivité et le bien-être des consommateurs. Cependant, peu d'attention a été accordée à l'incidence potentielle des réglementations concernant les marchés de produits sur les résultats du marché du travail ou l'incidence des politiques et institutions du marché du travail sur la performance des marchés de produits.

Le présent chapitre rend compte d'une analyse empirique réalisée récemment par l'OCDE en vue de mettre en évidence certains des effets croisés potentiels à long terme des réformes des politiques des marchés du travail et des produits. Se concentrant sur les réglementations anticoncurrentielles affectant des marchés de produits potentiellement concurrentiels (comme les barrières à l'entrée, les contrôles de prix, l'actionnariat public, les charges administratives et les obstacles aux échanges et à l'investissement), la première section présente une évaluation quantitative de l'incidence des réformes de la réglementation sur l'emploi, l'insécurité de l'emploi et l'inégalité des gains. La section suivante examine les effets de certaines politiques et institutions du marché du travail sur l'innovation et la structure industrielle.

La principale conclusion du présent chapitre est que les réglementations des marchés de produits et les politiques et institutions des marchés du travail ont d'importants effets croisés. Il s'ensuit plusieurs conséquences pour l'action des pouvoirs publics :

- La réduction des obstacles aux échanges et à la concurrence sur des marchés de produits potentiellement concurrentiels peut compléter les réformes des marchés du travail visant à accroître les niveaux d'emploi à long terme dans les pays de l'OCDE.
- En outre, les données préliminaires amènent à penser que ces gains d'emploi à long terme ne vont pas nécessairement de pair avec une plus grande inégalité à long terme sur les marchés du travail et une plus grande insécurité des perspectives d'emploi, représentées par plusieurs mesures de la rotation de la main-d'œuvre et de l'ancienneté moyenne dans l'emploi. Néanmoins, l'incidence de la réglementation sur la sécurité de l'emploi semble différer suivant les groupes de travailleurs et les coûts d'ajustement peuvent être importants pour certains travailleurs dont l'emploi a été supprimé. Cela met en évidence la nécessité d'accompagner les réformes sur les marchés des produits de politiques adaptées du marché du travail.

- En fonction du régime de relations professionnelles, un assouplissement des restrictions à l'embauche et au licenciement a, semble-t-il, un effet soit positif soit à peu près neutre sur l'activité d'innovation dans les différents secteurs économiques.

En outre, les effets potentiels sur la croissance de la réforme des marchés du travail (assouplissement de la protection de l'emploi, réduction de l'extension administrative des conventions collectives et diminution du coin fiscal) sont vraisemblablement renforcés car ils favorisent la spécialisation dans les industries à forte intensité de R-D.

Annexe B : Résumés de quelques documents relatifs à la politique de la concurrence et au développement

Carlin, Wendy, Steven Fries, Mark E. Schaffer et Paul Seabright (2001), « Competition and enterprise performance in transition economies : Evidence from a cross-country survey », CEPR, document de discussion n° 2840, juin.

S'appuyant sur une enquête réalisée conjointement par la BERD et la Banque mondiale auprès de 3 300 entreprises dans 25 pays, les auteurs constatent que le degré de concurrence perçue par les chefs d'entreprise a un effet important et positif sur la croissance des ventes et de la productivité du travail, et aussi un effet positif sur les décisions des entreprises de développer et d'améliorer leur production. Les deux mesures de la concurrence perçue sont le nombre perçue de concurrents importants pour l'entreprise et la mesure dans laquelle l'entreprise pense que la demande pour ses produits diminuerait si elle majorait ses prix (réels) de 10 pour cent. Un plus grand pouvoir de marché réduit la restructuration visant à abaisser les coûts.

Cooke, Sarah et David Elliott (1999) « Competition policy issues for APEC economies », photocopié, juillet.

Ce document aborde quatre questions principales que les pays en développement peuvent se poser lorsqu'ils envisagent d'adopter une législation en matière de concurrence ou de renforcer la concurrence dans leur économie. Il s'agit de savoir si cette loi est nécessaire compte tenu de la libéralisation commerciale, si elle nuit à la compétitivité internationale ou réduira la capacité d'attirer l'investissement direct étranger, et si une concurrence accrue fait monter le chômage ou créera d'autres problèmes sociaux. Les auteurs résument les faits observés, qui tendent à montrer que la libéralisation des échanges et la législation en matière de concurrence ne peuvent pas se substituer l'une à l'autre, que, tout bien considéré, la législation relative à la concurrence améliorera la compétitivité (sur la base d'observations très ténues), que la concurrence ne dissuadera pas l'IDE et, de fait, aidera peut-être à le favoriser et que, même si les coûts sociaux à court terme du passage à une économie plus concurrentielle peuvent être très élevés, ils ne représenteront rien en comparaison des coûts à long terme d'une économie non concurrentielle.

Dutz, Mark A. et Aydin Hayri (2001), « Does Effective Antitrust Policy Spur Economic Growth ? », photocopié, octobre.

Les auteurs ont cherché à vérifier, à l'aide de données provenant de plus de cent pays pour la période 1986-1995, s'il existe une corrélation significative et solide entre une politique antitrust ou des mesures de lutte contre la concentration dans l'ensemble de l'économie et des taux plus élevés de croissance économique par habitant. L'efficacité de la politique antitrust a été mesurée par les réponses à une vaste enquête menée auprès de cadres supérieurs dans 53 pays, interrogés sur la politique antimonopoles de leur pays, ainsi que par une mesure de la mobilité des plus grandes entreprises. Les auteurs ont observé une corrélation positive entre des politiques antitrust efficaces et une croissance résiduelle (c'est-à-dire une croissance qui ne s'explique pas par des variables pour lesquelles on s'accorde à dire qu'elles renforcent la croissance économique -- par exemple, la convergence (les pays pauvres ont davantage de possibilités de « rattrapage »), l'ouverture aux échanges, le capital humain et l'investissement en capital physique). Une analyse supplémentaire de la sensibilité indique qu'une politique antitrust efficace a un effet distinct de celui de l'ouverture commerciale.

Dutz, Mark A., Janos Ordover et Robert D. Willig (2000), « Entrepreneurship, Access Policy and Economic Development : Lessons from Industrial Organisation », *European Economic Review*, 44(4/6), mai, pp. 739-747.

Les auteurs présentent une analyse selon laquelle deux séries de mesures -- récompensant l'innovation productive et améliorant les possibilités de création d'entreprises -- sont essentielles pour favoriser le développement économique en favorisant l'entreprenariat. Ils soutiennent que l'accès obligatoire doit être étendu, au-delà des installations essentielles habituelles des services d'utilité publique, à d'autres éléments d'infrastructure industrielle et commerciale. Ces éléments sont des infrastructures locales, telles que des sites de production et des marchés de l'immobilier industriel, des services financiers, des services logistiques et de transport, des services professionnels aux entreprises, une main-d'œuvre qualifiée, et des cadres institutionnels, tels que la réglementation financière et la réglementation douanière. Les effets de ces mesures peuvent être importants : d'après une étude citée dans le document, on estime que le développement de la concurrence dans le secteur du camionnage au Mexique, par suite de la réforme de la réglementation, a amélioré de 10 pour cent la marge d'exploitation des entreprises utilisatrices représentatives.

Dutz, Mark A. et Maria Vagliasindi (2000), « Competition policy implementation in transition economies : An empirical assessment », *European Economic Review*, 44, pp. 762-772.

Les auteurs évaluent l'efficacité de la mise en œuvre d'une politique de la concurrence dans 18 économies en transition. L'efficacité est mesurée sous trois aspects : contrôle de l'application, sensibilisation à l'importance de la concurrence et efficacité institutionnelle. En ce qui concerne le premier aspect, on examine le contrôle de l'application séparément pour les entreprises et pour les organes exécutifs de l'Etat, et on évalue dans quelle mesure les amendes sont effectivement recouvrées. Les auteurs observent une solide corrélation positive entre une mise en œuvre efficace de la politique de la concurrence et l'expansion d'entreprises privées plus efficaces.

Evenett, Simon J., Margaret C. Levenstein et Valerie Y. Suslow (2001), « International Cartel Enforcement : Lessons from the 1990s », *World Economy : Special Global Trade Policy Issue* 24, pp. 1221-1245.

Les auteurs affirment que les ententes internationales sont plus stables que les ententes nationales. Ils apportent trois arguments : les frontières nationales sont un moyen direct de fragmenter les marchés internationaux, la surveillance est facilitée par les chiffres des importations et des exportations [mais il y a des difficultés à relier les « marchés » aux catégories de chiffres commerciaux], et la menace de représailles est plus grande dans les ententes internationales (la sanction prévue en cas de tricherie au sein de l'entente sur un marché peut être infligée sur tous les marchés approvisionnés par l'entente), ce qui renforce l'effet de l'entente sur un marché. Appliquant une analyse fondée sur le droit et l'économie, ils estiment que les sanctions, y compris les programmes de clémence à l'égard des entreprises, peuvent réduire les incitations à former des ententes. Ils notent toutefois que les ententes internationales sont plus difficiles à démanteler que les ententes pour lesquelles il existe des preuves dans le pays, et ils préconisent par conséquent une coopération plus intense, des sanctions plus lourdes et une vigilance complémentaire dans les autres domaines de la politique de la concurrence.

Hoekman, Bernard, Hiau Looi Kee, Marcelo Olarreaga, « Markups, Entry Regulation and Trade : Does Country Size Matter ? » CEPR, document de discussion n° 2853, juillet 2001.

Les auteurs mettent au point et essaient un modèle simple qui montre que les effets des obstacles à la concurrence des importations et des obstacles à l'entrée sur le marché intérieur sur les marges bénéficiaires dans l'industrie dépendent de la taille du pays. L'effet des premiers est plus marqué dans les

petits pays, et l'effet des seconds est plus important dans les grands pays. Après avoir estimé les marges bénéficiaires pour le secteur manufacturier dans 41 pays développés et en développement, les auteurs testent le modèle et leurs hypothèses ne sont pas démenties par les chiffres.

Khemani, R. Shyam et Mark A. Dutz (1995), « The Instruments of Competition Policy and their Relevance for Economic Development », dans Claudio Frischtak (dir. pub.), *Regulatory Policies and Reform in Industrializing Countries*.

Les auteurs soutiennent qu'une « législation bien conçue en matière de concurrence » doit faire partie du cadre de l'action gouvernementale. Cette législation, avec la sensibilisation à l'importance de la concurrence, complète les autres mesures gouvernementales visant à renforcer la concurrence en empêchant la multiplication des obstacles à l'entrée sur les marchés. Ils notent que la caractéristique commune aux 23 pays de l'est de l'Asie, qui ont des taux de croissance supérieurs à la moyenne des autres régions, est un degré élevé de concurrence entre les entreprises et une forte exposition à la concurrence intérieure ou internationale. Selon eux, les questions générales relatives à la véritable efficacité de l'administration et du contrôle de l'application du droit de la concurrence sont au centre d'un vif débat au sujet de l'opportunité de mettre en place une législation en matière de concurrence dans les pays en développement et les économies de marché émergentes. D'aucuns craignent que la législation ne s'applique de telle façon que la liberté et les récompenses des marchés disparaissent, ou que l'organisme chargé d'en contrôler l'application ne devienne une cible de la recherche de rente. Les régimes de concurrence établis de longue date font ressortir certains principes qui doivent apparaître dans la conception du cadre institutionnel de la mise en œuvre de la politique de la concurrence -- indépendance vis-à-vis de toute interférence politique et budgétaire, responsabilité publique, séparation des fonctions d'enquête, de poursuites et de jugement, système intégré de mécanismes de contrôle avec droit d'appel et transparence, rapidité des procédures et du règlement des affaires, et application d'importantes amendes, sanctions et mesures correctrices. Les auteurs affirment que la libéralisation des échanges complète la politique de la concurrence mais ne peut pas s'y substituer.

Kovacic, William E. (2002), « Institutional Foundation for economic legal reform in transition economies : the case of competition policy and antitrust enforcement », à paraître dans *Chicago-Kent Law Review*.

L'auteur centre son attention sur la politique de la concurrence comme un des volets de la réforme du droit de la concurrence dans les pays en transition. La politique de la concurrence compte de nombreux instruments, notamment la sensibilisation, l'éducation aux avantages des mécanismes du marché, les études à l'appui de ces activités et le contrôle de l'application des lois antitrust. Cependant, les pays peuvent adopter une stratégie intermédiaire telle que la mise en place progressive d'instruments et de responsabilités et le partage des tâches dans le cadre de la coopération régionale.

Le document examine les dangers d'une application malavisée du droit de la concurrence, mais aussi les raisons pour lesquelles la politique de la concurrence doit être au centre de la réforme. Les dangers sont notamment la subversion visant à préserver la structure existante de la richesse et des privilèges, les actions visant à décourager l'investissement et l'entrepreneuriat, et le détournement d'autres besoins plus urgents. Les raisons avancées en faveur de politique de la concurrence sont la promotion de la libéralisation, la préservation des avantages de la privatisation, la protection des consommateurs et de l'Etat contre les restrictions privées dommageables pour les échanges, et la réduction de la corruption par le retrait du pouvoir qu'ont les agents de la fonction publique d'accorder un privilège économique illicite.

On prend de plus en plus conscience des différences importantes, du point de vue des conditions initiales et des enjeux, dans les pays en transition par rapport aux pays occidentaux. On observe notamment une forte résistance à la réforme visant à mettre en place une économie de marché, qui se manifeste par des mesures de suppression de la concurrence prises à tous les niveaux de l'administration, un timide soutien politique aux organismes chargés de la concurrence, un manque de compétences locales en matière de droit de la concurrence ou d'organisation industrielle, des vices dans les procès portant sur des affaires antitrust, la fragilité des sauvegardes en matière de transparence et la vulnérabilité à la corruption qui en résulte, et des pénuries de ressources et de données.

Langhammer, Rolf J. (2000) « Changing Competition Policies in Developing Countries : From Policies Protecting Companies Against Competition to Policies Protecting Competition » *polycopié*, présenté à l'Atelier organisé sur le thème « Institutional Foundation of a Market Economy », Rapport sur le développement dans le monde 2001/2, Berlin, 23-25 février.

Selon l'auteur, depuis le milieu des années 80, la perception des marchés dans les pays en développement a changé fondamentalement. L'ancienne réticence à appliquer les lois de la concurrence d'une manière propre à accroître la concurrence était due à : a) la crainte qu'une concurrence accrue ne rende obsolètes les subventions et l'actionnariat public ; b) l'idée que les marchés des pays en développement étaient trop petits pour permettre le bon fonctionnement de la concurrence, et la supposition selon laquelle les pertes dues à une exploitation à moindre échelle seraient supérieures aux pertes imputables à la monopolisation ; c) la crainte que la concurrence n'entame la maîtrise de la base d'imposition qu'assure la propriété publique ; d) l'hostilité à l'économie de marché ; e) le désir de maintenir une discrimination positive en faveur des entreprises nationales. Le changement intervenu depuis le milieu des années 80 s'est traduit par une libéralisation de la politique à l'égard de l'investissement étranger et de la politique commerciale et une rationalisation des politiques fiscales. Ces changements ont entraîné une augmentation des exportations, ce qui a suscité des mesures de protection conjoncturelle de la part des pays industrialisés. Ces mesures ont conduit de nombreux pays en développement à adopter des politiques de la concurrence ou à réviser celles qui existaient. Ainsi, les différences dans les politiques de la concurrence entre pays en développement et pays de l'OCDE se sont atténuées. Bien qu'il ait noté avant qu'il soit erroné de prétendre que la libéralisation commerciale peut se substituer pleinement au droit de la concurrence, l'auteur indique que, pour les pays qui ont de faibles capacités administratives et un cadre institutionnel rudimentaire, la libéralisation des échanges est peut-être encore la stratégie la plus simple pour développer la concurrence.

Levenstein, Margaret et Valerie Suslow (2001), « Private International Cartels and Their Effects on Developing Countries », document de référence pour le Rapport 2001 de la Banque mondiale sur le développement dans le monde, version du 9 janvier 2001.

Le document examine les effets possibles de récentes ententes internationales entre entreprises privées sur les pays en développement, à l'aide de cinq études de cas et en estimant l'effet quantitatif des ententes sur le revenu des pays en développement. Les cinq études de cas portent sur les ententes concernant le brome, l'acide citrique, les électrodes de graphite, les tubes en acier et les vitamines, qui ont toutes donné lieu à des poursuites. L'estimation de l'effet des ententes repose sur le raisonnement suivant : on prend tout d'abord la série d'ententes ayant donné lieu à des poursuites aux Etats-Unis ou dans l'UE au cours des années 90, où les parties à l'entente et les marchés touchés n'étaient pas limités à un pays. Parmi ces ententes, une correspondance a été observée, pour 16 produits, entre les catégories utilisées pour les statistiques commerciales (à savoir, pour les produits, à l'exclusion des services) et les produits sur lesquels

portaient les ententes. Pour ces produits, les importations à destination des pays en développement « touchées par les ententes » représentaient 6.7 pour cent du total des importations vers ces pays. Cela surestime l'effet des ententes car les catégories de données commerciales sont généralement plus larges que les marchés de produits des ententes, mais l'absence de « correspondances » de catégorie commerciale pour de nombreuses ententes ayant fait l'objet de poursuite sous-estime cet effet, de même que la probabilité que toutes poursuites ne soient pas couronnées de succès. L'effet des ententes sur les prix va de presque rien à une hausse estimée à cinquante pour cent dans le cas des électrodes de graphite.

Maskus, Keith E. et Mohamed Lahouel (2000), « Competition Policy and Intellectual Property Rights in Developing Countries », *World Economy*, vol. 23, pp. 595-611.

Centrée principalement sur les droits de propriété intellectuelle et un possible accord multilatéral sur les stratégies en matière de concurrence, une section de ce document aborde explicitement la question de la politique de la concurrence dans les pays en développement. Les auteurs donnent des exemples de politiques de la concurrence interventionnistes -- faible protection par les brevets, politiques industrielles visant à réaliser des économies d'échelle, industrialisation par le biais de la protection des entreprises publiques, subventions, aides publiques et politiques des marchés publics -- et ils affirment que ces politiques sont, par nature, anticoncurrentielles et contre-productives. Selon eux, dans bien des pays en développement, le secteur public est au moins aussi responsable que le secteur privé des pratiques anticoncurrentielles, et ils citent des exemples de systèmes de licence d'investissement qui limitent l'entrée et d'offices de commercialisation ou d'entreprises publiques monopolisant les importations de certains produits en Tunisie. Ils notent cependant que les pays en développement reconnaissent, de plus en plus, les avantages nets, à long terme, de l'intensification de la concurrence et qu'ils renforcent donc unilatéralement leurs régimes de DPI et adoptent des lois en matière de concurrence.

Banque mondiale (2002), « Global Economic Prospects and the Developing Countries ».

Bien qu'il ne porte pas, de façon générale, sur la concurrence et le développement, le rapport plaide en faveur d'une réduction des obstacles à l'entrée sur le marché des services et d'un renforcement de la concurrence dans le secteur des transports, en particulier le transport maritime de ligne et le transport aérien. Dans le *Chapitre 7 « Competition »*, il est noté que la concurrence sur les marchés de produits accroît l'efficacité et la productivité. Cependant, dans les pays en développement, la croissance de la productivité résulte essentiellement des retombées technologiques des échanges, de l'investissement direct étranger, de l'octroi de licences et des co-entreprises [p. 133]. Le rapport souligne que les responsables gouvernementaux doivent en priorité assurer la liberté d'entrée et de sortie et l'exposition à la concurrence internationale. Les réglementations publiques qui limitent l'entrée/la sortie comportent une réglementation des marchés de facteurs (réglementation du travail, lois sur la restitution dans les pays en transition), des aides budgétaires ou quasibudgétaires telles que des prêts assortis de conditions favorables, des restrictions à l'établissement de nouvelles entreprises, des procédures obligatoires pour les nouvelles entreprises, telles qu'autorisations et inspections. Une étude a révélé que les pays en développement imposent généralement davantage de procédures pour le démarrage d'une nouvelle entreprise que les pays industriels. Le rapport note que les échanges internationaux sont particulièrement utiles pour promouvoir des marchés concurrentiels dans les pays en développement, où il y a des difficultés d'information, une médiocre application des contrats et des contraintes de capital humain [p. 143]. Par ailleurs, le commerce international presse les pouvoirs publics de lever les obstacles institutionnels à la concurrence puisque ces obstacles réduisent la capacité de l'économie nationale de répondre à la concurrence étrangère.

OMC (1998), Synthesis paper on the relationship of trade and competition policy to development and economic growth, WT/WGTCP/W/80, 18 septembre.

Le document examine le rapport entre les politiques commerciales et de la concurrence et le développement et la croissance économique. Il explique les raisons pour lesquelles un droit et une politique de la concurrence ont été mis en œuvre dans les économies de marché en développement, les interactions du commerce et de la politique de la concurrence du point de vue de la promotion d'un développement économique solide, les réserves et/ou considérations pratiques concernant la nécessité et/ou la conception appropriée d'un droit et d'une politique de la concurrence dans les pays en développement, et le rôle de la coopération internationale pour faciliter la mise en œuvre de la politique de la concurrence dans ces régions. En ce qui concerne les interactions du commerce et de la politique de la concurrence du point de vue de la promotion d'un solide développement économique, le document étudie : (1) la complémentarité de la libéralisation du commerce et de la politique de la concurrence dans la promotion de l'efficacité, du développement économique et de la croissance ; (2) la question de savoir si la libéralisation du commerce et de l'investissement peut remplacer la politique de la concurrence ; et (3) la question de savoir si, du point de vue du bien-être, il faut choisir entre appliquer la politique de la concurrence et atteindre la « masse critique » pour assurer la compétitivité internationale des entreprises. Au sujet du troisième point, le document traite de la question de savoir si le passage à une économie fondée sur la concurrence ne risque pas de provoquer des perturbations sociales et économiques, si un droit de la concurrence doit forcément être global, et quelles sont les priorités pour la mise en œuvre du droit et de la politique de la concurrence dans les économies de marché en développement.

CNUCED (1998) Éléments qui permettraient de faire ressortir les avantages que procurerait l'application de principes du droit et de la politique de la concurrence au développement économique aux fins d'une plus grande efficacité concernant le commerce international et le développement (TD/B/COM.2/EM/10/Rev.1, 25 mai).

Le document expose la théorie et examine les éléments d'observation concernant l'efficacité statique et dynamique et les avantages de la concurrence du point de vue du bien-être des consommateurs, surtout lorsqu'elle découle de la déréglementation et de la libéralisation, principalement à partir de données provenant des pays développés mais aussi à partir de certaines données d'observation provenant des pays en développement. Il examine les observations relatives aux effets de la concurrence sur diverses mesures de la croissance, et aux effets de la politique industrielle sur la concurrence et l'efficacité. Le document analyse certaines informations relatives aux effets sur les prix de la limitation des pratiques commerciales restrictives et de la sensibilisation à l'importance de la concurrence.

**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

Forum mondial de l'OCDE sur la concurrence

**ASSISTANCE TECHNIQUE DANS LE DOMAINE DU DROIT ET DE LA POLITIQUE DE LA
CONCURRENCE :
POINT DE VUE DES BENEFICIAIRES CONCERNANT LEURS BESOINS ET LE DEGRE
D'EFFICACITE DES METHODES DE FOURNITURE D'ASSISTANCE EMPLOYEES -
IMPLICATIONS POUR LES FOURNISSEURS D'ASSISTANCE**

-- Note du Secrétariat ; Séance II -

Cette note a été soumise POUR DISCUSSION au cours de la Séance II de la deuxième réunion du Forum mondial sur la concurrence, qui s'est tenue les 14 et 15 février 2002.

JT00128357

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**ASSISTANCE TECHNIQUE
DANS LE DOMAINE DU DROIT ET DE LA POLITIQUE DE LA CONCURRENCE :
POINT DE VUE DES BÉNÉFICIAIRES CONCERNANT LEURS BESOINS ET LE DEGRÉ
D'EFFICACITÉ DES MÉTHODES DE FOURNITURE D'ASSISTANCE EMPLOYÉES –
IMPLICATIONS POUR LES FOURNISSEURS D'ASSISTANCE**

1. Introduction : synthèse des contributions des pays non membres

1. Cette deuxième séance du Forum mondial devrait permettre un échange informel entre fournisseurs et bénéficiaires d'une assistance technique en matière de politique de la concurrence. Le groupe des fournisseurs d'assistance est constitué de délégués auprès de l'OCDE spécialistes du domaine, parfois accompagnés par des représentants des organismes nationaux assurant le financement de l'assistance dont ils sont les mandataires, ainsi que des secrétariats de diverses organisations internationales. Les bénéficiaires sont quant à eux des pays non membres de l'OCDE de toutes les régions du monde (environ 35 pays au total) qui se situent à différents stades de développement économique et à différents niveaux d'avancement, qui vont de la réflexion préalable à la mise en œuvre effective, après promulgation, en ce qui concerne l'introduction d'un droit et d'une politique de la concurrence. Les bénéficiaires ont été invités à présenter leur point de vue s'agissant de leurs besoins, du degré d'efficacité des méthodes de fourniture d'assistance et des compétences ainsi que de l'expérience qu'ils attendent de la part des fournisseurs d'assistance. Le but de la discussion est rechercher les moyens de renforcer l'efficacité de l'assistance fournie. A cet égard, il convient de préciser que les organismes de financement ont été invités en raison du fait que la discussion peut avoir des répercussions sur leur politique ; toutefois, leur présence ne signifie pas que le présent forum a pour objet la négociation, ni même un examen de fond des politiques mises en œuvre.

2. En préalable à la tenue de cette séance, le Secrétariat a invité les pays non membres à fournir une contribution sur le thème de l'assistance, ainsi qu'à compléter le tableau retraçant l'assistance reçue qui leur a été adressé et à répondre à un questionnaire concernant leur point de vue sur différents points. A la date du 31 janvier, sept pays non membres¹ avaient rédigé une contribution (ces contributions sont mises à la disposition des participants sous forme de documents séparés) et onze d'entre eux avaient complété le tableau ainsi que le questionnaire. Les réponses apportées au questionnaire par chacun des onze pays concernés sont présentées et commentées dans la présente note. L'annexe A reproduit ces questionnaires et les réponses qui y ont été apportées aussi fidèlement que possible, l'annexe B regroupant sous la forme d'un tableau synthétique les différentes mesures d'assistance dont les pays qui ont renvoyé les documents ont bénéficié².

3. Les questions posées aux pays non membres peuvent être regroupées en quatre chapitres : priorités en termes de besoins, meilleures formes d'assistance, expérience et principales compétences requises de la part des fournisseurs d'assistance, nécessité ou non d'un renforcement de la coordination de l'assistance. Les réponses apportées à ces questions peuvent quant à elles être synthétisées comme suit :

- *Besoins en termes d'assistance.* Les pays non membres estiment que le volume de l'assistance doit être accru ; cependant, les besoins dont ils font état varient. Certains ont besoin d'une assistance en matière d'élaboration ou de modification des lois relatives à la concurrence ou d'autres instruments juridiques. Les pays déjà dotés d'une législation dans le domaine de la concurrence mettent généralement en avant des besoins d'assistance a) en termes de fonctionnement de l'autorité en charge de la concurrence ou de conduite d'une enquête, sur un plan pratique et quotidien, et b) en termes de formation des personnels et d'analyse. (Un des pays concernés, la Côte-d'Ivoire, a indiqué n'avoir reçu aucune assistance depuis 1994.)

- *Modes d'assistance.* Les réponses fournies ne font pas apparaître le caractère de plus grande utilité d'un mode d'assistance donné mais permettent en revanche d'identifier les aspects positifs et négatifs des différentes méthodes de fourniture d'assistance existantes. Ainsi, séminaires, conférences et ateliers ne constituent pas un outil de formation approfondie aussi performant que d'autres méthodes mais permettent en revanche de s'adresser à un plus grand nombre de personnes ; ils touchent plus facilement les hauts fonctionnaires et peuvent enfin favoriser la constitution de réseaux ayant un effet bénéfique. Les stages de longue durée dans le cadre desquels les stagiaires sont confrontés à des cas pratiques apportent une très bonne formation à ces derniers mais peuvent avoir des retombées limitées en dehors d'eux-mêmes, surtout lorsqu'il ne s'agit pas de fonctionnaires de haut niveau, ce qui correspond souvent à la réalité. Enfin, l'utilité d'un conseiller résident est fonction de la durée de sa mission, de son niveau d'expérience et des tâches qui lui sont confiées par l'autorité d'accueil.
- *Expérience et compétences des fournisseurs d'assistance.* Dans la mesure où l'essentiel des besoins d'assistance ont trait à des questions à la fois institutionnelles et opérationnelles relatives au fonctionnement d'une autorité de la concurrence ou à la conduite d'une enquête dans le domaine de la concurrence, les fonctionnaires expérimentés en poste ou anciennement en poste, sont généralement plus qualifiés en matière d'assistance que les universitaires, les praticiens du secteur privé, ou autres intervenants ne possédant pas le même type d'expérience. L'assistance fournie par des fonctionnaires en activité peut en outre favoriser la constitution de réseaux. Quoi qu'il en soit, les consultants privés peuvent également être utiles, notamment en proposant un point de vue différent. Si une connaissance approfondie du bénéficiaire est souvent superflue, il est en revanche essentiel qu'un fournisseur d'assistance soit prêt à écouter ses interlocuteurs et qu'il/elle soit en mesure de comprendre que même les principes les plus élémentaires en matière de politique de la concurrence peuvent avoir des implications en termes d'action des pouvoirs publics différentes en fonction du niveau de développement et des traditions juridiques, culturelles et autres qui sont ceux de l'économie concernée.
- *Coordination.* L'absence de coordination entre les fournisseurs d'assistance ne figure pas parmi les problèmes identifiés.

2. Rappel du contexte ; résumé du travail déjà effectué par le Comité de la concurrence

4. Quand les pays de l'Europe centrale et orientale et l'ancienne Union soviétique sont entrés dans une phase de transition entre une économie centralisée et planifiée et une économie de marché, il y a un peu plus de dix ans, un certain nombre de pays de l'OCDE et d'organisations internationales ont lancé des programmes destinés à fournir à ces économies en transition une assistance technique ainsi que les moyens de renforcer leurs capacités, et à instaurer avec eux un dialogue sur les politiques à suivre. Depuis lors, la place renforcée accordée au libre jeu de la concurrence dans un cadre de marché, sur le plan politique, et la dynamique d'intégration mondiale, sur le plan économique, ont conduit à l'émergence d'un intérêt croissant pour la politique de la concurrence – ainsi qu'à l'adoption de lois relatives à la concurrence – dans les économies en développement de nombreuses régions du monde.

5. Compte tenu de ces éléments (intérêt accru, adoption de lois relatives à la concurrence), le Secrétariat de l'OCDE a déterminé deux axes d'intervention en juin 1999. S'agissant tout d'abord des politiques à suivre, le Secrétariat a proposé que les membres du Comité de la concurrence étudient la possibilité d'avoir des rencontres à la fois plus fréquentes et plus interactives avec leurs homologues des autorités de la concurrence de pays non membres. Bien qu'il ne soit pas directement issu de cette suggestion, le Forum mondial qui nous réunit aujourd'hui répond à cet objectif. Sur un plan plus technique,

le Secrétariat a par ailleurs suggéré que le groupe de travail N° 3 du Comité de la concurrence identifie les différents modes de fourniture d'assistance et se penche sur la question de l'amélioration possible de l'assistance fournie au moyen de l'identification des bonnes pratiques ou du renforcement de la coordination. Le Comité ayant fait connaître son accord, le Secrétariat a alors élaboré un questionnaire et rédigé une note concernant, d'une part, les activités menées par les pays membres au titre de l'assistance et leur point de vue sur le degré d'efficacité des différents modes d'assistance, et, d'autre part, les activités des organisations internationales. Une version révisée de cette note est mise à la disposition des participants pour alimenter la discussion dans le cadre du présent forum.

6. Lors de sa réunion du mois de février 2001, le groupe de travail a examiné la question des besoins existant en matière d'assistance et des modes de fourniture d'assistance sur la base d'un important volume d'information émanant de la CNUCED, de la Banque mondiale et de l'OMT. La discussion a généralement été jugée utile ; toutefois, la contribution des bénéficiaires du renforcement des capacités n'a joué qu'un rôle relativement limité. Participaient à cette réunion un certain nombre d'observateurs qui bénéficient actuellement d'une assistance de la part de l'OCDE ou d'autres instances, ainsi que certains pays membres qui ont reçu un volume substantiel d'assistance jusqu'à une date récente ; les représentants de ces économies n'ont cependant pas participé activement à la réunion en qualité d'actuels ou d'anciens bénéficiaires d'assistance. En conséquence, les délégués ont proposé que la discussion se poursuive dans le cadre du Forum mondial, de façon à ce que les bénéficiaires puissent y prendre une part plus importante. Le Secrétariat a par la suite suggéré que la question soit examinée en ce mois de février, le travail que l'OCDE mène en commun avec les organisateurs de l'anniversaire du Conseil de la Concurrence en France devant permettre la participation d'un plus grand nombre de pays non membres qu'à l'ordinaire.

7. En préalable à la discussion dans le cadre de ce Forum, il est utile rappeler les principaux points qu'ont fait apparaître les réponses apportées par les pays membres au questionnaire mentionné plus haut et les contributions respectives de la CNUCED, de la Banque mondiale et de l'OMT lors de la réunion de février dernier, ainsi que ceux qui ont émergé de l'échange de points de vue qui a lieu à cette occasion. Globalement, les réponses des pays membres concernant la nature de leurs activités d'assistance ont permis de dégager les éléments suivants.

- Si l'on se base sur les ressources disponibles, le nombre et la diversité des activités d'assistance ainsi que sur le critère de la couverture géographique, on constate que les pays membres de l'OCDE qui sont à ce jour les principaux fournisseurs d'assistance technique sont l'Australie, le Japon, les Etats-Unis, auxquels s'ajoute la Commission européenne. Chacun de ces intervenants dispose d'organismes spécialisés dans le financement de l'assistance internationale dotés de moyens importants, organismes qui ont dans les faits financé un volume considérable d'assistance en matière de politique de la concurrence. Une part substantielle de ce financement va à la fois à des intervenants privés et à des projets qui ne concernent pas spécifiquement la politique de la concurrence mais qui ont plus largement trait au "développement du marché" et incluent à ce titre des composantes qui ont elles-mêmes un rapport direct ou indirect avec la politique de la concurrence.
- Les pays disposant de ressources plus limitées ont recours à différentes méthodes pour optimiser leur action. Certains d'entre eux centrent leurs interventions sur un nombre limité de pays voisins, comme c'est le cas de la Finlande. D'autres, à l'instar du Danemark, ont bâti leur action sur des activités à faible coût qui se déroulent sur le territoire national, comme l'accueil de bénéficiaires pour des visites d'étude. Un grand nombre de ces fournisseurs d'assistance ont par ailleurs limité leurs dépenses en n'organisant pas ou peu de manifestations mais en envoyant en revanche aux manifestations organisées et parrainées par d'autres qu'eux-mêmes des délégués qui participent aux diverses commissions. Le Canada et le Mexique figurent parmi les pays qui appliquent cette stratégie.

- De façon générale, on observe que les pays qui n'ont pas de politique de la concurrence ou chez lesquels cette politique est moins développée et dont les moyens d'action dans le domaine de l'application de la loi sont également limités bénéficient d'un volume d'assistance moindre que ceux dont l'expérience en matière de concurrence est plus importante. Cette donnée reflète probablement, entre autres éléments, l'évaluation par les donneurs de la capacité des bénéficiaires potentiels à utiliser l'assistance fournie. Les décisions concernant les bénéficiaires de l'assistance et le niveau de celle-ci font également intervenir d'autres facteurs, et, notamment, des considérations générales de politique extérieure ainsi que le poids économique du pays considéré.

8. Les thèmes abordés dans les réponses apportées par les pays membres au questionnaire du Secrétariat et dans le cadre de la discussion qui a eu lors de la réunion du mois de février sont essentiellement les mêmes que ceux qu'évoquent les pays non membres dans les contributions qu'ils ont rédigées à l'occasion du Forum. Toutefois, un certain nombre d'autres points ont également été débattus. Les points de vue exprimés sont résumés ci-dessous.

- Les délégués ont indiqué que l'assistance technique en matière de politique de la concurrence doit être renforcée, mais aucune proposition n'a été formulée concernant la source possible des ressources nécessaires. Un fournisseur d'assistance dont l'activité consiste en grande partie à organiser des événements ponctuels à la demande des bénéficiaires a fait observer que certaines des demandes exprimées n'étaient pas le reflet d'un intérêt réel mais étaient liées au fait que la politique de la concurrence était considérée comme "porteuse", ou encore à l'insistance d'un donneur. Les délégués se sont cependant accordés à reconnaître que le volume de la demande effective était important et qu'il excédait largement l'offre existante.
- Les délégués ne sont parvenus à aucune conclusion concernant les formes d'assistance les plus efficaces, sur un plan général ou dans des cas particuliers.
- La plupart des délégués estiment (pour les mêmes raisons que les pays non membres) qu'en règle générale, les fonctionnaires chargés de la concurrence expérimentés, en poste ou anciennement en poste, sont plus qualifiés pour fournir une assistance que les universitaires, les praticiens privés ou autres intervenants ne possédant pas le même type d'expérience. Le financement des principaux donneurs s'opérant essentiellement par l'intermédiaire d'intervenants privés, les délégués se sont interrogés sur le fait de savoir si le rapport coût/efficacité de l'assistance technique pourrait être améliorée si une part plus importante de ce financement allait aux autorités de la concurrence.
- Bien que cette suggestion ait recueilli certains suffrages, la majorité des délégués s'est néanmoins accordée pour souligner que les autorités de la concurrence ont à faire face à des contraintes de personnel ; un certain nombre d'entre eux ont à cet égard indiqué qu'ils ne pourraient pas fournir un volume plus important d'assistance que ce n'est actuellement le cas, même avec des fonds plus importants. Différentes solutions à ce problème ont été évoquées, sans toutefois faire l'objet d'une discussion approfondie. Lorsque des fonds leur sont attribués, les autorités de la concurrence pourraient par exemple être laissées libres de déterminer les actions qu'elles souhaitent mener elles-mêmes et celles qu'elles jugent préférable de sous-traiter. Entre autres possibilités, certaines demandes de financement pourraient également être formulées par ces mêmes autorités dans le but de louer les services de fournisseurs d'assistance. Les délégués ne sont pas parvenus à une conclusion sur ce point.
- Les avis des délégués divergent par ailleurs sur le point de savoir dans quelle mesure le travail qu'ils accomplissent ou qu'ils pourraient accomplir avec les organismes qui assurent le

financement de l'assistance peut contribuer à définir une perspective dans le domaine de la politique de la concurrence, au travers de la conception des programmes d'assistance et du choix des intervenants privés.

- La coopération entre fournisseurs d'assistance technique est problématique, voire impossible, lorsqu'un pays agit en totalité ou en grande partie par l'intermédiaire d'intervenants privés. Le Secrétariat a en effet constaté que ces intervenants n'étaient pas désireux de coopérer avec d'autres entités (sauf dans un cas particulier où cette condition avait été posée par l'organisme gérant le financement). Un problème spécifique se pose dans le cas de l'Union européenne, dont l'autorité en charge du financement n'a pas la capacité de financer une participation de la Direction générale de la concurrence à des actions d'assistance organisées par d'autres. Cette circonstance renforce la difficulté de présenter une perspective propre à l'UE, ce qui est souvent jugé important par les bénéficiaires.
- De façon générale, les pays membres n'ont pas activement coordonné leur assistance technique les uns avec les autres, ou avec les organisations internationales, bien qu'une certaine forme de coopération résulte du co-parrainage par les pays membres de séminaires de l'OCDE et autres séminaires faisant appel à des panels internationaux, ainsi que de l'envoi de représentants à ces manifestations. On notera toutefois que les Etats membres de l'UE fournissent un certain volume d'assistance au nom de l'Union. La Corée et les Etats-Unis ont assuré le co-parrainage de manifestations avec l'OCDE. Enfin, l'Australie et le Japon sont engagés dans une action de coordination au niveau régional dans le cadre de l'APEC.
- La coordination entre les organisations internationales qui fournissent une assistance (OCDE, CNUCED, Banque mondiale et OMT) et les organisations régionales semble peu développée, même s'il existe une certaine forme de coopération APEC/OCDE (le plus souvent, toutefois, entre les pays de l'APEC qui sont membres de l'OCDE et le Secrétariat de l'OCDE).
- La coordination est sensiblement plus développée s'agissant des actions menées par l'OCDE, la CNUCED, la Banque mondiale et l'OMT. L'existence de contacts informels et le fait que les critères d'attribution d'une assistance ainsi que la forme de l'assistance fournie par ces organisations soient différents permettent d'éviter les effets de doublon. La CNUCED et la Banque mondiale centrent davantage leur action sur les pays les moins développés. En outre, si la CNUCED propose certains séminaires de formation, les manifestations qu'elle organise reposent; pour beaucoup d'entre elles, sur un dialogue plus général autour de la politique de la concurrence impliquant un grand nombre de pays. La Banque mondiale a également organisé un certain nombre de séminaires de formation mais ses interventions sont concentrées sur la fourniture d'une assistance de fond et à long terme à un nombre limité de pays. L'assistance technique fournie par l'OMT est plus récente et se fonde essentiellement sur des conférences accueillant un grand nombre de participants. Enfin, les événements organisés par l'OCDE dans le cadre de sa politique d'ouverture vers l'extérieur consistent essentiellement en séminaires de formation ou en réunions de plus petit format ; ils sont destinés à des pays dont le nombre est à la fois plus limité que celui des pays bénéficiaires de l'assistance de la CNUCED ou de l'OMT et plus important que celui des pays auxquels la Banque mondiale apporte son soutien. Les programmes de ces quatre organisations se complètent et une coopération active renforcée est en train de se mettre en place. (Les membres des secrétariats de ces organisations se sont rencontrés récemment pour explorer les moyens de développer encore plus avant la coopération.)

- Sur un plan général, une grande partie des délégués ont indiqué qu'ils considéraient que le renforcement du travail de coordination sous une forme limitée à la mise en place d'un bureau de centralisation dont les contours restent à définir serait une chose souhaitable. Toutefois, aucun consensus n'a été dégagé concernant le type de structure qui pourrait s'avérer à la fois utile et d'un bon rapport coût/efficacité. Bien que le site Internet de la CNUCED soit celui qui renferme le plus d'informations, ni la CNUCED ni l'OCDE n'ont de fonds à engager dans le suivi actif qu'impliquerait l'existence d'un bureau de centralisation digne de ce nom, et ce, même pour des manifestations planifiées, pas plus qu'ils n'ont de projet dans ce sens. Si le bureau de centralisation envisagé devait inclure des informations concernant les demandes d'assistance, les indications fournies par les donneurs potentiels concernant leurs domaines d'intérêt (en particulier sur le plan géographique) et autres renseignements potentiellement utiles, le dispositif nécessaire à son fonctionnement serait extrêmement coûteux. Il faut également tenir compte du fait qu'une partie de ces informations pourraient avoir un caractère politiquement sensible. Ce caractère sensible serait encore accru dans le cas de formes de coordination qui viseraient à évaluer à la fois les besoins des bénéficiaires et les programmes des donneurs, et qui s'accompagneraient d'un "pilotage", quelle qu'en soit la nature.

3. Définitions

9. La terminologie utilisée par les institutions existantes pour décrire diverses formes d'assistance n'est pas uniforme ; de plus, lorsqu'il y a uniformité, les termes employés revêtent souvent une signification légèrement différente. Il peut par conséquent être utile de poser un certain nombre de définitions avant de pousser plus loin l'analyse.

- A l'intérieur de la présente note, les termes "*assistance technique*" et "*renforcement des capacités*" sont synonymes et désignent l'assistance fournie en matière d'étude, d'élaboration et de mise en œuvre de lois relatives à la concurrence et autres lois ayant directement trait à la concurrence dans un cadre de marché. Cette forme d'assistance inclut l'assistance concernant les questions institutionnelles et la "promotion de la concurrence" ainsi que l'assistance centrée sur l'application de la législation. Il convient en outre de souligner que le terme d'"assistance technique" (qui est celui que nous utilisons le plus généralement dans cette note) ne fait référence qu'à l'assistance fournie directement ou indirectement par des pays ou des organisations forts d'une expérience et d'une compétence substantielles à des bénéficiaires dont l'expérience et le niveau de compétence sont sensiblement moindres. Le présent document concerne donc exclusivement l'assistance émanant des gouvernements et des organisations internationales et exclut par conséquent l'assistance de nature similaire qui est parfois fournie par les fondations et autres entités non gouvernementales agissant en leur nom propre, et non en celui d'un gouvernement. La *coopération en matière d'application de la loi* ne relève pas en elle-même de l'assistance technique, bien que cette dernière puisse inclure une démarche d'assistance liée à une question relevant de l'application de la loi³.
- Le terme "*dialogue sur les politiques à suivre*" désigne dans la présente note le type de discussions qui se déroulent actuellement dans le cadre des réunions du Comité de la concurrence, du Forum mondial de l'OCDE sur la concurrence, de la CNUCED et du Groupe de travail sur l'interaction du commerce et de la politique de la concurrence de l'OMT, démarche que le Réseau international de la concurrence envisage semble-t-il également d'adopter. Ce dialogue diffère de l'assistance technique en ce que la discussion rassemble des partenaires en situation d'égalité, ce qui n'exclut toutefois pas que l'un de ses objectifs puisse être le partage de compétences détenues par certaines économies au profit d'autres.

4. Apports de l'assistance technique

10. La fonction essentielle de l'assistance technique est le renforcement de la capacité des bénéficiaires, d'une part, à étudier le bien-fondé de l'adoption d'un droit ou d'une politique de la concurrence, d'autre part, à élaborer, voter et mettre en œuvre une loi ou une politique qui soit adaptée à leurs besoins particuliers. Dans leurs contributions, les pays non membres insistent sur cet aspect des choses et mettent plus spécifiquement l'accent sur le *transfert de savoir-faire* aux fonctionnaires en charge de la concurrence. Ce transfert s'opère par le biais d'un apprentissage au contact d'experts dans le domaine de la concurrence plus expérimentés mais aussi dans le cadre de relations de parité avec d'autres bénéficiaires de l'assistance technique confrontés à des problèmes similaires.

11. Les pays non membres ont identifié deux autres fonctions potentielles de l'assistance technique, dans certains cas précis. Ainsi, les manifestations de type événementiel peuvent être l'occasion de la *constitution de réseaux* et ouvrir de cette façon la voie à un travail de coopération informelle, ou même formelle, ainsi qu'à la mise en place future d'une assistance technique, en permettant l'établissement de contacts à la fois personnels et institutionnels. Ces manifestations peuvent également constituer le lieu d'émergence d'un *soutien politique* en faveur de la culture de la concurrence au sein de la population et parmi les responsables de l'action publique des pays bénéficiaires. Une des contributions de la Russie (à savoir un document signé par M. Ilya Yuzhanov, Ministre, Ministère russe de la politique antimonopole et du soutien de l'esprit d'entreprise) illustre ce point. En effet, après avoir, dans un premier temps, convié des représentants d'autres ministères à assister à des rencontres de haut niveau organisées par l'OCDE sur le thème de l'introduction de la concurrence dans les secteurs caractérisés par l'existence d'un monopole naturel, M. Yuzhanov a rédigé la préface d'une publication rassemblant les principaux points abordés lors de ces rencontres et a enfin convié les membres du Secrétariat de l'OCDE à participer à une réunion publique ainsi qu'à une conférence de presse lorsque cet ouvrage a été publié en langue russe.

5. Classification des besoins d'assistance

5.1. Assistance dans le domaine législatif

12. Les besoins exprimés par les bénéficiaires dépendent en tout premier lieu de l'existence ou non d'une législation nationale en matière de concurrence. Les économies qui ne possèdent pas de législation de cette nature recherchent une information qui leur permette d'étudier la question de l'adoption d'une loi ainsi qu'une *assistance dans le domaine législatif*. Le Vietnam est par exemple demandeur d'une assistance pour l'élaboration de sa première loi de la concurrence. Les économies déjà dotées d'un appareil législatif peuvent également avoir besoin de ce type d'assistance dans le cas où elles envisagent de modifier la législation existante, ou bien lorsqu'elles préparent une législation dérivée, des règlements ou encore des lignes directrices. L'Estonie, l'Indonésie, le Kenya, la Lituanie et la Roumanie mentionnent l'existence d'un besoin dans ce sens, ce dernier pays travaillant par exemple à l'élaboration de règles en matière de notification des fusions. Une assistance sur le plan législatif est parfois également nécessaire s'agissant d'élaborer ou d'amender une loi dans un domaine connexe, comme celui qui touche aux monopoles naturels.

5.2. Questions institutionnelles et opérationnelles (notamment, relations de l'autorité de la concurrence avec ses interlocuteurs)

13. Pour les économies possédant une loi relative à la concurrence qui n'a pas besoin d'être amendée, les principales demandes d'assistance concernent : a) le fonctionnement d'une autorité de la concurrence, b)

la conduite d'enquêtes ayant trait au respect de la loi. Le poids des *questions institutionnelles* est particulièrement important dans le premier cas. L'Indonésie fait référence à ces deux points en termes généraux, le Kenya évoquant en revanche plus spécifiquement un besoin d'assistance concernant la structure dont un organisme en charge de la concurrence doit être doté. La Russie a pour sa part trouvé très utiles les consultations de la Commission européenne sur l'application décentralisée du droit de la concurrence ; quant au Brésil, il mentionne la "mise en place des procédures" comme étant l'un des points les plus importants.

14. A différents titres, la promotion de la concurrence nécessite par ailleurs un travail d'analyse des relations qu'une autorité en charge de la concurrence doit entretenir avec les instances de régulation sectorielles, ainsi qu'avec les autres institutions gouvernementales, les ONG et le public. Ainsi, le Kenya, la Lituanie et la Tunisie font également état d'un besoin d'*assistance en matière de promotion de la concurrence*, eu égard à la nécessité d'établir et de renforcer la culture de la concurrence dans le cadre de la transition et du développement économiques. La Lituanie souhaite en particulier obtenir une "assistance pour la mise en œuvre de la campagne de sensibilisation" visant "le secteur public et l'appareil judiciaire" ainsi que "le monde des affaires et les organismes administratifs".

5.3. *Assistance dans le domaine de l'application de la loi*

15. L'essentiel des besoins exprimés concerne de loin le point particulier du *travail de mise en œuvre de la loi* qui incombe aux autorités en charge de la concurrence ; à cet égard, on note principalement une demande d'*assistance pratique relative au fonctionnement quotidien de l'autorité de la concurrence*. Comme c'est le cas ailleurs, l'un des éléments qui conditionnent la nature des besoins d'un pays est le degré de développement de son système de mise en œuvre du droit en matière de concurrence. L'Indonésie indique par exemple qu'au stade où elle se trouve, tous les domaines qui peuvent être abordés dans le cadre de l'assistance sont utiles. Le Chili indique en ce qui le concerne qu'aucune des questions abordées ne lui a paru sans intérêt pour le renforcement de ses capacités techniques, tout en soulignant qu'il est important que l'assistance fournie puisse être adaptée à ses besoins propres. Dans cette perspective, le Chili considère qu'il y a aujourd'hui nécessité pour le pays de recevoir une assistance technique dans le domaine de la mise en œuvre de dispositions pénales en matière de concurrence.

16. L'Estonie est d'accord sur le fait que l'examen de toute question ayant trait à la pratique quotidienne est utile mais indique en revanche que les formes "très spécifiques" d'assistance le sont moins, le Kenya semblant pour sa part n'accorder que peu d'importance à une assistance relative à la "théorie de la concurrence". Quoique les commentaires ainsi formulés par ces deux pays puissent être considérés comme l'expression de la préférence clairement manifestée pour une assistance de type pratique, il serait intéressant de savoir quels sont les domaines dans lesquels l'Estonie juge la fourniture d'une assistance trop spécifique et d'avoir confirmation du fait que la remarque émanant du Kenya signifie qu'étant donné la nature de ses besoins, une assistance relative à la "politique de la concurrence" revêt un caractère trop général.

17. Un des éléments de l'assistance dans le domaine de l'application de la loi est la formation des personnels. Le Kenya, l'Indonésie, la Lituanie et la Tunisie soulignent tous l'importance de ce point. Le Brésil considère également qu'il s'agit là d'une des formes d'assistance les plus utiles. Enfin, la Roumanie mentionne de son côté la formation des membres de l'appareil judiciaire comme une forme à la fois nécessaire et utile d'assistance.

18. L'un des éléments essentiels de la formation des personnels concerne les techniques d'investigation. La Thaïlande estime ainsi qu'une formation relative aux méthodes d'investigation et d'évaluation applicables aux affaires de vente par lots, de discrimination par les prix, de prix d'éviction, etc.

constitue son principal besoin. L'Indonésie et la Roumanie font état d'un besoin dans le domaine des "techniques d'investigation", de façon générale, tandis que le Kenya évoque précisément l'"investigation en matière d'activités constitutives d'une entente". La Lituanie parle pour sa part d'alignement des méthodes d'investigation, de mise en œuvre de la loi et de reporting sur les bonnes pratiques identifiées à l'échelle internationale et les règles applicables au sein de l'Union européenne.

19. Un certain nombre de pays non membres ont mentionné les domaines dans lesquels l'assistance reçue avait, d'après leur expérience, été particulièrement utile. Ces domaines sont les suivants :

- pour la Lituanie, les fusions et les ententes ;
- pour le Chili, les fusions et l'analyse des activités qui constituent de nouvelles formes d'abus de position dominante ;
- pour l'Estonie, les fusions, en premier lieu, puis les ententes et l'abus de position dominante par les monopoles naturels ou "non naturels" ;
- pour l'Indonésie, les ententes, les soumissions concertées et l'abus de position dominante par les monopoles "non naturels" ;
- pour ce qui est du Kenya et de la Thaïlande, les fusions, les ententes, l'abus de position dominante par les monopoles naturels et "non naturels" sont cités à égalité ;
- pour la Roumanie, le domaine cité est celui de la mise en œuvre des règles applicables en cas d'entente, d'abus de position dominante et d'aides de l'Etat ;
- s'agissant enfin de la Tunisie, c'est la mise en œuvre des règles applicables en cas d'abus de position dominante de la part de monopoles "non naturels" qui est mentionnée.

20. La Thaïlande mentionne pour sa part l'assistance dont elle a bénéficié dans le domaine des ententes injustifiables comme ayant été potentiellement utile et fait à cet égard observer la chose suivante : C'est une question qui est régulièrement évoquée au cours des forums de négociation de l'OMT. Nous nous sommes en conséquence préparés pour la prochaine série de négociations sur ce point⁴.

6. Efficacité relative des différents modes de fourniture d'assistance

21. Bien que plusieurs bénéficiaires indiquent que toute forme d'assistance est la bienvenue, trois formats sont cités en priorité : i) les conférences, séminaires et ateliers ; ii) les programmes d'accueil de stagiaires ; iii) les conseillers résidents de longue durée. D'autres formes d'assistance technique, telles que les consultations ou les publications, utilisées seules ou en combinaison avec les méthodes susmentionnées, sont également mentionnées par un certain nombre de pays non membres. Nous examinerons dans les paragraphes qui suivent les avantages et les inconvénients de chacun de ces modes d'assistance à la lumière des commentaires spécifiques formulés par les bénéficiaires à cet égard, ceci au regard des trois fonctions qui sont celles de l'assistance technique aux yeux de ces derniers, à savoir la transmission d'un savoir-faire pratique, la constitution de réseaux et l'obtention d'un soutien politique en faveur de la culture de la concurrence.

6.1. Séminaires, ateliers et conférences

22. Les séminaires, ateliers et conférences (ci-après "les séminaires") constituent la forme d'assistance citée par le plus grand nombre de bénéficiaires comme étant la plus utile. Les participants à un séminaire ne sauraient en retirer le même niveau d'expérience et de savoir-faire pratique qu'un stage réussi peut procurer (voir ci-dessous) ; toutefois, un séminaire, s'il ne constitue pas un moyen d'acquisition d'un savoir-faire très pointu, permet en revanche de toucher un plus grand nombre de personnes. L'Estonie vante par exemple les mérites des séminaires dans la mesure où ils ont permis à l'ensemble de ses responsables de la concurrence d'acquérir des connaissances au travers de leur participation, la Lettonie estimant pour sa part que les séminaires basés sur des études de cas sont les plus utiles, étant donné que les personnels concernés, qui connaissent le droit de la concurrence, ont en revanche besoin de plus d'informations sur son application pratique. Quant aux séminaires régionaux, ils sont l'occasion d'apprendre d'autres bénéficiaires ; enfin, les séminaires réunissant un panel de représentants de différentes autorités en charge de la concurrence ont un potentiel de crédibilité et d'utilité particulièrement élevé.

23. Il convient en outre de souligner qu'étant donné la durée limitée d'un séminaire, les hauts fonctionnaires peuvent plus facilement y assister ; or, ces derniers sont les mieux placés pour faire advenir dans leur pays les changements de politique ou de procédure nécessaires, en mettant à profit l'assistance reçue. Dans un grand nombre de cas, ces hauts fonctionnaires sont par ailleurs ceux pour qui la constitution de réseaux revêt le plus d'importance. Le Brésil indique à ce sujet que les conférences et les séminaires se sont avérés être le meilleur moyen de rapprocher les professionnels du domaine de la concurrence.

24. Pour l'Estonie, les formations pratiques dans le cadre desquelles des affaires en cours sont discutées et analysées avec l'aide de conseillers constituent la méthode de transfert d'un savoir-faire pratique la plus utile. Aux yeux du Chili, les séminaires reposant sur des études de cas ont fait la preuve de leur utilité, à la fois pour discuter de problèmes déjà rencontrés par le pays et d'autres problèmes auxquels il n'a pas encore été confronté :

Notre participation aux séminaires basés sur des études de cas organisés par l'OCDE a été précieuse, dans la mesure où elle nous a permis de nous rendre compte qu'un grand nombre de situations et de problèmes sont très similaires d'un pays à l'autre et qu'ils ont suscité les mêmes interrogations s'agissant de l'attitude que doit adopter l'organisme en charge de la concurrence. Indépendamment du fait que notre propre agence de la concurrence a déjà été confrontée à certaines des situations examinées, la possibilité qui nous est offerte d'expliquer nos procédures, nos analyses et nos résultats peut être comparée à un examen par un jury de "pairs", grâce auquel le travail effectué par l'agence est évalué de façon impartiale.

D'un autre côté, l'analyse de problèmes qui ne se sont pas encore posés à notre agence nous fournit la capacité de recul ainsi que les outils qui nous aident à accumuler le savoir nécessaire pour faire face aux cas que nous aurons probablement à traiter dans l'avenir⁵.

25. Toujours selon le Chili, les séminaires régionaux basés sur des études de cas favorisent la participation des délégués présents au débat et sont particulièrement riches d'enseignements :

D'après notre expérience, les séminaires reposant sur des études de cas sont plus utiles si un grand nombre de pays y expriment leur point de vue. Les discussions qui s'en suivent et la diversité des positions représentées sont des éléments clés qui permettent aux participants d'acquérir une expérience sur le plan technique.

[...]

L'étude de cas pratiques auxquels les autres organismes en charge de la concurrence ont été confrontés, qu'ils soient en cours d'instruction ou qu'un jugement final ait été rendu, nous fournit

d'excellents outils d'analyse. Ce système suscite une participation active au débat et inspire aux participants de nouvelles et pertinentes questions⁶.

26. Les séminaires peuvent servir efficacement les deux autres fonctions de l'assistance technique, à savoir la constitution de réseaux et l'obtention d'un soutien politique en faveur de la culture de la concurrence. Comme cela a été souligné précédemment, la durée d'un séminaire est relativement limitée, ce qui facilite la participation de hauts fonctionnaires, tant du côté des fournisseurs d'assistance que de celui des bénéficiaires. Ces événements accueillent par ailleurs un grand nombre de bénéficiaires : ce sont là des éléments qui facilitent la constitution de réseaux. Lorsqu'ils se tiennent dans la capitale d'un bénéficiaire et s'adressent à un public ciblé (responsables de l'action des pouvoirs publics ou magistrats, par exemple), ou lorsqu'ils sont couplés à une séance publique, les séminaires peuvent également permettre au bénéficiaire d'obtenir un soutien pour son travail dans le domaine de la promotion de la concurrence, tant sur le fond que sur le plan strictement politique⁷. Les publications (comme, par exemple, des documents de référence ou les actes des séminaires) peuvent également susciter un soutien politique efficace. Comme cela a déjà été mentionné plus haut, le ministère russe de la politique antimonopole évoque à cet égard l'effet positif qu'a entraîné pour sa mission le fait de pouvoir inviter des responsables d'autres ministères à des rencontres de haut niveau consacrées à la réforme des monopoles naturels, la publication d'un ouvrage tiré de ces rencontres et la réunion publique, doublée d'une conférence de presse, qui ont accompagné la sortie de cet ouvrage. Dans le même ordre d'idées, la Lettonie estime que le fait d'impliquer dans les séminaires des institutions gouvernementales autres que les autorités de la concurrence constituerait une forme utile de promotion de la culture de la concurrence qui pourrait se traduire par une augmentation des fonds alloués à ces autorités :

La diffusion du savoir relatif au droit de la concurrence dans différentes institutions gouvernementales a permis d'atteindre plus rapidement les objectifs de réforme économique. Dans cette perspective, il serait utile d'impliquer d'autres institutions gouvernementales dans les projets d'assistance technique touchant au contrôle de la concurrence, et, en particulier, celles de ces institutions qui sont responsables de la mise en œuvre de la politique économique. Peut-être serait-il ainsi possible de dégager à partir des budgets nationaux des ressources supplémentaires pour le contrôle de la concurrence, ce qui revêt une importance capitale, notamment dans le cas d'économies connaissant une croissance rapide.

6.2. Programmes d'accueil de stagiaires

27. A condition que le stagiaire ait la possibilité de travailler avec les personnels de l'autorité en charge de la concurrence du pays d'accueil, la formule du stage est sans doute le moyen le plus direct et le plus efficace de transférer un savoir-faire pratique à un individu. Dans ce sens, les stages sont, pour certains bénéficiaires, la forme d'assistance la plus utile. La Thaïlande indique par exemple que les stages ont sa préférence dans la mesure où ils permettent un apprentissage par la pratique. La Côte-d'Ivoire privilégie elle aussi cette formule. Quoi qu'il en soit, les stages présentent également certains désavantages.

28. Les bénéfices qui peuvent être retirés d'un stage dépendent de plusieurs facteurs, dont la durée du stage et le degré d'intégration du stagiaire aux activités du fournisseur d'assistance par ce dernier. Par ailleurs, les stages coûtent cher et ne permettent qu'à une seule personne d'acquérir une expérience. En conséquence, le succès d'un stage est en grande partie fonction des compétences de cette personne, ainsi que de sa capacité à transférer ses acquis à ses collègues et à modifier en définitive l'approche de son institution d'origine concernant différents points, sur la base des enseignements tirés du stage effectué. Les stagiaires de haut niveau sont les plus susceptibles d'appliquer les connaissances nouvellement acquises d'une façon qui profite à l'ensemble de leur service ; cependant, les fonctionnaires qui occupent des

positions hiérarchiques élevées sont également ceux à qui il est le plus difficile de s'absenter de leur poste pendant la durée d'un stage.

29. Le fait de consigner par écrit ce qu'ils ont appris durant le stage constitue un bon moyen pour les stagiaires de faire partager à leurs collègues l'expérience qu'ils ont vécue, une fois de retour. Israël, qui a appliqué cette méthode avec succès, rapporte ce qui suit :

[s]ur la base de leur expérience, [les stagiaires] ont rédigé (et diffusé auprès de leurs pairs) des documents très complets dans lesquels ils résument ce qu'ils ont appris concernant le point de vue et l'expérience des organismes... [fournisseurs d'assistance], relativement à différents secteurs d'activité et à différents scénarios. Ces documents se sont avérés extrêmement utiles pour le travail de l'IAA dans la mesure où ils fournissent aux fonctionnaires chargés du traitement des dossiers des informations de première main relatives aux considérations diverses dont ils doivent tenir compte dans le cadre de leur travail⁸.

30. Les stages n'ont qu'une utilité limitée en ce qui concerne les deux autres fonctions de l'assistance technique, c'est-à-dire la constitution de réseaux et l'obtention d'un soutien politique en faveur de la culture de la concurrence. Les stages peuvent cependant constituer une première étape vers la fourniture d'assistance et vers un travail de coopération futurs en permettant l'établissement de contacts à la fois institutionnels et personnels entre le fournisseur d'assistance et le bénéficiaire. Israël estime par exemple que :

les stages ont été utiles en ce qu'ils ont permis à l'IAA* de connaître précisément la structure des organismes [qui fournissent une assistance technique] (et de nouer des liens personnels avec certains de leurs membres). Ces acquis facilitent la coopération future entre les organismes gouvernementaux⁹.

31. Il convient cependant de souligner que les stages n'offrent que des possibilités limitées en termes de constitution de réseaux et ne sont que de peu d'utilité pour faire émerger un soutien politique en faveur de la concurrence dont les bénéficiaires pourraient profiter, si tant est qu'ils jouent un rôle quelconque en la matière.

32. Les *visites d'étude* auprès d'autorités de la concurrence plus expérimentées constituent sans doute une solution de remplacement plus réaliste dans les cas où le caractère limité des ressources ou bien l'existence d'interdictions auxquels il n'est pas possible de déroger empêchent les fournisseurs d'assistance de proposer des programmes d'accueil de stagiaires efficaces. Les visites d'étude ne permettent pas un transfert aussi important de savoir-faire, mais leur plus courte durée les rend moins coûteuses et il est incontestable qu'elles contribuent à l'établissement de contacts et au transfert de savoir-faire pratique. Ainsi, la Lituanie a dépêché son responsable de la presse pour une visite d'étude d'une semaine auprès de l'autorité suédoise en charge de la concurrence qui s'est révélée très utile pour comprendre comment le service de presse de cette autorité fonctionne.

6.3. Conseillers résidents

33. Plusieurs pays non membres ont été satisfaits de l'envoi de conseillers résidents et ont trouvé ce type de programme utile. L'Estonie et la Thaïlande mentionnent spécifiquement le bénéfice qu'elles en ont retiré. Au cours de la première moitié des années 1990, les autorités en charge de la concurrence de pays d'Europe centrale actuellement membres de l'OCDE, à savoir la République tchèque, la Hongrie, la Pologne et la Slovaquie ont bénéficié de tels programmes. Ces pays n'ont pas fourni de contribution

relative à ces programmes mais, en général, ceux-ci ont été jugés très utiles. Eu égard au fait que peu des contributions soumises par les pays non membres traitent de la question des conseillers résidents de façon étendue, l'analyse qui suit intègre des informations tirées des programmes plus anciens mentionnés ci-dessus.

34. La valeur que revêt l'envoi de conseillers résidents dépend d'un certain nombre de facteurs, dont la durée. Dans le cadre de la présente note, la notion de "long terme" s'applique à des séjours de six mois ou plus. Les conseillers pourront au demeurant être plus rapidement utiles s'ils possèdent déjà une expérience internationale et s'ils reçoivent une formation concernant l'économie du pays de résidence et son appareil législatif dans le domaine de la concurrence, ou s'ils ont au moins le temps de les étudier.

35. Bien entendu, l'expérience et les compétences des conseillers dans le domaine institutionnel comme dans celui des enquêtes sont également des facteurs déterminants de l'utilité du programme pour le bénéficiaire de cette forme d'assistance, comme le fait observer l'Estonie. En effet, l'intervention d'un conseiller, fut-il le mieux informé d'entre eux, peut n'avoir qu'une valeur limitée si ce dernier n'a pas d'expérience de l'assistance extérieure ou n'est pas au moins doué de capacité d'adaptation. Le Kenya souligne par ailleurs la nécessité pour les bénéficiaires de "domestiquer" l'assistance fournie et de "se l'approprier", pour que celle-ci puisse être d'une réelle utilité. Les compétences et l'expérience qui sont, de manière générale, les plus appréciées s'agissant d'assistance technique font plus loin l'objet d'un développement spécifique.

36. Peut-être plus encore que toute autre forme d'assistance, l'utilité d'un conseiller résident dépend enfin de la capacité de l'autorité d'accueil et du conseiller lui-même à mettre en place un mode de collaboration qui permette d'optimiser la productivité du conseiller. En général, les programmes qui ont donné les meilleurs résultats sont ceux dans le cadre desquels les hauts fonctionnaires de l'autorité d'accueil recueillent de façon informelle l'avis du conseiller sur les problèmes auxquels ils ou elles sont confrontés, tout en permettant un échange d'information entre ce dernier et les gestionnaires en charge du traitement des dossiers ayant des questions à lui soumettre. Dans les cas où ces fonctionnaires de haut niveau n'ont pas choisi de faire des conseillers résidents leurs assistants "informels", ils ont parfois cherché à utiliser leurs compétences en donnant aux gestionnaires l'ordre d'informer le conseiller du contenu de leurs dossiers, qu'ils aient ou non manifesté leur intérêt pour les conseils que celui-ci pouvait leur apporter. En pareil cas, le coût des conseillers résidents augmente, tandis que l'avantage que constitue leur présence diminue. Il ne s'agit toutefois là que de généralisations, l'un des atouts des programmes d'envoi de conseillers étant, en principe, constitué par le fait que ceux-ci peuvent être formatés (et ajustés) pour répondre aux besoins spécifiques du bénéficiaire.

37. En résumé, la mise à disposition en qualité de conseillers de fonctionnaires spécialisés dans le domaine de la concurrence à la fois expérimentés et flexibles peut constituer une forme d'assistance mieux adaptée à la situation particulière du bénéficiaire et couvrant par ailleurs un champ d'intervention plus large que d'autres formes d'assistance, à la condition que ces conseillers soient soutenus par leur autorité d'origine et qu'il leur soit confié des missions de longue durée (six mois ou plus). Si les programmes d'envoi de conseillers ne permettent pas d'acquérir l'expérience approfondie qu'un individu peut retirer d'un stage, ils offrent en revanche la possibilité de former un nombre important de personnes et peuvent en outre inclure un travail intensif pour quelques-uns.

38. Le principal désavantage de tels programmes est leur coût (ce qui explique leur rareté). Pour le pays fournisseur d'assistance et son autorité de la concurrence, ce coût est élevé, surtout dans le cas où le conseiller bénéficie d'une formation ou d'un temps d'étude avant de partir en mission pour six mois ou plus. La Tunisie, qui n'a pas elle-même reçu de conseiller résident, note cependant que les fournisseurs d'assistance ont besoin d'une période d'adaptation plus longue lorsque leurs connaissances concernant le bénéficiaire sont insuffisantes, ce qui renchérit le coût des programmes dont il est ici question. La Lituanie

fait par ailleurs état d'un cas dans lequel l'emploi du temps chargé des fonctionnaires sélectionnés comme conseillers est venu contrecarrer un de ces programmes :

Bien que Jumelage [en association avec la Communauté européenne et certains des Etats membres de l'UE] ait progressé de manière satisfaisante, le programme de travail n'a pas pu être mené à bien pendant la phase initiale du projet. La principale raison de ce retard réside dans les visites d'experts de courte ou de moyenne durée prévues. Celles-ci sont en effet restées en nombre inférieur à ce qui avait été convenu, en raison du fait que beaucoup d'experts ont eu des difficultés à obtenir l'aval nécessaire de leur administration d'origine¹⁰.

39. Selon le niveau hiérarchique des conseillers, les programmes d'envoi de conseillers résidents peuvent servir les deux autres fonctions de l'assistance technique que sont la constitution de réseaux et l'obtention d'un soutien politique en faveur de la concurrence. Les contacts personnels ou institutionnels noués dans le cadre d'un programme peuvent en effet ouvrir la voie à une assistance technique future et sont en outre susceptibles de faciliter une coopération informelle, voire formelle, entre le fournisseur d'assistance et le bénéficiaire. Bien qu'il soit en revanche peu probable que la présence d'un conseiller ait un effet en termes de soutien politique, ce conseiller peut avoir des idées ou des contacts qui contribuent à l'obtention de ce soutien, soit par le biais de techniques de promotion, soit en créant les conditions nécessaires à un soutien international au niveau politique.

6.4. *Autres modes d'assistance technique*

40. En plus des méthodes faisant l'objet des développements qui précèdent, les bénéficiaires d'assistance technique identifient d'autres modes d'assistance utiles, comme les consultations et les publications. Ceux-ci peuvent facilement être combinés avec certaines des formes d'assistance décrites plus haut¹¹ mais peuvent également être utilisés isolément. Les paragraphes qui suivent analysent brièvement l'apport que les consultations et les publications peuvent constituer pour les bénéficiaires.

6.4.1. *Consultations*

41. Les consultations, que ce soit sous forme de réunions ou d'échanges écrits, demandent des ressources relativement limitées et permettent d'apporter au bénéficiaire un conseil et un savoir-faire sur mesure concernant un problème spécifique et urgent. La Fédération de Russie considère par exemple que les consultations réalisées par les experts de l'OCDE et de la CE au sujet de projets d'amendements de la législation sont d'une très grande utilité.

42. Les consultations offrent également une possibilité de constitution de réseaux, et peuvent aussi générer un soutien politique en faveur de l'action des bénéficiaires si elles font intervenir des fonctionnaires suffisamment haut placés. Aux yeux de la Fédération de Russie, la visite de responsables d'autorités de la concurrence établies peut contribuer efficacement au travail réalisé par les autorités de la concurrence des bénéficiaires pour promouvoir la culture de la concurrence.

43. Les consultations requièrent une connaissance approfondie du bénéficiaire, notamment lorsqu'elles ont trait à des dispositions législatives à l'état de projet, ce qui a fortement limité leur utilité dans le cas de la Tunisie. La Thaïlande formule une observation similaire au sujet d'un projet de rédaction de lignes directrices, sur laquelle nous reviendrons plus précisément dans la suite de cette note.

6.4.2. *Publications*

44. L'Indonésie estime que les publications constituent l'une des formes d'assistance les plus utiles. De la même façon, la Fédération de Russie souligne l'utilité des publications en langue russe parrainées par la CNUCED et l'Union européenne, tandis que le Chili juge que les études comparatives sur le droit de la concurrence présentent un grand intérêt en tant que moyen d'acquisition de connaissances sur l'expérience d'autres pays. Les pays baltes estiment avoir reçu une assistance utile au travers du bilan annuel de leurs activités de mise en œuvre de la législation qui leur est fourni sous forme de document écrit dans le cadre du Programme régional pour les pays baltes. La Côte-d'Ivoire indique qu'elle aurait pour sa part besoin d'une assistance pour pouvoir souscrire les abonnements nécessaires à la littérature de type universitaire.

45. Les publications sont souvent relativement bon marché et peuvent être utilisées dans différents cas de figure. Outre le fait qu'elles permettent de transférer un savoir-faire à un grand nombre de personnes (surtout lorsqu'elles sont traduites dans la langue du bénéficiaire), elles contribuent au travail de promotion de la concurrence réalisé par l'autorité en charge de la concurrence du pays bénéficiaire. A cet égard, l'utilisation qui a été faite par la Russie d'une publication récente de l'OCDE a été signalée plus haut. La Lituanie a également trouvé très profitable l'assistance technique qui lui a été apportée pour rédiger des brochures d'information d'accès facile.

7. **Questions relatives à l'organisation et à la fourniture de l'assistance technique**

46. Dans cette septième partie, nous analyserons trois questions de portée générale relatives à l'organisation et à la fourniture de l'assistance technique : i) avantages et inconvénients respectifs des manifestations centrées sur une seule économie et des manifestations à caractère régional ; ii) compétences et expérience attendues de la part d'un fournisseur d'assistance ; iii) aspects administratifs de l'organisation de l'assistance.

7.1. *Avantages et inconvénients respectifs des manifestations centrées sur une seule économie et des manifestations à caractère régional*

47. Pour des raisons diverses, les bénéficiaires apprécient à la fois l'assistance destinée à une seule économie et l'assistance à caractère régional et considèrent l'une et l'autre comme très profitables. De manière générale, la première de ces deux formes d'assistance est jugée positive, dans la mesure où elle permet une discussion à la fois plus spécifique et plus en profondeur (Estonie), précisément adaptée aux besoins du bénéficiaire sur le plan pratique (Lituanie, Thaïlande, Roumanie), et où elle fournit des solutions à des problèmes existants (Lituanie). Dans le cas de manifestations à caractère régional, les bénéficiaires n'ont pas autant d'influence sur les thèmes qui sont traités, ce qui, selon l'Estonie et la Thaïlande, peut conduire à ce qu'un bénéficiaire éprouve le sentiment que certains de ces thèmes ne présentent pas d'intérêt réel pour lui. La Roumanie note en outre que ces manifestations se prêtent moins à une analyse approfondie des questions clés qui se posent en matière de concurrence.

48. L'assistance régionale a toutefois des avantages. Cette forme d'assistance offre en particulier une perspective plus large sur chacun des thèmes traités (Indonésie) et permet d'échanger avec d'autres bénéficiaires et de tirer des enseignements de leur expérience (Estonie, Lituanie, Roumanie, Tunisie). Certaines manifestations à caractère régional permettent même une forme d'examen par les pairs parmi les bénéficiaires d'assistance participant à la réunion. La Lituanie indique que les autorités de la concurrence baltes bénéficient, dans le cadre du Programme régional pour les pays baltes de l'OCDE, d'une évaluation écrite annuelle centrée sur différents thèmes, à laquelle s'ajoutent des séminaires qui combinent des éléments relevant du dialogue sur les politiques à suivre et de l'examen par les pairs mis en place par le

Comité de la concurrence et des activités de renforcement des capacités ciblées sur les domaines identifiés dans les évaluations annuelles. Le Chili estime pour sa part que :

la possibilité qui nous est offerte [par les séminaires régionaux basés sur des études de cas] d'expliquer nos procédures, nos analyses et nos résultats peut être comparée à un examen par un jury de "pairs", grâce auquel le travail effectué par l'agence est évalué de façon impartiale. La seule présence de représentants d'une agence étrangère ou d'un pays tiers, qui se trouvent ainsi mis en contact avec le personnel de l'agence, permet d'échanger des points de vue et d'exprimer librement des opinions avec ses pairs¹².

49. Un certain nombre de contributions font par ailleurs état du fait que l'assistance régionale contribue à l'établissement de contacts personnels et institutionnels susceptibles d'aboutir à une coopération informelle, voire formelle¹³. On peut également estimer que les manifestations à caractère régional sont relayées auprès du public plus facilement que les manifestations centrées sur un seul pays et permettent par voie de conséquence aux bénéficiaires – qu'il s'agisse de l'hôte de la manifestation ou, dans une moindre mesure, d'autres bénéficiaires participant à cette manifestation – d'obtenir un soutien politique en faveur de leur action.

50. Au-delà de ces aspects généraux, l'assistance destinée à une seule économie et l'assistance à caractère régional peuvent présenter des avantages ou des inconvénients en fonction du thème traité. Le Kenya fait à cet égard observer qu'une manifestation ciblée sur une seule économie est plus appropriée lorsqu'il s'agit de mettre en place un cadre légal et des institutions nationales dans le domaine de la concurrence, alors qu'il paraît plus judicieux de traiter sur le plan régional des questions telles que le contrôle des fusions et les ententes sur les prix. Le Brésil estime en outre que :

[L]orsque le thème abordé concerne l'échange d'expérience dans le domaine juridictionnel, une manifestation à caractère régional aura des résultats plus positifs qu'une manifestation centrée sur un seul pays. Dans le cas où un pays bénéficiaire a atteint le stade de mise en œuvre de sa propre législation, une manifestation centrée sur ce seul pays sera en revanche plus profitable qu'un événement régional. En résumé, l'efficacité de l'événement dépend essentiellement de la situation relative de chaque pays concernant la mise en œuvre de lois antitrust nationales¹⁴.

7.2. *Compétences et expérience attendues de la part d'un fournisseur d'assistance*

51. Le questionnaire adressé aux pays non membres leur demandait de classer quatre facteurs relatifs aux compétences et à l'expérience qu'un fournisseur d'assistance doit posséder. Le classement établi est le suivant (classement par ordre décroissant d'importance) :

1. expérience de travail au sein d'une autorité en charge de la concurrence ;
2. connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire ;
3. expérience de la fourniture d'assistance à des économies en développement ou en transition ;
4. connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde.

Les pays non membres interrogés ont par ailleurs exposé les raisons de leur classement.

52. En général, les raisons pour lesquelles l'expérience de travail auprès d'une autorité de la concurrence est placée en tête de classement rejoignent ce qu'ont indiqué les délégués présents à la réunion de février 2001 du groupe de travail N° 3 du Comité de la concurrence, à savoir le fait qu'une part très importante des besoins d'assistance a trait au fonctionnement d'une autorité de la concurrence et à la conduite d'une enquête dans le domaine de la concurrence. L'exemple le plus frappant que l'on puisse relever à l'intérieur des différentes contributions fournies est sans doute l'observation formulée par la Russie relativement à l'utilité des conseils de la Commission européenne au sujet de l'application décentralisée du droit de la concurrence. Un universitaire ou un praticien privé ne possédant pas l'expérience de l'application du droit de la concurrence ne saurait en aucun cas traiter cette question avec la même autorité et la même crédibilité qu'un fonctionnaire compétent appartenant à une autorité de la concurrence importante.

53. S'agissant de l'avantage que présente le fait d'avoir affaire à des fonctionnaires spécialisés dans le domaine de la concurrence, la Lituanie ajoute le commentaire suivant :

L'assistance fournie par des fonctionnaires spécialisés dans le domaine de la concurrence en activité est à la fois la plus efficace et la plus bénéfique. En effet, outre l'expérience de travail auprès d'une autorité de la concurrence dont ils peuvent se réclamer, ces fonctionnaires en activité sont généralement beaucoup mieux informés de l'évolution du droit et de la politique de la concurrence dans leur pays ainsi que dans différentes parties du monde et plus compétents sur ce point¹⁵.

54. La Lituanie souligne toutefois que cette formule a un inconvénient, et cite à cet égard l'exemple de fonctionnaires participant à un programme de jumelage qui ont eu des difficultés à prendre leurs distances par rapport à leur administration d'origine et ont par voie de conséquence souvent été dans l'impossibilité de fournir une assistance aussi importante que cela était souhaité.

55. La Tunisie mentionne elle aussi le fait que les consultants privés manquent souvent d'expérience pratique. Ce pays souligne en outre qu'"au-delà de l'expérience pratique", la fourniture d'assistance par des fonctionnaires appartenant à une autorité de la concurrence permet un échange de vues et facilite les demandes d'information, ouvrant ainsi la voie à une assistance technique renforcée et à une coopération future.

56. Cette préférence générale pour les fournisseurs d'assistance possédant une expérience de l'application du droit de la concurrence ne signifie pas que l'assistance que peuvent apporter les consultants privés est sans valeur. L'Estonie note en particulier que ces consultants ont souvent un point de vue très différent et que les discussions qu'ils ont avec eux donnent aux fonctionnaires des pays bénéficiaires travaillant dans le domaine de la concurrence l'occasion de voir les choses sous un autre angle. Le Brésil considère que l'efficacité relative de l'assistance fournie par les fonctionnaires en charge de la concurrence et par les consultants privés dépend du stade de développement de l'autorité de la concurrence du pays bénéficiaire et indique qu'en ce qui le concerne "l'assistance fournie par des fonctionnaires spécialisés dans le domaine de la concurrence en activité s'est avérée plus profitable". L'Estonie et la Lituanie sont d'accord sur le fait que les qualifications nécessaires dépendent de la nature des besoins. Dans le cas où une autorité de la concurrence ne cherche pas à obtenir des "conseils pratiques" mais a besoin de renseignements sur des questions juridiques de type général (ou, au contraire, très spécifique), la Lituanie estime qu'il peut être préférable de faire appel à un consultant privé, et notamment à un universitaire. De la même façon, l'Indonésie peut, dans certaines circonstances, avoir besoin de conseils relativement à des questions de nature économique ou juridique à caractère purement national, auquel cas l'expérience d'un conseiller étranger n'est pas aussi utile que les connaissances que peut apporter un consultant local.

57. Les pays non membres ne fournissent que peu d'informations au sujet des autres composantes du profil qui doit être celui d'un fournisseur d'aide. Les contributions de la Thaïlande et de la Tunisie contiennent toutefois un développement bref mais important à ce sujet. La Tunisie formule pour ce qui concerne une remarque d'ordre général concernant le fait que l'acquisition, par le fournisseur d'assistance, des connaissances relatives à la situation économique et juridiques du bénéficiaire nécessaires demande du temps. S'il n'est pas indispensable de posséder une connaissance approfondie de la situation du bénéficiaire dans tous les cas, il est en revanche essentiel qu'un fournisseur d'assistance soit prêt à écouter ses interlocuteurs et qu'il/elle soit en mesure de comprendre que même les principes les plus élémentaires en matière de politique de la concurrence peuvent avoir des implications en termes d'action des pouvoirs publics différentes en fonction du niveau de développement et des traditions juridiques, culturelles et autres qui sont ceux de l'économie concernée. L'expérience de la fourniture d'assistance à d'autres économies peut à cet égard être utile, mais elle n'est ni nécessaire ni suffisante. La Thaïlande cite pour sa part en exemple un cas dans lequel elle a constaté que les conseillers n'étaient pas suffisamment flexibles :

Nous avons reçu il y a quelques années une assistance technique ... destinée à nous aider à élaborer des lignes directrices pour la mise en œuvre de la Loi sur la concurrence récemment adoptée. Nous avons à cet égard été confrontés à un problème dû aux différences existant en matière de culture économique, de mode de vie, de la conception même de la loi, etc., différences qui ont été à l'origine du malentendu intervenu au moment de la rédaction des lignes directrices. [L'assistance fournie] doit être adaptée à la situation de la Thaïlande. Il convient en outre de souligner que les consultants ont toujours leur propre domaine de spécialité et qu'ils ne veulent pas fournir d'assistance en dehors de ce domaine. C'est là une des limites de l'assistance¹⁶.

7.3. *Coordination sur le plan international*

58. Aucun des bénéficiaires ne signale de cas dans lesquels un manque de coordination aurait conduit à des difficultés, pas plus, d'ailleurs, qu'ils n'expriment le souhait de voir la coordination de l'assistance technique renforcée. En fait, certains d'entre eux, comme par exemple l'Estonie, craignent qu'un tel renforcement n'ait des effets négatifs, dans la mesure où il pourrait se traduire par un allongement des délais, déjà non négligeables, qui sont ceux des procédures de demande d'assistance. La Lituanie redoute de son côté qu'une coordination renforcée ne puisse par ailleurs ralentir la mise en œuvre de projets à propos desquels un accord a déjà été conclu. A l'inverse, le Brésil estime qu'un défaut de coordination entre les fournisseurs d'assistance pourrait un jour poser problème, même si cela n'a pas été le cas jusqu'à présent.

7.4. *Aspects administratifs de l'organisation de l'assistance*

59. Plusieurs bénéficiaires trouvent les aspects administratifs des demandes d'assistance technique d'une excessive lourdeur. L'Estonie, en particulier, plaide pour une accélération des procédures, tandis que la Fédération de Russie souligne que :

[L']un des principaux points faibles de l'assistance technique est la *lourdeur de la bureaucratie*. En effet, un délai très important sépare parfois la décision de fournir l'assistance technique demandée du démarrage effectif du projet¹⁷.

60. La Fédération de Russie estime en outre que l'administration des projets d'assistance technique fait parfois peser une trop lourde charge sur les bénéficiaires :

Dans le cas de demandes d'assistance pour des manifestations de courte durée, il est parfois demandé aux bénéficiaires de fournir au parrain de la manifestation de nombreuses données, chiffrées et non chiffrées, ce qui renforce considérablement la pression pesant sur les personnels concernés, si l'on considère le caractère très limité des ressources humaines et techniques des structures ayant en charge la lutte contre les monopoles dans les pays en transition¹⁸.

8. Données factuelles concernant l'assistance technique reçue par les bénéficiaires

61. Les réponses au questionnaire incluent des données factuelles relatives à différents aspects de l'assistance technique reçue par les bénéficiaires, à savoir : i) la part relative des programmes pluriannuels et des manifestations ponctuelles ; ii) la part relative des activités d'assistance qui ont lieu à l'étranger et de celles qui se déroulent dans le pays bénéficiaire ; iii) la part relative des séminaires, des programmes d'envoi de conseillers et des programmes d'accueil de stagiaires. Ces renseignements sont utiles pour interpréter les réponses apportées aux autres questions par les différents pays concernés mais ne permettent cependant pas de procéder à des généralisations sur la corrélation éventuelle entre les proportions indiquées et les autres variables que sont la situation géographique, le niveau de développement ou la quantité d'assistance reçue.

62. Les réponses fournies par les bénéficiaires font état de différents schémas de répartition de l'assistance reçue sous forme de programmes pluriannuels et sous celle de manifestations ponctuelles. La Tunisie a reçu une quantité limitée d'assistance, sous la forme exclusive de programmes pluriannuels, ce type de programme représentant pour le Brésil, l'Estonie, la Lituanie et la Roumanie un pourcentage de l'assistance dont ils bénéficient qui va de 66 à 80 pour cent. Le Kenya fait lui aussi état d'un volume d'assistance limité, mais sous la seule forme d'événements ponctuels. Il convient de souligner que les réponses à cette question peuvent refléter pour partie une différence d'interprétation. L'Indonésie indique par exemple que près de 90 pour cent de l'assistance dont elle a bénéficié est constituée par des événements ponctuels, alors que la Banque mondiale et un certain nombre d'autres donateurs lui apportent un soutien.

63. Les réponses concernant le lieu de délivrance de l'assistance technique font apparaître des différences de même nature. Certains bénéficiaires, tels que l'Estonie, le Kenya et la Roumanie ont principalement reçu une assistance sur leur propre territoire, le pourcentage d'assistance à l'étranger variant entre 10 et 30 pour cent. Pour d'autres, les proportions sont inversées : ainsi, la Lituanie n'a reçu que 40 pour cent de l'assistance dont elle a bénéficié sur le territoire national, ce pourcentage tombant à 20 pour cent dans le cas de la Tunisie et du Brésil. Pour ce qui concerne l'Indonésie, la part d'assistance reçue à domicile et à l'étranger est identique.

64. La part relative des diverses formes d'assistance varie également selon les pays bénéficiaires. Dans le cas de l'Estonie, de la Lituanie et de la Roumanie, la part des séminaires et conférences ne dépasse pas 60 pour cent. Les programmes d'envoi de conseillers ou d'accueil de stagiaires par les fournisseurs d'assistance représentent par conséquent un pourcentage substantiel de l'assistance reçue, le poids des programmes de stages/visites d'étude à l'intérieur de ce pourcentage étant en règle générale plus limité. En ce qui concerne le Kenya, les séminaires et conférences ont, à l'inverse, représenté "[p]rès de cent pour cent de l'assistance". La Tunisie indique pour sa part qu'elle a reçu une quantité limitée d'assistance, et ce, sous la forme exclusive de séminaires et de stages ; ce pays n'a pas accueilli de conseiller résident. S'agissant du Brésil, le poids des séminaires dans l'assistance dont le pays bénéficie est d'environ 80 pour cent, le pourcentage restant correspondant à l'assistance apportée par les conseillers résidents, qui "assurent environ la moitié des conférences et séminaires". L'Indonésie indique enfin qu'elle a bénéficié d'une assistance sous forme de séminaires et conférences et sous forme de programmes d'envoi de conseillers ou d'accueil de stagiaires en proportion égale.

9. Thèmes de discussion

65. Les organisateurs du Forum mondial espèrent qu'il permettra aux pays non membres d'échanger leurs points de vue sur les thèmes suivants, parmi d'autres :

- les principaux besoins existant, et le type d'assistance permettant d'y répondre ;
- les formes d'assistance (en particulier séminaires, stages et conseillers résidents) qu'ils jugent les plus utiles, en général ou dans des cas particuliers ;
- les compétences et l'expérience qu'un fournisseur d'assistance doit posséder, en particulier parmi les possibilités suivantes :
 - expérience de travail au sein d'une autorité en charge de la concurrence ;
 - connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire ;
 - expérience de la fourniture d'assistance à des économies en développement ou en transition ;
 - connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde ;
- les avantages ou coûts potentiels d'un renforcement de la coordination de l'assistance.

66. Les faits et points de vue exposés par les bénéficiaires serviront de point de départ pour un examen plus approfondi de l'ensemble de ces thèmes. Les questions de portée plus générale ci-dessous méritent également considération :

- Les besoins et l'offre d'assistance technique sont-ils en adéquation et, dans le cas où les besoins excéderaient l'offre, quelles sont les mesures qui pourraient permettre d'augmenter le volume de celle-ci?
- Les responsables de la concurrence considèrent-ils qu'il est à la fois souhaitable et possible que l'autorité dont ils ont la charge joue un plus grand rôle en matière de fourniture d'assistance technique, sans qu'il y ait interférence avec ses autres responsabilités?
- Dans l'affirmative, que pensent les pays membres des possibilités suivantes?
 - Mise à disposition de l'autorité de la concurrence d'une part plus importante des fonds disponibles, assortie du libre choix de fournir l'assistance demandée par l'intermédiaire de son personnel ou d'utiliser ses compétences pour concevoir des projets d'assistance technique et sélectionner des sous-traitants privés qualifiés.
 - Mise à disposition de ressources destinées à couvrir le coût d'employés spécifiquement affectés à l'assistance technique.
- Dans la négative, les pays membres pensent-ils qu'il est souhaitable et possible que les autorités de la concurrence jouent un plus grand rôle auprès des agences en charge du

financement en matière de conseil, concernant la conception de projets d'assistance technique et la sélection de sous-traitants privés qualifiés?

ANNEXE A

RÉPONSES DES BÉNÉFICIAIRES AU QUESTIONNAIRE SUR L'ASSISTANCE TECHNIQUE

La présente annexe regroupe les réponses apportées par le Brésil, le Chili, l'Estonie, l'Indonésie, le Kenya, la Lituanie, la Roumanie, la Thaïlande et la Tunisie au questionnaire de l'OCDE relatif à l'assistance technique à la date du 31 janvier 2002.

BRÉSIL

1. Il serait utile que vous puissiez compléter aussi précisément que possible le tableau ci-joint concernant l'assistance technique que votre autorité de la concurrence a reçu en 2000/2001 et qu'elle prévoit de recevoir en 2002. Toutefois, plus encore que ces données quantitatives, nous aimerions connaître votre point de vue sur les points évoqués ci-dessous.

Voir tableau joint.

2. D'après votre expérience :

Quelles sont les questions abordées dans le cadre de l'assistance technique qui ont été les plus utiles/les moins utiles, et pourquoi?

L'échange d'informations sur des questions relevant de la politique antitrust, telles que les ententes injustifiables, a été pour nous l'un des instruments de coopération les plus utiles, à la fois sur le plan formel, car il permet de préciser le cadre légal, et sur le plan informel, dans la mesure où il permet d'apporter des réponses rapides aux problèmes qui peuvent se poser.

Comme le montre les renseignements figurant dans le tableau ci-joint, la participation à des séminaires et à des conférences a représenté un moyen tout aussi important de coopération entre les autorités brésiliennes et étrangères responsables de la politique antitrust et les représentants du secteur privé.

Quelles formes d'assistance (conférences, séminaires, conseillers, stages) ont été les plus utiles/les moins utiles, et pourquoi?

Les conférences et les séminaires ont constitué le meilleur moyen de rapprocher les professionnels spécialistes de la politique antitrust. Toutefois, l'échange informel d'informations n'est pas la meilleure façon de faire face à la nécessité de disposer d'une documentation officielle qui s'est parfois présentée dans nos procédures formelles.

Quels sont les avantages et les inconvénients respectifs de manifestations centrées sur un seul pays et de manifestations à caractère régional? La réponse est-elle fonction du thème traité? Veuillez expliciter votre point de vue.

Lorsque le thème abordé concerne l'échange d'expérience dans le domaine juridictionnel, une manifestation à caractère régional aura des résultats plus positifs qu'une manifestation centrée sur un seul pays. Dans le cas où un pays bénéficiaire a atteint le stade de mise en œuvre de sa propre législation, une

manifestation centrée sur ce seul pays sera en revanche plus profitable qu'un événement régional. En résumé, l'efficacité de l'événement dépend essentiellement de la situation relative de chaque pays concernant la mise en œuvre de lois antitrust nationales.

En dehors de la connaissance du droit et de la politique de la concurrence, quelles sont les compétences et l'expérience que vous jugez importantes ou nécessaires chez un fournisseur d'assistance? A cet égard, comment classeriez-vous les quatre items suivants?

- (1) Expérience de travail au sein d'une autorité en charge de la concurrence?
- (4) Expérience de la fourniture d'assistance à des économies en développement ou en transition?
- (3) Connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde?
- (2) Connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire?

Quels sont les avantages et les inconvénients respectifs de recevoir une assistance de la part de fonctionnaires chargés de la concurrence en activité et de la part de consultants privés (cabinets de consultants, cabinets d'avocats, universitaires, etc.)? La réponse est-elle fonction du domaine abordé? Veuillez expliciter votre point de vue.

La réponse à cette question se rapproche de celle que nous avons faite à la question relative aux manifestations par pays ou régionales ci-dessus, à savoir que cela dépend du degré de développement des institutions de contrôle de la concurrence. Dans le cas du Brésil, l'assistance reçue de fonctionnaires chargés de la concurrence en activité s'est avérée plus profitable que les autres possibilités évoquées.

Quelle part approximative de l'assistance que vous recevez consiste consiste, d'un côté, en programmes pluriannuels, de l'autre, en manifestations ponctuelles?

Nous estimons que près de 80 pour cent de l'assistance reçue consiste en programmes pluriannuels, en particulier sous la forme de séminaires et de conférences.

Quelle part approximative des activités d'assistance dont vous bénéficiez se déroule sur votre territoire/à l'étranger?

Environ 80 pour cent des activités d'assistance dont nous bénéficions se déroule à l'étranger.

Quelle part approximative de l'assistance que vous recevez représentent, d'un côté, les séminaires et conférences, de l'autre, l'envoi de conseillers résidents ou les stages effectués dans les pays fournisseurs d'assistance?

Environ 80 pour cent de l'assistance reçue consiste en séminaires et en conférences. Nous estimons par ailleurs que les conseillers résidents assurent environ la moitié de ces séminaires et conférences.

3. Un manque apparent de coordination entre fournisseurs d'assistance a-t-il été pour vous cause de difficulté dans certaines circonstances? Veuillez expliciter votre point de vue. Veuillez également nous faire part des commentaires que vous pourriez avoir à formuler relativement aux avantages ou aux inconvénients que présenterait à vos yeux un renforcement de la coordination internationale des programmes d'assistance technique.

Bien que le manque de coordination entre fournisseurs d'assistance n'ait pas été pour nous cause de difficulté, un tel défaut pourrait engendrer des problèmes de gaspillage, d'efficacité du travail entrepris, d'allongement des délais, etc.

4. Quel est, selon vous, le principal besoin de votre économie en termes d'assistance dans le domaine du droit et de la politique de la concurrence à l'heure actuelle?

Nous avons choisi de procéder ici de la même façon que pour le point 2 ci-dessus et de classer les questions qui suivent par ordre d'importance.

- (2) Elaboration d'une loi régissant la concurrence? Elaboration d'une législation dérivée/de règlements d'application?
- (1) Mise en œuvre des lois relatives à la concurrence?
- (4) Destinées à lutter contre l'abus de position dominante par les monopoles naturels?
- (3) Destinées à lutter contre l'abus de position dominante par les monopoles "non naturels"?
- (1) Destinées à lutter contre les ententes?
- (2) Destinées à lutter contre les fusions anti-concurrentielles?

Si votre principal besoin a trait à la mise en œuvre de la législation, quelle serait, selon vous, la forme d'assistance la plus profitable (établissement de procédures, formation du personnel, autres)?

Une fois que la loi a été élaborée et mise en œuvre, l'une des formes les plus profitables de coopération concerne le travail qui reste à effectuer, et notamment l'établissement de procédures et la formation du personnel.

5. Veuillez formuler toute observation ou apporter tout élément d'information qui vous paraîtrait utile.

CHILI

Pour répondre à la demande qui nous a été adressée, nous nous conformerons à l'organisation du questionnaire élaboré par l'OCDE et nous efforcerons de fournir autant d'éléments d'information que possible, de la manière la plus claire qui soit.

1. Questions abordées dans le cadre de l'assistance technique et généralités.

Depuis que nous bénéficions d'une assistance, aucune des questions abordées ne nous a paru sans intérêt pour le renforcement de nos capacités techniques. Bien que certaines de ces questions présentent un plus grand intérêt que d'autres, du fait qu'elles s'inscrivent dans le cadre d'une enquête en cours et qu'elles constituent une préoccupation par conséquent immédiate, tous les thèmes, approches et analyses nous paraissent de nature à contribuer à la réalisation des objectifs du FNE.

Notre participation aux séminaires basés sur des études de cas organisés par l'OCDE a par exemple été précieuse, dans la mesure où elle nous a permis de nous rendre compte qu'un grand nombre de situations et de problèmes sont très similaires d'un pays à l'autre et qu'ils ont suscité les mêmes interrogations s'agissant de l'attitude que doit adopter l'organisme en charge de la concurrence. Indépendamment du fait que notre propre agence de la concurrence a déjà été confrontée à certaines des situations examinées, la possibilité qui nous est offerte d'expliquer nos procédures, nos analyses et nos résultats peut être comparée à un examen par un jury de "pairs", grâce auquel le travail effectué par l'agence est évalué de façon impartiale.

D'un autre côté, l'analyse de problèmes qui ne se sont pas encore posés à notre agence nous fournit la capacité de recul ainsi que les outils qui nous aident à accumuler le savoir nécessaire pour faire face aux cas que nous aurons probablement à traiter dans l'avenir.

En tout état de cause, il est très important de tenir compte du degré de développement de la politique de la concurrence dans chacun des pays considérés, de façon à ce que l'assistance de caractère technique fournie soit cohérente avec ce niveau de développement et par conséquent utile. Ainsi, un grand nombre de pays d'Amérique latine n'ont pas encore adopté de loi relative à la concurrence, alors que d'autres possèdent et appliquent ce type de législation depuis des années et que d'autres encore sont dans une phase de mise en œuvre de lois nouvellement votées et de structuration de leurs institutions de contrôle de la concurrence.

Si l'on se réfère à ce qui précède, il apparaît donc que certains des domaines qui peuvent être abordés dans le cadre de l'assistance n'ont de pertinence que s'agissant d'organismes en charge de la concurrence nouvellement créés ou de pays qui ne possèdent ni autorité de la concurrence ni législation. Dans ce cas de figure, des pays comme le Chili peuvent utilement faire connaître leur opinion et peuvent en outre fournir une assistance technique.

Il nous paraît important de souligner que le FNE est un organisme spécialisé qui s'attache exclusivement à l'application de la législation qui régit la concurrence. La loi que nous appliquons actuellement est entrée en vigueur en octobre 1973 mais nous avons une législation antitrust depuis la fin des années 50. Contrairement à ce qui est le cas dans un grand nombre de pays d'Amérique latine, nous ne sommes pas chargés de veiller au respect des lois relatives à la protection du consommateur.

2. Formes d'assistance

Nous avons eu l'occasion de participer à des séminaires basés sur des études de cas et à des conférences au cours des années 1999 à 2001.

Le système d'études de cas, qui s'appuie sur le haut niveau de compétence et d'appréhension des situations reconnu aux agents de l'OCDE et aux experts qui conçoivent ces programmes, a constitué pour nous une expérience très enrichissante. L'étude de cas pratiques auxquels les autres organismes en charge de la concurrence ont été confrontés, qu'ils soient en cours d'instruction ou qu'un jugement final ait été rendu, nous fournit d'excellents outils d'analyse. Ce système suscite une participation active au débat et inspire aux participants de nouvelles et pertinentes questions.

En ce qui concerne les stages, nous intervenons en tant que fournisseurs d'assistance technique. Des représentants du Costa Rica ont ainsi été accueillis par le FNE pour des séjours de courte durée et ont suivi un programme de formation qui comportait des exposés par nos experts ainsi que l'analyse d'affaires en cours. Notre objectif est à cet égard de faire connaître notre législation ainsi que les procédures mises en place et la façon dont nous abordons différents comportements anti-concurrentiels.

D'après notre expérience, les séminaires reposant sur des études de cas sont plus utiles si un grand nombre de pays y expriment leur point de vue. Les discussions qui s'en suivent et la diversité des positions représentées sont des éléments clés qui permettent aux participants d'acquérir une expérience sur le plan technique.

Sur la base de notre dernière expérience dans le domaine des stages de courte durée, nous estimons qu'un programme conçu pour accueillir des stagiaires originaires d'un seul pays constitue pour les fonctionnaires des deux parties une occasion unique d'échanger leurs expériences et de discuter du traitement des affaires courantes, mais aussi de répondre à des demandes complexes. Ces programmes ont été très positifs pour les deux parties intéressées et nous essaierons de notre côté d'en monter d'autres. Nous sommes à cet égard engagés dans des discussions préliminaires avec les autorités panaméennes en charge de la concurrence.

3. Compétences des fournisseurs d'assistance

En tant que bénéficiaire, nous estimons que le niveau de compétence des fournisseurs d'assistance et, en particulier, leur capacité à analyser de façon synthétique les cas qui leur sont présentés et à fournir un certain nombre d'éléments clés aidant à la résolution du problème posé est d'une grande importance.

En qualité de fournisseur d'assistance, nous pensons néanmoins que la seule présence de fonctionnaires ou d'experts mandatés par un organisme en charge de la concurrence étranger ou par un gouvernement étranger, au travers des contacts qu'ils ont avec le personnel, permet d'échanger les points de vue et de discuter librement entre pairs. C'est là un élément d'une grande importance, qui permet une appréhension globale du travail effectué par l'organisme en charge de la concurrence.

Le Chili est l'un des pays qui participent aux négociations en vue de l'instauration de l'Accord de libre-échange des Amériques (ALEA-ALCA). Dans le cadre de ce forum, les délégations ont instauré une séance consacrée à l'assistance technique à l'intérieur de presque toutes les sessions consacrées à la négociation, bien que ce thème ne fasse pas partie du programme officiel des négociations.

Cette expérience s'est avérée très positive, notamment pour les pays qui ne possèdent pas de législation dans le domaine de la concurrence. Ceci démontre qu'il n'est pas nécessaire de s'appuyer sur des

compétences très pointues pour fournir une assistance et pour organiser des discussions reposant sur des études de cas.

4. Nos besoins en termes d'assistance technique

Notre agence nationale de contrôle de la concurrence a compétence pour faire appliquer la loi dans de nombreux domaines, y compris celui des marchés régulés issus du processus de privatisation au Chili. Les enquêtes que nous sommes amenés à effectuer peuvent par conséquent s'orienter dans de très nombreuses directions.

Le FNE possède une expérience du contrôle de la concurrence de près de trente années. C'est une institution gouvernementale prestigieuse dotée d'un profil technique clairement défini. Nos Commissions Antitrust, qui sont des organismes indépendants, ont également une longue tradition de mise en œuvre de la législation. Leurs décisions ont influencé de manière positive un grand nombre de marchés et tracé un certain nombre de voies visant à orienter les acteurs soumis à la concurrence présents sur ces marchés dans leurs activités.

Quoi qu'il en soit, les problèmes de concurrence deviennent chaque jour plus complexes. De nouveaux marchés et de nouvelles entreprises se créent et le caractère international des échanges engendre des perturbations continues sur les marchés.

L'analyse des activités qui constituent de nouvelles formes d'abus de position dominante est un domaine que nous souhaitons aborder. Notre structure organisationnelle n'envisage pas d'introduire un contrôle obligatoire des fusions ni un examen systématique des opérations d'acquisition ou de prise de contrôle ; cependant, nous avons été amenés à effectuer des enquêtes impliquant l'analyse de processus de concentration.

Il est important pour nous de renforcer nos capacités techniques de façon à pouvoir exercer un contrôle sur les activités des sociétés qui détiennent une part importante de marché et qui pourraient être conduites à abuser de leur position.

Par ailleurs, compte tenu du fait que certaines fusions et acquisitions donnent lieu à enquête, notre agence a besoin d'élargir ses compétences en se familiarisant avec les différentes approches existantes en matière d'analyse des fusions.

Un autre point présente une grande importance à nos yeux : il s'agit de la nécessité d'acquérir au travers de l'assistance technique la connaissance des lois aux termes desquelles certaines conduites sont passibles de sanctions pénales. Notre agence accorde en effet une grande importance à la question de la limitation éventuelle ou même, à terme, du remplacement des sanctions pénales, dont la possibilité est inscrite dans nos lois, par d'autres dispositions. Les effets positifs et négatifs qu'induirait ce changement d'orientation doivent être pris en compte.

En ce sens, les études comparatives des droits de la concurrence existants, présentées ou fournies sous forme d'assistance technique, sont considérées comme très utiles par le FNE, en ce qu'elles permettent d'avoir connaissance de l'expérience d'autres pays et d'améliorer nos institutions.

ESTONIE

1. Il serait utile que vous puissiez compléter aussi précisément que possible le tableau ci-joint concernant l'assistance technique que votre autorité de la concurrence a reçu en 2000/2001 et qu'elle prévoit de recevoir en 2002. Toutefois, plus encore que ces données quantitatives, nous aimerions connaître votre point de vue sur les points évoqués ci-dessous.

2. D'après votre expérience :

Quelles sont les questions abordées dans le cadre de l'assistance technique qui ont été les plus utiles/les moins utiles, et pourquoi?

Toutes les questions ayant trait au travail quotidien des personnels en charge de la concurrence qui ont été abordées nous ont paru utiles et, notamment, celles qui concernent les règles de procédure, dans la mesure où le besoin de connaissances est particulièrement important dans ce domaine. Les thèmes très spécifiques nous ont en revanche semblé présenter une moindre utilité car ils n'ont pas une aussi grande importance pour notre travail quotidien.

Quelles formes d'assistance (conférences, séminaires, conseillers, stages) ont été les plus utiles/les moins utiles, et pourquoi?

Les séminaires ont sans doute constitué la forme d'assistance la plus utile ; ils ont en effet permis à l'ensemble des membres du Conseil de la concurrence d'être impliqués et d'acquérir des connaissances. Pour ce qui est de l'acquisition de compétences sur un plan pratique, la forme d'assistance qui nous a été la plus profitable est celle des stages effectués au sein des autorités en charge de la concurrence d'autre pays. Ces stages ont été plus utiles que la formation théorique dans la mesure où ils nous ont permis d'avoir une vision concrète de la façon dont les dossiers sont traités. D'après notre expérience, le niveau de compétence des conseillers est très variable ; nous avons reçu quelques très bons conseillers dont l'assistance a été d'une remarquable qualité.

Quels sont les avantages et les inconvénients respectifs de manifestations centrées sur un seul pays et de manifestations à caractère régional? La réponse est-elle fonction du thème traité? Veuillez expliciter votre point de vue.

Oui, la réponse dépend du thème traité. L'avantage de manifestations centrées sur un seul pays est qu'elles permettent aux participants d'examiner des questions spécifiques de manière plus précise. L'avantage de manifestations à caractère régional est qu'elles sont l'occasion de comparer sa propre expérience avec celles de collègues. A l'inverse, il peut arriver dans ce cas que les questions qui font l'objet de la discussion ne soient pas réellement transposables, par exemple, lorsqu'il s'agit des dispositions précises d'une loi, etc.

En dehors de la connaissance du droit et de la politique de la concurrence, quelles sont les compétences et l'expérience que vous jugez importantes ou nécessaires chez un fournisseur d'assistance? A cet égard, comment classeriez-vous les quatre items suivants? Expérience de travail au sein d'une autorité en charge de la concurrence?

Très important.

Expérience de la fourniture d'assistance à des économies en développement ou en transition?

Important.

Connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde?

Important ; peut constituer un avantage.

Connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire?

Très important

Nous estimons également que l'implication du fournisseur d'assistance joue un rôle important dans le succès de l'entreprise.

Quels sont les avantages et les inconvénients respectifs de recevoir une assistance de la part de fonctionnaires chargés de la concurrence en activité et de la part de consultants privés (cabinets de consultants, cabinets d'avocats, universitaires, etc.)? La réponse est-elle fonction du domaine abordé? Veuillez expliciter votre point de vue.

Ces deux types d'assistance sont très importants. Les consultants privés ont souvent un point de vue très différent de celui des fonctionnaires chargés de la concurrence, ce qui nous donne l'occasion de voir les choses sous un autre angle. Tout dépend bien sûr du domaine abordé.

Quelle part approximative de l'assistance que vous recevez consiste, d'un côté, en programmes pluriannuels, de l'autre, en manifestations ponctuelles?

2/3 de l'assistance que nous recevons consiste en programmes pluriannuels et 1/3 en manifestations ponctuelles.

Quelle part approximative des activités d'assistance dont vous bénéficiez se déroule sur votre territoire/à l'étranger?

10 pour cent des activités d'assistance dont nous bénéficions se déroulent à l'étranger et 90 pour cent sur notre territoire.

Quelle part approximative de l'assistance que vous recevez représentent, d'un côté, les séminaires et conférences, de l'autre, l'envoi de conseillers résidents ou les stages effectués dans les pays fournisseurs d'assistance?

60 pour cent de cette assistance est constituée par les séminaires et conférences, 30 pour cent par la venue de conseillers et 10 pour cent par des visites d'étude.

3. Un manque apparent de coordination entre fournisseurs d'assistance a-t-il été pour vous cause de difficulté dans certaines circonstances? Veuillez expliciter votre point de vue. Veuillez également nous faire part des commentaires que vous pourriez avoir à formuler relativement aux avantages ou aux inconvénients que présenterait à vos yeux un renforcement de la coordination internationale des programmes d'assistance technique.

Nous n'avons heureusement pas été confrontés à ce type de situation. Le renforcement de la coordination internationale pourrait présenter un inconvénient qui serait le retard apporté au traitement d'une demande d'assistance et à la prise en compte du besoin existant, par voie de conséquence. Nous souhaiterions à cet égard faire observer qu'étant donné la multiplication rapide des problèmes liés à la concurrence, la procédure de demande d'assistance devrait être accélérée.

4. Quel est, selon vous, le principal besoin de votre économie en termes d'assistance dans le domaine du droit et de la politique de la concurrence à l'heure actuelle?

Elaboration d'une législation dérivée/de règlements d'application?	Très important.
Mise en œuvre des lois relatives à la concurrence?	Très important.
Destinées à lutter contre l'abus de position dominante par les monopoles naturels?	Important.
Destinées à lutter contre l'abus de position dominante par les monopoles "non naturels"?	Important.
Destinées à lutter contre les ententes?	Important.
Destinées à lutter contre les fusions anti-concurrentielles?	Très important.

Si votre principal besoin a trait à la mise en œuvre de la législation, quelle serait, selon vous, la forme d'assistance la plus profitable (établissement de procédures, formation du personnel, autres)?

La formation du personnel à l'utilisation des études de cas. Nous avons en effet établi que les formations qui nous apportaient le plus étaient les formations pratiques dans le cadre desquelles des affaires en cours sont discutées et analysées avec l'aide de conseillers.

5. Veuillez formuler toute observation ou apporter tout élément d'information qui vous paraîtrait utile.

INDONÉSIE

1. Il serait utile que vous puissiez compléter aussi précisément que possible le tableau ci-joint concernant l'assistance technique que votre autorité de la concurrence a reçu en 2000/2001 et qu'elle prévoit de recevoir en 2002. Toutefois, plus encore que ces données quantitatives, nous aimerions connaître votre point de vue sur les points évoqués ci-dessous.

Nous avons reçu une assistance de la part de la Banque mondiale, du Bundeskartellamt (projet GTZ, Allemagne), d'ELLIPS (USAID) et de la FTC au Japon (Projets JICA). Cette assistance prend la forme du conseil, de la formation du personnel, d'études, de la formation du personnel d'organismes externes ayant un lien avec la concurrence, de séminaires ou de conférences portant sur la concurrence et sur la dissémination des politiques appliquées par l'Indonésie en matière de concurrence ainsi que de nombreux autres thèmes.

2. D'après votre expérience :

Quelles sont les questions abordées dans le cadre de l'assistance technique qui ont été les plus utiles/les moins utiles, et pourquoi?

Le plus utile pour l'Indonésie est l'étude comparée des politiques de la concurrence existantes et de la législation indonésienne en matière de concurrence ainsi que des techniques nationales d'investigation s'agissant d'affaires ayant trait au non-respect des règles qui régissent la concurrence. A ce stade initial, aucune des questions abordées dans le cadre de l'assistance technique n'est "moins utile" ou sans utilité pour la KPPU

Quelles formes d'assistance (conférences, séminaires, conseillers, stages) ont été les plus utiles /les moins utiles, et pourquoi?

Les formes d'assistance les plus utiles sont le conseil et la formation durables, les séries de séminaires/conférences et l'assistance relative à la conception et à l'édition de publications. Ce type d'assistance renforce les compétences de la KPPU et des organismes connexes en matière de traitement des affaires qui relèvent du domaine de la concurrence.

Quels sont les avantages et les inconvénients respectifs de manifestations centrées sur un seul pays et de manifestations à caractère régional? La réponse est-elle fonction du thème traité? Veuillez expliciter votre point de vue.

Les manifestations à caractère régional permettent aux participants d'appréhender les thèmes traités de manière plus globale. Dans un monde sans frontières, la gestion des dossiers concernant un manquement aux règles qui régissent la concurrence impliquera une interaction des autorités compétentes au niveau régional.

En dehors de la connaissance du droit et de la politique de la concurrence, quelles sont les compétences et l'expérience que vous jugez importantes ou nécessaires chez un fournisseur d'assistance? A cet égard, comment classeriez-vous les quatre items suivants?

En dehors de la connaissance du droit et de la politique de la concurrence, la KPPU demande aux fournisseurs d'assistance de posséder des compétences sur le plan de l'investigation, de la rédaction de rapports et de l'analyse, ainsi qu'une connaissance des systèmes et des supports informatiques. De notre point de vue, l'ordre d'importance des quatre items identifiés est le suivant :

- Connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans notre pays.
- Expérience de travail au sein d'une autorité en charge de la concurrence.
- Connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde.
- Expérience de la fourniture d'assistance à des économies en développement ou en transition.

Quels sont les avantages et les inconvénients respectifs de recevoir une assistance de la part de fonctionnaires chargés de la concurrence en activité et de la part de consultants privés (cabinets de consultants, cabinets d'avocats, universitaires, etc.)? La réponse est-elle fonction du domaine abordé? Veuillez expliciter votre point de vue.

Oui, la réponse est fonction du domaine abordé. Dans un grand nombre de cas, les consultants locaux fournissent une assistance plus utile que les consultants étrangers.

Quelle part approximative de l'assistance que vous recevez consiste, d'un côté, en programmes pluriannuels, de l'autre, en manifestations ponctuelles?

La plus grande part de l'assistance que nous recevons consiste en manifestations ponctuelles (près de 90 pour cent).

Quelle part approximative des activités d'assistance dont vous bénéficiez se déroule sur votre territoire/à l'étranger?

Environ 50-50.

Quelle part approximative de l'assistance que vous recevez représentent, d'un côté, les séminaires et conférences, de l'autre, l'envoi de conseillers résidents ou les stages effectués dans les pays fournisseurs d'assistance?

Environ 50-50.

3. Un manque apparent de coordination entre fournisseurs d'assistance a-t-il été pour vous cause de difficulté dans certaines circonstances? Veuillez expliciter votre point de vue. Veuillez également nous faire part des commentaires que vous pourriez avoir à formuler relativement aux avantages ou aux inconvénients que présenterait à vos yeux un renforcement de la coordination internationale des programmes d'assistance technique.

Un manque de coordination s'est produit une fois ou deux. Cela s'est manifesté par le fait que la personne responsable de la fourniture d'assistance n'était pas favorable au calendrier ou aux activités prévues, ou a refusé de s'y conformer.

4. Quel est, selon vous, le principal besoin de votre économie en termes d'assistance dans le domaine du droit et de la politique de la concurrence à l'heure actuelle?

Elaboration d'une loi régissant la concurrence? Elaboration d'une législation dérivée/de règlements d'application?

Mise en œuvre des lois relatives à la concurrence?

Destinées à lutter contre l'abus de position dominante par les monopoles naturels?

Destinées à lutter contre l'abus de position dominante par les monopoles "non naturels"?

Destinées à lutter contre les ententes?

Destinées à lutter contre les fusions anti-concurrentielles?

Le principal besoin de votre économie en termes d'assistance dans le domaine du droit et de la politique de la concurrence a trait à la mise en œuvre d'une loi relative à la concurrence permettant de lutter contre les abus de position dominante par les monopoles non naturels, les pratiques anti-concurrentielles en matière d'appels d'offres et les ententes.

Si votre principal besoin a trait à la mise en œuvre de la législation, quelle serait, selon vous, la forme d'assistance la plus profitable (établissement de procédures, formation du personnel, autres)?

La mise en place de procédures et de lignes directrices, la formation du personnel, un conseil régulier, une formation relative aux systèmes de gestion de l'information/des bases de données sont les formes d'assistance les plus profitable pour la KPPU.

5. Veuillez formuler toute observation ou apporter tout élément d'information qui vous paraîtrait utile.

Le développement institutionnel est l'une de nos préoccupations pour ce qui concerne le futur proche. La KPPU se trouve en effet en situation de devoir confirmer sa contribution à la reprise économique en Indonésie. Un soutien de la part des organismes en charge de la concurrence d'autres pays nous paraît à cet égard constituer un impératif.

KENYA

1. Il serait utile que vous puissiez compléter aussi précisément que possible le tableau ci-joint concernant l'assistance technique que votre autorité de la concurrence a reçu en 2000/2001 et qu'elle prévoit de recevoir en 2002. Toutefois, plus encore que ces données quantitatives, nous aimerions connaître votre point de vue sur les points évoqués ci-dessous.

Voir tableau ci-joint.

2. D'après votre expérience :

Quelles sont les questions abordées dans le cadre de l'assistance technique qui ont été les plus utiles/les moins utiles, et pourquoi?

Les questions que nous avons jugées les plus utiles sont celles qui concernent l'organisation des organismes en charge de la concurrence, le contrôle des fusions et les enquêtes relatives aux activités constitutives d'une entente ; les moins utiles sont celles qui ont trait à la théorie de la concurrence.

Quelles formes d'assistance (conférences, séminaires, conseillers, stages) ont été les plus utiles/les moins utiles, et pourquoi?

Les stages et les séminaires sont les formes d'assistance qui se sont révélées les plus utiles, dans la mesure où elles permettent, respectivement, le transfert de compétences techniques en matière de gestion des dossiers concernant un manquement aux règles qui régissent la concurrence et le partage d'expériences entre pairs.

Quels sont les avantages et les inconvénients respectifs de manifestations centrées sur un seul pays et de manifestations à caractère régional? La réponse est-elle fonction du thème traité? Veuillez expliciter votre point de vue.

Les avantages et les inconvénients relatifs de manifestations centrées sur un seul pays et de manifestations à caractère régional sont fonction du thème traité. Ainsi, par exemple, une manifestation ciblée sur une seule économie est plus appropriée lorsqu'il s'agit de mettre en place un cadre légal et des institutions nationales, alors qu'il paraît plus judicieux de traiter sur le plan régional des questions telles que le contrôle des fusions et les ententes sur les prix.

En dehors de la connaissance du droit et de la politique de la concurrence, quelles sont les compétences et l'expérience que vous jugez importantes ou nécessaires chez un fournisseur d'assistance? A cet égard, comment classeriez-vous les quatre items suivants?

Expérience de travail au sein d'une autorité en charge de la concurrence?

Expérience de la fourniture d'assistance à des économies en développement ou en transition?

Connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde?

Connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire?

En dehors de la connaissance du droit et de la politique de la concurrence, les compétences et l'expérience qui nous paraissent importantes chez un fournisseur d'assistance sont les suivantes :

- connaissance de la culture et des traditions nationales ;
- connaissance des structures politiques et économiques du pays ;
- connaissance du niveau de développement et de la répartition des revenus (seuils de pauvreté).
- S'agissant des quatre items identifiés, l'ordre de priorité des compétences et de l'expérience qu'un fournisseur d'assistance doit posséder est à notre avis le suivant :
 - connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire ;
 - expérience de la fourniture d'assistance à des économies en développement ou en transition ;
 - expérience de travail au sein d'une autorité en charge de la concurrence ;
 - connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde.

Quels sont les avantages et les inconvénients respectifs de recevoir une assistance de la part de fonctionnaires chargés de la concurrence en activité et de la part de consultants privés (cabinets de consultants, cabinets d'avocats, universitaires, etc.)? La réponse est-elle fonction du domaine abordé? Veuillez expliciter votre point de vue.

Les avantages et les inconvénients respectifs de recevoir une assistance de la part de fonctionnaires chargés de la concurrence en activité et de la part de consultants privés (cabinets de consultants, cabinets d'avocats, universitaires, etc.) dépendent dans tous les cas de l'objectif recherché et des tâches qui doivent être effectuées au travers de l'assistance. A moins que l'assistance ne soit domestiquée et que les bénéficiaires ne se l'approprient, il a de fortes chances pour que ses effets soient de courte durée et qu'elle ne soit que de peu d'utilité pour la communauté nationale.

Quelle part approximative de l'assistance que vous recevez consiste, d'un côté, en programmes pluriannuels, del'autre, en manifestations ponctuelles?

Le Kenya n'a à ce jour bénéficié d'aucun programme d'assistance pluriannuel dans le domaine du droit et de la politique de la concurrence. En 2001, la CNUCED a fourni une assistance technique et financière pour un séminaire régional de cinq jours ; l'OCDE a par ailleurs fourni une assistance au responsable de l'organisme en charge de la concurrence en vue de permettre à ce dernier d'assister au premier Forum de la concurrence à Paris, en France.

Quelle part approximative des activités d'assistance dont vous bénéficiez se déroule sur votre territoire/à l'étranger?

Manifestations se déroulant sur le territoire national à 80 pour cent ; manifestations à l'étranger à hauteur de 20 pour cent.

Quelle part approximative de l'assistance que vous recevez représentent, d'un côté, les séminaires et conférences, de l'autre, l'envoi de conseillers résidents ou les stages effectués dans les pays fournisseurs d'assistance?

Les séminaires et conférences ont représenté près de 100 pour cent de l'assistance reçue.

3. Un manque apparent de coordination entre fournisseurs d'assistance a-t-il été pour vous cause de difficulté dans certaines circonstances? Veuillez expliciter votre point de vue. Veuillez également nous faire part des commentaires que vous pourriez avoir à formuler relativement aux avantages ou aux inconvénients que présenterait à vos yeux un renforcement de la coordination internationale des programmes d'assistance technique.

Le Kenya n'ayant reçu de la communauté internationale qu'un volume négligeable d'assistance dans le domaine du droit et de la politique de la concurrence au cours des dernières années, il ne lui est pas possible d'évaluer les avantages que présenterait la coordination de l'action des fournisseurs d'assistance. La seule chose que nous puissions dire est que l'assistance de la CNUCED a été extrêmement bénéfique pour le renforcement de nos capacités.

4. Quel est, selon vous, le principal besoin de votre économie en termes d'assistance dans le domaine du droit et de la politique de la concurrence à l'heure actuelle?

Elaboration d'une loi régissant la concurrence? Elaboration d'une législation dérivée/de règlements d'application?

Mise en œuvre des lois relatives à la concurrence?

Destinées à lutter contre l'abus de position dominante par les monopoles naturels?

Destinées à lutter contre l'abus de position dominante par les monopoles "non naturels"?

Destinées à lutter contre les ententes?

Destinées à lutter contre les fusions anti-concurrentielles?

Les principaux besoins du Kenya en termes d'assistance dans le domaine du droit et de la politique de la concurrence **concernent / sont les suivants** :

- renforcement des capacités ;
- élaboration d'une loi régissant la concurrence ;
- promotion de la culture de la concurrence et élaboration de règlements d'application et de lignes directrices ;
- mise en œuvre des lois relatives à la concurrence :
 - destinées à lutter contre les ententes ;
 - destinées à lutter contre l'abus de position dominante par les monopoles naturels ;
 - destinées à lutter contre l'abus de position dominante par les monopoles "non naturels" ;
 - destinées à lutter contre les fusions anti-concurrentielles.

Si votre principal besoin a trait à la mise en œuvre de la législation, quelle serait, selon vous, la forme d'assistance la plus profitable (établissement de procédures, formation du personnel, autres)?

La formation du personnel et la fourniture de matériel de bureau/matériel informatique constitueront la forme d'assistance la plus profitable.

5. Veuillez formuler toute observation ou apporter tout élément d'information qui vous paraîtrait utile.

Les programmes de promotion visant à sensibiliser les ministères/départements ministériels ainsi que les milieux d'affaires et les consommateurs à l'apport que constituent le droit et la politique de la concurrence au développement économique et au bien-être du consommateur devraient jouer un rôle capital en matière de renforcement de l'acceptabilité de la culture de la concurrence et du respect de la loi.

LITUANIE

Nous avons regroupé nos réponses à la plupart des questions figurant dans le questionnaire qui nous a été adressé dans un document séparé intitulé "Présentation générale". Vous trouverez également ci-dessous une réponse courte aux différentes questions posées.

1. Il serait utile que vous puissiez compléter aussi précisément que possible le tableau ci-joint concernant l'assistance technique que votre autorité de la concurrence a reçu en 2000/2001 et qu'elle prévoit de recevoir en 2002. Toutefois, plus encore que ces données quantitatives, nous aimerions connaître votre point de vue sur les points évoqués ci-dessous.

Voir notre présentation générale ainsi que le tableau ci-joint.

2. D'après votre expérience :

Quelles sont les questions abordées dans le cadre de l'assistance technique qui ont été les plus utiles/les moins utiles, et pourquoi?

Toutes les questions mentionnées dans la présentation générale nous ont été d'une très grande utilité.

Quelles formes d'assistance (conférences, séminaires, conseillers, stages) ont été les plus utiles/les moins utiles, et pourquoi?

Il nous est impossible de faire plus particulièrement référence à un séminaire ou à un autre, à une conférence particulière, ou à toute autre manifestation. En effet, toutes les manifestations auxquelles nous avons assisté étaient bien organisées et faisaient intervenir des experts très expérimentés.

Quels sont les avantages et les inconvénients respectifs de manifestations centrées sur un seul pays et de manifestations à caractère régional? La réponse est-elle fonction du thème traité? Veuillez expliciter votre point de vue.

Les manifestations centrées sur un seul pays et les manifestations à caractère régional présentent les unes et les autres une grande utilité. Les manifestations concernant un seul pays permettent aux participants de se concentrer davantage sur les problèmes spécifiques rencontrés par ce pays et de répondre à ses besoins propres. Ce type de manifestation permet en général à l'autorité de la concurrence concernée d'obtenir une réponse aux questions qu'elle se pose et de résoudre les problèmes existants. Les thèmes abordés dans le cadre d'une manifestation régionale ont le plus souvent un caractère plus général. Ces manifestations n'en demeurent pas moins très importantes en ce qu'elles permettent aux participants de renforcer la connaissance qu'ils ont de la politique de la concurrence et de sa mise en œuvre dans les pays voisins, de partager leur expérience ainsi que de nouer et d'entretenir des contacts avec les responsables d'autres institutions en charge de la concurrence. Les deux types de manifestation cités sont par conséquent indispensables.

En dehors de la connaissance du droit et de la politique de la concurrence, quelles sont les compétences et l'expérience que vous jugez importantes ou nécessaires chez un fournisseur d'assistance? A cet égard, comment classeriez-vous les quatre items suivants?

- Expérience de travail au sein d'une autorité en charge de la concurrence.

- Connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire.
- Expérience de la fourniture d'assistance à des économies en développement ou en transition.
- Connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde.

Quels sont les avantages et les inconvénients respectifs de recevoir une assistance de la part de fonctionnaires chargés de la concurrence en activité et de la part de consultants privés (cabinets de consultants, cabinets d'avocats, universitaires, etc.)? La réponse est-elle fonction du domaine abordé? Veuillez expliciter votre point de vue.

L'assistance reçue de fonctionnaires chargés de la concurrence en activité est la plus efficace et la plus bénéfique. En effet, outre le fait qu'ils possèdent une expérience de travail au sein de l'autorité en charge de la concurrence concernée, ces fonctionnaires en activité sont généralement beaucoup mieux informés de l'évolution du droit et de la politique de la concurrence dans leur pays ainsi que dans différentes parties du monde et plus compétents sur ce point. Le seul inconvénient que présente le fait de recevoir une assistance de fonctionnaires chargés de la concurrence en activité tient aux difficultés que ceux-ci rencontrent dans la plupart des cas pour obtenir l'aval nécessaire de leur administration d'origine, ce qui limite très souvent leur capacité à fournir un volume plus important d'assistance.

L'efficacité de l'assistance fournie par les consultants privés dépend en grande partie du domaine abordé. L'intervention des consultants privés et, en particulier, des universitaires, est en règle générale beaucoup plus efficace lorsque les questions abordées sont de nature très générale ou, au contraire, très spécifique. Les domaines qui nécessitent une expérience pratique (procédures d'enquête en cas d'entente, par exemple) doivent, selon nous, être présentés aux bénéficiaires par des fonctionnaires chargés de la concurrence en activité.

Quelle part approximative de l'assistance que vous recevez consiste, d'un côté, en programmes pluriannuels, de l'autre, en manifestations ponctuelles?

Programme pluriannuels : 70 pour cent ; manifestations ponctuelles : 30 pour cent.

Quelle part approximative des activités d'assistance dont vous bénéficiez se déroule sur votre territoire/à l'étranger?

Lituanie : 40 pour cent ; pays étrangers : 60 pour cent.

Quelle part approximative de l'assistance que vous recevez représentent, d'un côté, les séminaires et conférences, de l'autre, l'envoi de conseillers résidents ou les stages effectués dans les pays fournisseurs d'assistance?

Séminaires et conférences : 50 pour cent, conseillers résidents : 40 pour cent, stages effectués dans les pays fournisseurs d'assistance : 10 pour cent.

3. Un manque apparent de coordination entre fournisseurs d'assistance a-t-il été pour vous cause de difficulté dans certaines circonstances? Veuillez expliciter votre point de vue. Veuillez également nous faire part des commentaires que vous pourriez avoir à formuler relativement aux avantages ou aux inconvénients que présenterait à vos yeux un renforcement de la coordination internationale des programmes d'assistance technique.

La coordination des programmes d'assistance technique en Lituanie a été assurée par le Ministère des Affaires étrangères, et nous n'avons pas rencontré de problème lié à un manque de coordination dans la pratique. Le principal avantage d'un renforcement de la coordination internationale est le fait que cela permettrait d'éviter que l'assistance fournie par différents pays ou organismes fasse double emploi ; le principal inconvénient d'une telle évolution réside dans le risque de ralentissement de la mise en œuvre des projets qu'elle comporte.

4. Quel est, selon vous, le principal besoin de votre économie en termes d'assistance dans le domaine du droit et de la politique de la concurrence à l'heure actuelle?

Elaboration d'une loi régissant la concurrence? Elaboration d'une législation dérivée/de règlements d'application?

Mise en œuvre des lois relatives à la concurrence?

Destinées à lutter contre l'abus de position dominante par les monopoles naturels?

Destinées à lutter contre l'abus de position dominante par les monopoles "non naturels"?

Destinées à lutter contre les ententes?

Destinées à lutter contre les fusions anti-concurrentielles?

Notre principal besoin en termes d'assistance dans le domaine du droit et de la politique de la concurrence concerne la mise en œuvre des lois relatives à la concurrence, particulièrement en matière de lutte contre les ententes et les fusions anti-concurrentielles. La forme la plus profitable d'assistance serait à cet égard la formation du personnel, dans tous les domaines possibles, et notamment une formation permettant de garantir que les méthodes d'investigation, de mise en œuvre de la législation et de reporting soient basées sur les meilleures pratiques à l'échelle internationale et qu'elles soient par ailleurs conformes aux règles en vigueur dans l'Union européenne.

Une assistance pour la mise en œuvre de la campagne de sensibilisation visant en particulier le secteur public dans son ensemble et l'appareil judiciaire nous serait également très utile.

Nous avons également – quoique dans une moindre mesure – besoin d'assistance pour élaborer une législation dérivée/des règlements d'application, notamment pour ce qui concerne les exemptions par catégories.

5. Veuillez formuler toute observation ou apporter tout élément d'information qui vous paraîtrait utile.

ROUMANIE

1. Il serait utile que vous puissiez compléter aussi précisément que possible le tableau ci-joint concernant l'assistance technique que votre autorité de la concurrence a reçu en 2000/2001 et qu'elle prévoit de recevoir en 2002. Toutefois, plus encore que ces données quantitatives, nous aimerions connaître votre point de vue sur les points évoqués ci-dessous.

2. D'après votre expérience :

Quelles sont les questions abordées dans le cadre de l'assistance technique qui ont été les plus utiles/les moins utiles, et pourquoi?

Parmi celles qui ont été abordées, les questions qui ont été pour nous les plus utiles sont celles qui ont trait aux techniques d'investigation et à la notification de l'existence d'une concentration économique aux intéressés.

Quelles formes d'assistance (conférences, séminaires, conseillers, stages) ont été les plus utiles/les moins utiles, et pourquoi?

Toute forme d'assistance est bénéfique pour notre autorité de la concurrence ; toutefois, les plus utiles sont la formation du personnel (stages, ateliers, séminaires) ou les visites d'étude auprès d'autorités en charge de la concurrence qui possèdent l'expérience de la mise en œuvre des règles applicables en la matière.

Quels sont les avantages et les inconvénients respectifs de manifestations centrées sur un seul pays et de manifestations à caractère régional? La réponse est-elle fonction du thème traité? Veuillez expliciter votre point de vue.

L'avantage des manifestations à caractère régional tient au fait qu'elles permettent un échange de points de vue avec d'autres autorités de la concurrence ; dans le cas des manifestations centrées sur un seul pays, l'assistance fournie est tout entière orientée vers la résolution des problèmes rencontrés par une autorité en particulier, ce qui leur confère une très grande efficacité.

Les manifestations régionales présentent un inconvénient, à savoir le fait qu'il n'est pas possible d'analyser en profondeur les thèmes abordés dans un tel cadre.

En dehors de la connaissance du droit et de la politique de la concurrence, quelles sont les compétences et l'expérience que vous jugez importantes ou nécessaires chez un fournisseur d'assistance? A cet égard, comment classeriez-vous les quatre items suivants?

2. Expérience de travail au sein d'une autorité en charge de la concurrence.
1. Expérience de la fourniture d'assistance à des économies en développement ou en transition.
4. Connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde.
3. Connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire.

Quels sont les avantages et les inconvénients respectifs de recevoir une assistance de la part de fonctionnaires chargés de la concurrence en activité et de la part de consultants privés (cabinets de consultants, cabinets d'avocats, universitaires, etc.)? La réponse est-elle fonction du domaine abordé? Veuillez expliciter votre point de vue.

[non renseigné]

Quelle part approximative de l'assistance que vous recevez consiste, d'un côté, en programmes pluriannuels, de l'autre, en manifestations ponctuelles?

Programmes pluriannuels : 80 pour cent ; manifestations ponctuelles : 20 pour cent.

Quelle part approximative des activités d'assistance dont vous bénéficiez se déroule sur votre territoire/à l'étranger?

Sur notre territoire : 70 pour cent ; à l'étranger : 30 pour cent.

Quelle part approximative de l'assistance que vous recevez représentent, d'un côté, les séminaires et conférences, de l'autre, l'envoi de conseillers résidents ou les stages effectués dans les pays fournisseurs d'assistance?

Séminaires et conférences : 50 pour cent ; conseillers résidents et stages : 50 pour cent.

3. Un manque apparent de coordination entre fournisseurs d'assistance a-t-il été pour vous cause de difficulté dans certaines circonstances? Veuillez expliciter votre point de vue. Veuillez également nous faire part des commentaires que vous pourriez avoir à formuler relativement aux avantages ou aux inconvénients que présenterait à vos yeux un renforcement de la coordination internationale des programmes d'assistance technique.

Non.

4. Quel est, selon vous, le principal besoin de votre économie en termes d'assistance dans le domaine du droit et de la politique de la concurrence à l'heure actuelle?

Elaboration d'une loi régissant la concurrence? Elaboration d'une législation dérivée/de règlements d'application?

Mise en œuvre des lois relatives à la concurrence?

Destinées à lutter contre l'abus de position dominante par les monopoles naturels?

Destinées à lutter contre l'abus de position dominante par les monopoles "non naturels"?

Destinées à lutter contre les ententes?

Destinées à lutter contre les fusions anti-concurrentielles?

- Compléter le cadre législatif dans le domaine des aides d'Etat et dans celui de la politique antitrust.
- Renforcer nos capacités sur le plan administratif.
- Garantir la bonne application des règles existantes en matière de lutte contre les monopoles et en matière d'aides d'Etat et, notamment, l'alignement des programmes d'aide incompatibles avec ces règles sur les principes qui régissent les aides d'Etat.

Si votre principal besoin a trait à la mise en œuvre de la législation, quelle serait, selon vous, la forme d'assistance la plus profitable (établissement de procédures, formation du personnel, autres)?

Intensification de la formation du personnel du Conseil de la concurrence et des membres de l'appareil judiciaire dans les domaines de la concurrence et des aides d'Etat.

5. Veuillez formuler toute observation ou apporter tout élément d'information qui vous paraîtrait utile.

THAÏLANDE

1. Il serait utile que vous puissiez compléter aussi précisément que possible le tableau ci-joint concernant l'assistance technique que votre autorité de la concurrence a reçu en 2000/2001 et qu'elle prévoit de recevoir en 2002. Toutefois, plus encore que ces données quantitatives, nous aimerions connaître votre point de vue sur les points évoqués ci-dessous.

Nous avons reçu une assistance technique de la Banque mondiale destinée à définir des lignes directrices en vue de l'élaboration d'une loi sur la concurrence en 1999. Ces lignes directrices s'avérant non conformes à la culture économique du pays, il a toutefois fallu procéder à des ajustements. Ce travail d'ajustement des lignes directrices initialement définies s'est effectué au travers de consultations entre le Ministère du commerce intérieur (MCI) et des universitaires spécialistes du domaine considéré.

Nous n'avons reçu d'assistance d'aucune autre source au cours de la période 2000/2001. Sur la base des ressources limitées dont il dispose, le MCI a adopté plusieurs projets dans le domaine du contrôle de la concurrence, tels que des conseillers (sic), une étude des pratiques d'autres pays en matière de lutte contre les comportements anti-concurrentiels visant à définir des lignes directrices relatives aux pratiques commerciales déloyales qui tombent sous le coup de la Loi relative à la concurrence (article 29) et une enquête sur les pratiques commerciales de secteurs d'activité soupçonnés d'avoir des comportements anti-concurrentiels.

Pour l'année 2002, nous avons le projet de confier à un professionnel un programme de formation visant à familiariser aussi largement que possible nos personnels avec les différents aspects de la concurrence.

2. D'après votre expérience :

Quelles sont les questions abordées dans le cadre de l'assistance technique qui ont été les plus utiles/les moins utiles, et pourquoi?

Les questions abordées présentent toutes un grand intérêt et une grande utilité pour nous, dans la mesure où ne faisons que commencer à nous pencher sur les questions de concurrence. Nous citerons toutefois en particulier l'assistance concernant l'action concertée de sociétés transnationales relativement à la fixation des prix de biens et de services et, plus spécifiquement, l'information concernant les ententes injustifiables qui nuisent aux intérêts des consommateurs dans de nombreux pays. C'est une question qui est régulièrement évoquée au cours des forums de négociation de l'OMC. Nous nous sommes en conséquence préparés pour la prochaine série de négociations sur ce point.

Quelles formes d'assistance (conférences, séminaires, conseillers, stages) ont été les plus utiles/les moins utiles, et pourquoi?

Les stages constituent pour nous la forme la plus importante et la plus utile d'assistance à l'heure actuelle : en effet, c'est pour nous le moyen d'apprendre par la pratique comment résoudre les problèmes concrets qui peuvent se poser en matière de lutte contre les comportements anticoncurrentiels. Viennent ensuite les conférences/séminaires et les conseillers.

Quels sont les avantages et les inconvénients respectifs de manifestations centrées sur un seul pays et de manifestations à caractère régional? La réponse est-elle fonction du thème traité? Veuillez expliciter votre point de vue.

Les manifestations centrées sur un seul pays sont bénéfiques dans la mesure où elles permettent d'examiner dans le détail les problèmes rencontrés par le pays concerné dans le domaine de la mise en œuvre du droit de la concurrence et les solutions qui peuvent y être apportées. Les manifestations à caractère régional offrent pour leur part la possibilité d'échanger sa propre expérience avec des pays de la même région en situation comparable et sont à cet égard riches d'enseignements. Cependant, l'intérêt relatif des deux types de manifestation dépend également du thème autour duquel celles-ci sont organisées et des contributions des participants.

En dehors de la connaissance du droit et de la politique de la concurrence, quelles sont les compétences et l'expérience que vous jugez importantes ou nécessaires chez un fournisseur d'assistance? A cet égard, comment classeriez-vous les quatre items suivants?

Expérience de travail au sein d'une autorité en charge de la concurrence?

Expérience de la fourniture d'assistance à des économies en développement ou en transition?

Connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde?

Connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire?

Veuillez trouver ci-dessous le classement par ordre d'importance des compétences et de l'expérience qu'un fournisseur d'assistance doit posséder.

1. Un fournisseur d'assistance doit posséder une expérience de travail au sein d'une autorité en charge de la concurrence. Grâce à cette expérience, il saura, le cas échéant, comment agir face à une pratique anticoncurrentielle donnée et sera en mesure de résoudre tout problème connexe qui viendrait à survenir dans la pratique.
2. La connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans notre pays est une nécessité pour un fournisseur d'assistance dans la mesure où cela doit lui permettre d'adapter ses connaissances et l'expérience qu'il possède à la situation qui est la nôtre.
3. Le fait d'avoir l'expérience de la fourniture d'assistance à des économies en développement ou en transition sera une chose bénéfique car le fournisseur d'assistance sera dès lors en mesure d'apprécier avec exactitude les problèmes qui se posent au pays bénéficiaire et d'adopter un moyen de résoudre ces problèmes qui soit adapté au pays.
4. La connaissance des régimes de droit et de politique de la concurrence existant dans différentes parties du monde sera également utile dans la mesure où nous ne vivons pas isolés et où l'ère de libéralisation des échanges dans laquelle nous nous trouvons nous oblige à prendre en compte les activités commerciales et les investissements de nombreux pays. Le fait de connaître les régimes de droit et de politique de la concurrence en vigueur dans ces pays constituera par conséquent un élément positif.

Quels sont les avantages et les inconvénients respectifs de recevoir une assistance de la part de fonctionnaires chargés de la concurrence en activité et de la part de consultants privés (cabinets de consultants, cabinets d'avocats, universitaires, etc.)? La réponse est-elle fonction du domaine abordé? Veuillez expliciter votre point de vue.

Le domaine dans lequel le bénéfice susceptible d'être retiré d'une assistance est pour nous le plus important est celui des méthodes d'investigation et d'identification applicables dans les cas de violation du droit de la concurrence telles que la vente par lots, la discrimination par les prix, les prix d'éviction, etc.

3. Un manque apparent de coordination entre fournisseurs d'assistance a-t-il été pour vous cause de difficulté dans certaines circonstances? Veuillez expliciter votre point de vue. Veuillez également nous faire part des commentaires que vous pourriez avoir à formuler relativement aux avantages ou aux inconvénients que présenterait à vos yeux un renforcement de la coordination internationale des programmes d'assistance technique.

Nous avons reçu il y a quelques années une assistance technique de la Banque mondiale destinée à nous aider à élaborer des lignes directrices pour la mise en œuvre de la Loi sur la concurrence récemment adoptée. Nous avons à cet égard été confrontés à un problème dû aux différences existant en matière de culture économique, de mode de vie, de la conception même de la loi, etc., différences qui ont été à l'origine du malentendu intervenu au moment de la rédaction des lignes directrices. L'assistance fournie doit être adaptée à la situation de la Thaïlande. Il convient en outre de souligner que les consultants ont toujours leur propre domaine de spécialité et qu'ils ne veulent pas fournir d'assistance en dehors de ce domaine. C'est là une des limites de l'assistance. Nous avons à cet égard été confrontés à un problème dû aux différences existant en matière de culture économique, de mode de vie, de la conception même de la loi, etc., différences qui ont été à l'origine du malentendu intervenu au moment de la rédaction des lignes directrices.

4. Quel est, selon vous, le principal besoin de votre économie en termes d'assistance dans le domaine du droit et de la politique de la concurrence à l'heure actuelle?

Elaboration d'une loi régissant la concurrence? Elaboration d'une législation dérivée/de règlements d'application?

Mise en œuvre des lois relatives à la concurrence?

Destinées à lutter contre l'abus de position dominante par les monopoles naturels?

Destinées à lutter contre l'abus de position dominante par les monopoles "non naturels"?

Destinées à lutter contre les ententes?

Destinées à lutter contre les fusions anti-concurrentielles?

Nous avons besoin d'une assistance en matière de mise en œuvre des lois relatives à la concurrence dans l'ensemble des domaines mentionnés ci-dessus.

Si votre principal besoin a trait à la mise en œuvre de la législation, quelle serait, selon vous, la forme d'assistance la plus profitable (établissement de procédures, formation du personnel, autres)?

Les stages constituent pour nous la forme d'assistance la plus profitable car ils permettent un apprentissage par la pratique.

5. Veuillez formuler toute observation ou apporter tout élément d'information qui vous paraîtrait utile.

La Thaïlande est un pays en développement, qui vient seulement de promulguer sa loi sur la concurrence. Nous avons par conséquent besoin de l'assistance d'autres pays sous toutes les formes possibles – assistance technique ou assistance financière – pour nous aider dans notre tâche de mise en œuvre de la loi. Nous estimons que la fourniture d'une assistance permettra d'accroître l'efficacité de ce travail de mise en œuvre.

TUNISIE

1. Il serait utile que vous puissiez compléter aussi précisément que possible le tableau ci-joint concernant l'assistance technique que votre autorité de la concurrence a reçu en 2000/2001 et qu'elle prévoit de recevoir en 2002. Toutefois, plus encore que ces données quantitatives, nous aimerions connaître votre point de vue sur les points évoqués ci-dessous.

2. D'après votre expérience :

Quelles sont les questions abordées dans le cadre de l'assistance technique qui ont été les plus utiles/les moins utiles, et pourquoi?

Développement et promotion de la culture de la concurrence. (Le pourquoi : Période de transition à une économie libérale.)

Moins utiles : Assistance pour la préparation des textes sur la concurrence.

Quelles formes d'assistance (conférences, séminaires, conseillers, stages) ont été les plus utiles/les moins utiles, et pourquoi?

Plus utiles : Conférences
Séminaires
Stages

Le pourquoi : Promouvoir la culture de la concurrence et tirer profit de l'expérience des autres autorités de la concurrence.

Moins utiles : Conseillers sur place

Le pourquoi : méconnaissance de l'environnement du pays ce qui nécessite une longue période d'adaptation outre les coûts très élevés à supporter.

Quels sont les avantages et les inconvénients respectifs de manifestations centrées sur un seul pays et de manifestations à caractère régional? La réponse est-elle fonction du thème traité? Veuillez expliciter votre point de vue.

Coopération à l'échelle d'un seul pays :

Avantages : échange d'expérience

Inconvénients : limitation aux seuls problèmes généraux (pas de réponse pour les cas particuliers du pays).

En dehors de la connaissance du droit et de la politique de la concurrence, quelles sont les compétences et l'expérience que vous jugez importantes ou nécessaires chez un fournisseur d'assistance? A cet égard, comment classeriez-vous les quatre items suivants?

Expérience de travail au sein d'une autorité en charge de la concurrence?

Expérience de la fourniture d'assistance à des économies en développement ou en transition?

Connaissance des systèmes de droit et de politique de la concurrence existant dans différentes parties du monde?

Connaissance approfondie des systèmes juridique, institutionnel et économique en vigueur dans le pays bénéficiaire?

- Expérience de l'apport d'une assistance à des économies en transition ou en développement .
- Expérience du travail dans des services officiels de la concurrence.
- Connaissance du droit et de la politique de la concurrence des différentes parties du monde.
- Connaissance précise du régime juridique du pays prestataire (sic) d'assistance.

Quels sont les avantages et les inconvénients respectifs de recevoir une assistance de la part de fonctionnaires chargés de la concurrence en activité et de la part de consultants privés (cabinets de consultants, cabinets d'avocats, universitaires, etc.)? La réponse est-elle fonction du domaine abordé? Veuillez expliciter votre point de vue.

Inconvénients : pas d'expérience pratique des consultants privés (défaut d'études de cas etc.)

Avantage de l'assistance d'autorités de concurrence : Outre l'expérience pratique, l'entretien d'une coopération continue qui permet l'échange d'idées et facilite la demande de renseignements.

Quelle part approximative de l'assistance que vous recevez consiste, d'un côté, en programmes pluriannuels, de l'autre, en manifestations ponctuelles?

Pourcentage d'assistance : 100 %
Programmes pluriannuels : 100 %

Quelle part approximative des activités d'assistance dont vous bénéficiez se déroule sur votre territoire/à l'étranger?

Pourcentage d'activités : 80 % à l'étranger
20 % en Tunisie

Quelle part approximative de l'assistance que vous recevez représentent, d'un côté, les séminaires et conférences, de l'autre, l'envoi de conseillers résidents ou les stages effectués dans les pays fournisseurs d'assistance?

Pourcentage de séminaires et de stages : 100%
Pourcentage de conseillers résidents : 100%
Stages dans d'autres économies étrangères : 100%

3. Un manque apparent de coordination entre fournisseurs d'assistance a-t-il été pour vous cause de difficulté dans certaines circonstances? Veuillez expliciter votre point de vue. Veuillez également nous faire part des commentaires que vous pourriez avoir à formuler relativement aux avantages ou aux inconvénients que présenterait à vos yeux un renforcement de la coordination internationale des programmes d'assistance technique.

Pas de problèmes.

4. Quel est, selon vous, le principal besoin de votre économie en termes d'assistance dans le domaine du droit et de la politique de la concurrence à l'heure actuelle?

Elaboration d'une loi régissant la concurrence? Elaboration d'une législation dérivée/de règlements d'application?

Mise en œuvre des lois relatives à la concurrence?

Destinées à lutter contre l'abus de position dominante par les monopoles naturels?

Destinées à lutter contre l'abus de position dominante par les monopoles "non naturels"?

Destinées à lutter contre les ententes?

Destinées à lutter contre les fusions anti-concurrentielles?

- Mise en œuvre de la loi de la concurrence contre les abus de la position dominante des monopoles « non naturels »
- Formation du personnel et promotion de la culture de la concurrence
- Continuation du programme de la coopération avec souhait :
- de l'étendre à des institutions de concurrence d'autres pays
- d'être assisté aux actions pour le développement de la culture de la concurrence.

Si votre principal besoin a trait à la mise en œuvre de la législation, quelle serait, selon vous, la forme d'assistance la plus profitable (établissement de procédures, formation du personnel, autres)?

5. Veuillez formuler toute observation ou apporter tout élément d'information qui vous paraîtrait utile.

ANNEXE B

ASSISTANCE TECHNIQUE DANS LE DOMAINE DE LA POLITIQUE DE LA CONCURRENCE REÇUE EN 2000-2001 PAR LES BÉNÉFICIAIRES ET PRÉVISIONS POUR 2002

Cette annexe regroupe les 9 tableaux retraçant l'assistance technique dans le domaine de la politique de la concurrence reçue en 2000-2001 et les prévisions pour 2002 qui ont été transmis à l'OCDE à la date du 31 janvier 2002 en réponse à son questionnaire, tableaux fournis par le Brésil, la Bulgarie, le Chili, l'Estonie, le Kenya, la Lituanie, la Roumanie, la Russie et la Tunisie.

BRÉSIL

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2000 juin	Mercosur : réunion du CT-5 ¹	Buenos Aires		Argentine		Fonctionnaires spécialistes de la concurrence en activité		
juin	Réunion de l'OMC	Genève		Suisse	OMC	Idem		OMC*
sept.	3 ^{ème} Séminaire nordique sur la politique de la concurrence – Lutte contre les ententes	Stockholm		Suède		Idem		
2001 nov.	Séminaire international sur les ententes	Brighton		RU	OCDE	Idem		OCDE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2001 nov.	Séminaire international de l'IBRAC sur le droit de la concurrence	Campos do Jordão		Brésil	IBRAC	Fonctionnaires spécialistes de la concurrence en activité/intervenants privés		IBRAC
déc.	Séminaire international sur l'industrie du gaz naturel : réglementation et concurrence	Porto Alegre	06-08	Brésil	OCDE/SDE	Idem		SDE
fév.	Atelier international avancé sur les ententes	New York	13-17	EU		Fonctionnaires spécialistes de la concurrence en activité		
mars	Cours sur le droit de la concurrence	Washington		EU		Idem		
avril	Conférence sur la politique de la concurrence dans les secteurs relatifs aux infrastructures	Washington	23-24	EU		Idem		
avril	Mercosur : réunion du CT-5	Asuncion	24-28	Paraguay		Fonctionnaires spécialistes de la concurrence en activité		

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Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2001 mai	Congrès international sur la défense économique et la défense des consommateurs	Brasilia		Brésil	SEAE/SDE	Fonctionnaires spécialistes de la concurrence en activité/intervenants privés		OECD / SEAE / SDE
mai	10ème Conférence internationale sur la concurrence	Berlin	18-25	Allemagne		Fonctionnaires spécialistes de la concurrence en activité		
mai	Réunion de l'OCDE sur la politique de la concurrence	Paris	28/05-01/06	France	OCDE	Idem		OCDE
juin	Mercosur : réunion du CT-5	Asuncion	12-15	Paraguay				
sept.	13ème réunion du Groupe de négociation sur la politique de la concurrence	Panama	03-08	Panama		Fonctionnaires spécialistes du domaine en activité		
sept.	OCDE : Comité DPC et Forum mondial sur la concurrence	Paris	13-21	France	OCDE	Idem		OCDE
oct.	Mercosur : réunion du CT-5	Montevideo	16-19	Uruguay		Idem		

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataire	Partenaires	FINANCEMENT
2001 nov	Séminaire international de l'IBRAC sur le droit de la concurrence	Foz Iguacu do	22-24	Brazil	<i>IBRAC</i>	Fonctionnaires spécialistes du domaine en activité/intervenants privés		<i>IBRAC</i>

BULGARIE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
février 2000	Séminaire de formation	Vienne, ICV	15 jours	Autriche	OCDE	Fonctionnaires spécialistes de la concurrence en activité	ICV	ICV / OCDE
février 2000	Séminaire de formation	Sofia	39 jours	Bulgarie	American Bar Association	Intervenants privés	American Bar Association	American Bar Association
mars 2000	Séminaire	Istanbul	5 jours	Turquie	Autorité turque de la concurrence	Fonctionnaires de la concurrence en activité	Autorité turque de la concurrence	Autorité turque de la concurrence
mars 2000	Séminaire	Bruxelles	4 jours	Belgique	CE	Intervenants privés	CE	Bureau d'information sur l'assistance technique (TAIEX) de la CE
avril 2000	Atelier	Rome	5 jours	Italie	CE	Idem	CE	Idem
avril 2000	Séminaire de formation	Sofia	3 jours	Bulgarie	Autorité suédoise de la concurrence	Idem	Autorité suédoise de la concurrence	Ministère suédois des affaires étrangères
mai 2000	Atelier	Bruxelles	5 jours	Belgique	CE	Idem	CE	Programme PHARE de la CE
juillet 2000	Séminaires de formation	Dublin	12 jours	Irlande	CE	Idem	CE	CE
août 2000	Formation	Paris	12 jours	France	Ambassade de France à Sofia	Idem	CE	Gouvernement français
août 2000	Visite de formation	Stockholm	8 jours	Suède	Ministère suédois des affaires étrangères	Fonctionnaires spécialistes de la concurrence en activité	Autorité suédoise de la concurrence	Ministère suédois des affaires étrangères

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Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
Septembre 2000	Formation	Bruxelles	129 jours	Belgique	CE	Fonctionnaires spécialistes de la concurrence	DG Concurrence	CE
Septembre 2000	Conférence	Bruxelles	4 jours	Belgique	CE	Intervenants privés	DG Concurrence	CE
Septembre 2000	Conférence	Stockholm	5 jours	Suède	Ministère suédois des affaires étrangères	Intervenants privés	Autorité suédoise de la concurrence	Ministère suédois des affaires étrangères
Septembre 2000	Conférence	Tallin	5 jours	Estonie	CE	Fonctionnaires spécialistes de la concurrence	CE	Bureau TAIEX de la CE
octobre 2000	Conférence	Berlin & Bonn	5 jours	Allemagne	CE	Idem	Bundeskartell-amt	Programme PHARE de la CE
octobre 2000	Séminaire	Skopje	4 jours	Macédoine	Fondation allemande pour la coopération juridique internationale, Pacte de stabilité	Idem	Cf. parrainage	Cf. parrainage
Décembre 2000	Séminaire	Sofia	4 jours	Bulgarie	Fondation allemande pour la coopération juridique internationale, Pacte de stabilité	Idem	Cf. parrainage	Cf. parrainage
janvier 2001	Séminaire de formation	Tokyo	30 jours	Japon	Agence japonaise de coopération internationale	Fonctionnaires spécialistes de la concurrence/ intervenants privés	Agence japonaise de coopération internationale	Agence japonaise de coopération internationale
janvier 2001	Sém. de formation	Sofia	1 jour	Bulgarie	American Bar Association	Fonctionnaires spécialistes de la concurrence (sic)	American Association Bar	American Bar Association
février 2001	Sém. de formation	Vienne, ICV	14 jours	Autriche	OCDE	Idem	ICV	ICV / OCDE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
mars 2001	Session commune	Bruxelles	7 jours	Belgique	CE	Fonctionnaires spécialistes de la concurrence	CE	Bureau TAIEX de la CE
avril 2001	Sém. de formation	Sofia	2 jours	Bulgarie	Programme Phare de l'UE	Intervenants privés	IBF International Consulting	Programme PHARE de la CE
mars 2001	Sém. de formation	Sofia	5 jours	Bulgarie	American Association Bar	Fonctionnaires spécialistes de la concurrence	American Bar Association	Bar Association
mai 2001	Formation	Bruxelles	94 jours	Belgique	CE	Idem	DG Concurrence	CE
mai 2001	Conférence	Berlin	6 jours	Allemagne	Fondation allemande pour la coopération juridique internationale	Idem	Bundes-kartellamt	Fondation allemande pour la coopération juridique internationale
juin 2001	Séminaire de formation	Sofia	19 jours	Bulgarie	Programme Phare de la CE	Intervenants privés	IBF International Consulting	Programme Phare de la CE
juin 2001	Conférence	Ljubljana	4 jours	Slovénie	CE	Fonctionnaires spécialistes de la concurrence	CE	Bureau TAIEX de la CE
juin 2001	Conférence	Ljubljana	1 jour	Slovénie	OCDE / Pacte de stabilité	Idem	Pacte de stabilité	OCDE / Pacte de stabilité
juin 2001	Atelier	Istanbul	5 jours	Turquie	Fondation turque pour la coopération internationale	Idem	Autorité turque de concurrence	Fondation turque pour la coopération internationale
juillet 2001	Formation	Budapest	21 jours	Hongrie	Université d'été d'Europe centrale	Intervenants privés	Cf. parrainage	Cf. parrainage
juillet 2001	Atelier	Bruxelles	8 jours	Belgique	CE	Idem	CE	CE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
juillet 2001	Séminaire de formation	Sofia	5 jours	Bulgarie	American Bar Association	Fonctionnaires spécialistes de la concurrence	American Bar Association	American Bar Association
août 2001	Séminaire de formation	Tokyo	30 jours	Japon	Agence japonaise de coopération internationale	Fonctionnaires spécialistes de la concurrence / intervenants privés	Cf. parrainage.	Cf. parrainage.
Septembre 2001	Conférence	Bucarest	2 days	Roumanie	OCDE / Pacte de stabilité	Fonctionnaires spécialistes de la concurrence	Pacte de stabilité	OCDE / Pacte de stabilité
Septembre 2001	Séminaire de formation	Sofia	12 jours	Bulgarie	Programme Phare de la CE	Intervenants privés	IBF International Consulting	Programme Phare de la CE
Septembre 2001	Séminaire de formation	Vienne, Institut commun de Vienne	99 jours	Autriche	Institut commun de Vienne	Intervenants privés	Institut commun de Vienne	Institut commun de Vienne
Octobre 2001	Forum mondial sur la concurrence	Paris	2 jours	France	OCDE	Fonctionnaires spécialistes de la concurrence / intervenants privés	OCDE	OCDE
Octobre 2001	Séminaire de formation	Sofia	4 jours	Bulgarie	Programme Phare de la CE	Intervenants privés	IBF International Consulting	Programme Phare de la CE
Novembre 2001	Séminaire de formation	Sofia	12 jours	Bulgarie	Idem	Idem	Idem	Idem
Novembre 2001	Séminaire de formation	Sofia	1 jour	Bulgarie	Idem	Consultant privé (sic)	Idem	Idem

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Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
Novembre 2001	Séminaire	Budapest	5 jours	Hongrie	USAID	Fonctionnaires spécialistes de la concurrence / intervenants privés	USAID	USAID
Novembre 2001	Atelier	Riga	3 jours	Lettonie	CE	Fonctionnaires spécialistes de la concurrence	CE	Bureau TAIEX de la CE
Novembre 2001	Atelier	Sofia	2 jours	Bulgarie	OCDE, Pacte de stabilité	Idem	OCDE/Pacte de stabilité	OCDE / Pacte de stabilité
Novembre 2001	Atelier	Istanbul	8 jours	Turquie	Agence turque de coopération internationale	Idem	Autorité turque de la concurrence	Agence turque de coopération internationale
Décembre 2001	Séminaire de formation	Sofia	2 jours	Bulgarie	Programme Phare de la CE	Intervenants privés	IBF International Consulting	Programme Phare de la CE
Décembre 2001	Séminaire de formation	Sofia	5 jours	Bulgarie	Idem	Idem	Idem	Idem
Décembre 2001	Séminaire de formation	Sofia	3 jours	Bulgarie	American Association Bar	Fonctionnaires spécialistes de la concurrence	Cf. parrainage.	Cf. parrainage.
2002	Séminaire de formation	Vienne, ICV	14 jours	Autriche	ICV / OCDE	Idem	ICV	ICV / OCDE
2002	Session commune	Bruxelles	7 jours	Belgique	CE	Idem	CE	Bureau TAIEX de la CE
2002	Conférence		4 jours	Lituanie	CE	Idem	CE	Idem
2002	Séminaire de formation	Sofia	3 days	Bulgaria	American Association Bar	Idem	Cf. parrainage	Cf. parrainage
2002	Formation	Membres de l'UE	30 jours	Etats membres de l'UE	PHARE	Idem	Autorités de la concurrence	Programme Phare de la CE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2002	Séminaire & conférence	Pays de la région	13 jours	Pays de la région (sic)	OCDE / Pacte de stabilité	Fonctionnaires spécialistes de la concurrence	Autorités de la concurrence	OCDE / Pacte de stabilité
2002	Forum mondial sur la concurrence	Paris	2 jours	France	OCDE	Fonctionnaires spécialistes de la concurrence / intervenants privés	OCDE	OCDE
2002	Atelier	Istanbul	8 jours	Turquie	Agence turque de coopération internationale	Fonctionnaires spécialistes de la concurrence	Autorité turque de la concurrence	Agence turque de coopération internationale

CHILI

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2001 / 11	Conférence	Ottawa	3 jours	Séminaire ouvert, Chili inclus	Bureau de la concurrence du Canada	Fonctionnaires spécialistes de la concurrence/universitaires		Sans objet
2001 / 10	Stage court	Santiago	5 jours	Costa Rica	F.N.E. / Commission de la concurrence du Costa Rica	Fonctionnaires spécialistes de la concurrence		Agences de la coopération du Costa Rica et du Chili
2001 / 8	Conférence	Rio de Janeiro	4 jours	Séminaire ouvert, Chili inclus	CADE (Brésil)	Fonctionnaires spécialistes de concurrence/avocats / universitaires		CADE
2001 / 4	Conférence	Washington D.C.	5 jours	Séminaire ouvert, Chili inclus	BID (IDB)	Fonctionnaires spécialistes de concurrence/universitaires / experts		Sans objet
2000 / 12	Conférence	Caracas	4 jours	Pays d'Amérique latine, Chili inclus	OCDE / Procompetencia (Venezuela)	Idem		OCDE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2000 / 11	Séminaire de formation	Lima	5 jours	Pays d'Amérique latine, Chili inclus	INDECOPI (Pérou)	Fonctionnaires spécialistes de la concurrence		Sans objet
2000 / 9	Conseiller résident : séjour court	San José, San Salvador	6 jours	Costa Rica / Salvador	F.N.E. / Commission de la concurrence du Costa Rica ; gouvernement du Salvador	Idem		Agence de coopération du Chili et FNE
2000 / 9-8	Conseiller résident : séjour court	San José	10 jours	Costa Rica	F.N.E. / Commission de la concurrence du Costa Rica	Idem		Idem
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2002 / 3	Stage court	Santiago	5 jours	Panama	FNE / Commission de la concurrence du Panama	Fonctionnaires spécialistes de la concurrence		Non confirmé
Non déterminé	Stage court	Santiago ou San José	5 jours	Costa Rica	FNE / Commission de la concurrence du Costa Rica	Idem		Non confirmé

ESTONIE

Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
20 mois	Estonie	PHARE / Direction générale de la concurrence, de la consommation et de la répression des fraudes, France	Fonctionnaires spécialistes de la concurrence en activité		PHARE
11 mois	Estonie	PHARE	Idem		PHARE
12 mois	Estonie	République de Finlande / Autorité finlandaise de la concurrence	Idem		République de Finlande / Autorité finlandaise de la concurrence
12 mois (prévision 2002)	Estonie	PHARE	Idem		PHARE

KENYA

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Parte- naires	FINAN- CEMENT
2001 février	Atelier	Cape Town (Afrique du Sud)	Deux jours	Pays africains	Afrique du Sud	Experts en matière de concurrence	Dept for Int'l Develop- ment (DFID), RU / OMC	Dept for Int'l Develop- ment (DFID), RU / OMC
2001 mars	Séminaire	Mombasa (Kenya)	Cinq jours	Agences en charge de la concurren- ce régionales	Kenya	Experts	CNUCED	Kenya et CNUCED
2001 octobre	Forum	Paris (France)	Deux jours	21 pays non membres de l'OCDE invités	OCDE	Conférence	-	OCDE
2002 février	Forum	Paris (France)	Deux jours	Pays non membres de l'OCDE invités	OCDE	Conférence	-	OCDE

LITUANIE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Parte- naires	FINAN- CEMENT
2000								
26/02 – 13/03	Séminaire	Vienne	14		OCDE			
08 – 09/06	Conférence	Lisbonne	2	Etats membres de l'UE et pays candidats à l'adhésion à l'UE	Portugal			
13 – 14/07	Conférence	Kiev	2	Pays de l'Europe centrale et orientale	Commission antimonopole de l'Ukraine, CNUCED, Commission européenne			
10 – 12/09	Conférence	Stockholm	2	Pays nordiques	Autorité suédoise de la concurrence			
25 – 27/09	Séminaire	Tallin	5	Pays candidats à l'UE	Commission européenne			
18/09 – 18/12	Formation	Bruxelles	90	Lituanie	Idem			
13 – 17/11	Congrès	Durban	5		Consumers International			
21 – 22/11	Atelier	Brighton	2	Etats membres de l'UE et pays candidats à l'adhésion à l'UE	Office pour la loyauté dans de commerce (Off. of Fair Trading), Angleterre			
2001								
06/12/2000 – 30/11/2001	Conseiller : séjour de longue durée (conseiller pré- adhésion)	Vilnius	230	Lituanie	Commission européenne	Anciens fonction- naires spécialistes de la concurrence		Jumelage PHARE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Parte- naires	FINAN- CEMENT
06/12/2000 – 30/11/2001	Consultation de courte durée (sic)	Vilnius	223	Lituanie	Commission européenne	Conseillers en matière de concurrènc		Jumelage PHARE
28/02 – 12/03	Séminaire	Vienne	14		OCDE			
05 – 09/03	Séminaire	Bruxelles	5	Pays candidats l'adhésion à l'UE	Commission européenne			
11 – 17/03	Séminaire	Bruxelles	5	Idem	Idem			
¾	Conférence	Séoul	1		Commission pour la loyauté dans le commerce de Corée			
20 – 22/05	Conférence	Berlin	3		Bundeskartellamt			
15 – 19/06	Conférence	Ljubljana	4	Pays candidats l'adhésion à l'UE	Commission européenne			
04/06	Séminaire	Paris	1	Pays de l'OCDE	OCDE			
25/06 – 07/07	Formation	Potsdam	14	Lituanie	Commission européenne			
28/07 – 21/10	Formation	Bonn	90	Lituanie	Idem			
31/08 – 30/11	Formation	Paris	90	Lituanie	OCDE			
10 – 21/09	Formation	Potsdam	11	Lituanie	Commission européenne			
16 – 18/10	Forum	Paris	3	Pays de l'OCDE	OCDE			
24 – 26/10	Séminaire	Tallin	2	Pays baltes et Fédération de Russie	Idem			
25 – 26/10	Visite d'étude	Lisbonne		Lituanie	Commission européenne			
08 – 09/11	Séminaire	Riga	2	Pays candidats l'adhésion à l'UE	Idem			
11 – 18/11	Formation	Stockholm	5	Lituanie	Idem			
15 – 21/11	Formation	Bonn	5	Lituanie	Commission européenne			
24 – 25/11	Conférence	Ottawa	2		Bureau de la concurrence du Canada			

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Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Parte- naires	FINAN- CEMENT
01 – 05/12	Visite d'étude	Lisbonne	5	Pays candidats l'adhésion à l'UE	Commission européenne			
01 – 08/12	Séminaire	Londres	8	Idem	Ministère des affaires étrangères et du Commonwealth du RU			
2002								
04 – 15/03	Séminaire	Vienne	14		OCDE			
15 – 18/06	Conférence	Vilnius	4	Pays candidats l'adhésion à l'UE	Commission européenne			

ROUMANIE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/ Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2000	Consultation, séminaires	Conseil de la concurrence	10 mois	Roumanie	Commission féd. du Commerce (FTC), EU	Conseillers résidents	Conseil de la concurrence	USAID
2001	Consultation, séminaires	Idem	6 mois	Roumanie	FTC, Etats-Unis	Idem	Idem	USAID
2001	Stage de formation	de Bruxelles	5 jours	Roumanie	Commission européenne	Fonctionnaires spécialistes de la concurrence		Bureau d'information sur l'assistance technique (TAIEX)
2001	Stage de formation	de Bruxelles	5 jours	Roumanie	Idem	Idem		TAIEX
2000 (sic)	Séminaire	Vienne	10 jours	Roumanie	OCDE	Idem		OCDE
2001	Séminaire	Vienne	10 jours	Roumanie	Idem	Idem		Idem
2001	Séminaire	Trèves, Allemagne	2 jours	Roumanie	Académie de droit européen	Universitaires		Académie de droit européen
2001	Stage de formation	de Idem	5 jours	Roumanie	Idem	Idem		Idem
2001	Séminaire	Bruxelles	5 jours	Roumanie	Commission européenne	Fonctionnaires spécialistes de la		Commission européenne

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	conconcurrence	Prestataires d'assistance	Partenaires	FINANCEMENT ENT
2001	Visite d'étude	Rome, Italie	5 jours	Roumanie	Autorità, Italie	Fonctionnaires spécialistes de la concurrence	Conseil de la concurrence	la Programme Phare	Idem
2001	Visite d'étude	Trèves, Bonn, Luxembourg, Bruxelles	12 days	Roumanie	Ministère des finances, Allemagne	Idem	Idem	Idem	Idem
2001-2002	Séminaires, visites d'étude, élaboration d'une législation	Conseil de la concurrence	17 mois	Roumanie	Ministère des finances, Allemagne ; Autorità, Italie	Conseillers : séjours de courte et de moyenne durée	Idem	Idem	Idem

RUSSIE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2001 février	Première Conférence sur la réforme de la réglementation	Singapour	2 jours	Fédération de Russie, pays membres de l'APEC/de l'OCDE	APEC, OCDE	Fonctionnaires spécialistes de la concurrence, avocats, universitaires		APEC, OCDE
2001 février/mars	Séminaire sur la politique de la concurrence	Vienne, Autriche	14 jours	Fédération de Russie, économies en transition	FMI, Institut de Vienne, Banque mondiale	Idem	OCDE, Institut de développement économique	FMI
2001 mars	Séminaire sur la politique de la concurrence	Bangkok, Thaïlande	3 jours	Fédération de Russie, pays membres de l'APEC	APEC, gouvernement du Royaume de Thaïlande	Idem		APEC
2001 mars	Consultations dans le domaine de la concurrence et de la réforme de la régl. dans le domaine des télécommunications	Moscou, Fédération de Russie	2 jours	Fédération de Russie	OCDE	Fonctionnaires spécialistes de la concurrence	Ministère russe de la politique antimonopole (MPA)	OCDE
2001 mars	Consultations sur le projet de loi "relatif aux aides d'Etat"	Bruxelles, Belgique	2 jours	Idem	Commission européenne	Idem		TACIS
2001 avril	Séminaire "Abus de position dominante"	Volgograd, Fédération de Russie	3 jours	Idem	OCDE, USAID	Idem	MPA ; FTC/DOJ Etats-Unis	USAID

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Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2001 mai	Séminaires "Pratiques constitutives d'une entente"	Novgorod, Fédération de Russie	3 jours	Fédération de Russie	OCDE, USAID	Fonctionnaires spécialistes de la concurrence	MPA ; FTC/DOJ, Etats-Unis	USAID
2001 mai	Conférence internationale sur les questions relatives à la politique de la concurrence	Berlin, Allemagne	2 jours	Idem	Bundeskartellamt	Fonctionnaires spécialistes de la concurrence, avocats, universitaires		Bundeskartellamt
2001 mai	Consultations sur la pol. de la concurrence et sur la réforme de la régl. dans le domaine de l'électricité	Moscou, Fédération de Russie	2 jours	Fédération de Russie	OCDE	Fonctionnaires spécialistes de la concurrence	MPA	OCDE
2001 mai	Consultations sur le projet de loi "relatif aux aides d'Etat"	Paris, France	4 jours	Idem	Commission européenne	Idem		TACIS
2001 juin	Séminaire "Concentration économique"	Nijni Novgorod, Fédération de Russie	3 jours	Idem	OCDE, USAID	Idem	MPA, FTC/DOJ, Etats-Unis	USAID
2001 juin	XIII ^{ème} Session de l'Interstate Antimonopoly Council des pays de la CEI	Moscou, Fédération de Russie	2 jours	Fédération de Russie, pays de la CEI	MPA, CNUCED	Idem		CNUCED
2001 juillet	Conférence internationale "Politique de la concurrence"	Séoul, Corée	4 jours	Fédération de Russie, pays membres de l'APEC/de l'OCDE	Commission pour la loyauté dans le commerce de Corée	Fonctionnaires spécialistes de la concurrence, avocats, universitaires		APEC
2001 septembre	Formation "Réforme de la fiscalité"	Madrid, Espagne	5 jours	Fédération de Russie	Commission européenne	Fonctionnaires spécialistes de la concurrence		TACIS

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2001 septembre	Séminaire "Monopoles naturels"	Novorossiisk, Fédération de Russie	2 jours	Fédération de Russie	DGCCRF, France	Fonctionnaires spécialistes de la concurrence	MPA	DGCCRF, France
2001 septembre	XIV ^{ème} Session de l'Interstate Antimonopoly Council des pays de la CEI	Astana, République Kazakhstan	1 jour	Fédération de Russie, pays de la CEI	Autorité antimonopole kazakhe, CNUCED, MPA	Idem		CNUCED, Autorité antimonopole kazakhe
2001 septembre	Conférence internationale "10ème Anniversaire de l'autorité antimonopole kirghize"	Bishkek, République Kirgizstan	1 jour	Idem	Autorité antimonopole kirghize, MPA, CNUCED	Idem		Autorité antimonopole kirghize, CNUCED
2001 septembre	Séminaire "Initiative de coopération en matière de réforme de la réglementation"	Pékin, Chine	2 jours	Fédération de Russie, pays Membres de l'APEC/de l'OCDE	APEC, OCDE	Fonctionnaires spécialistes de la concurrence, avocats, universitaires		APEC
2001 septembre	Consultations sur la pol. de la concurrence et sur la réforme de la régl. dans le domaine du gaz	Moscou, Fédération de Russie	2 jours	Fédération de Russie	OCDE	Fonctionnaires spécialistes de la concurrence	MPA	OCDE
2001 octobre	Séminaire sur la politique de la concurrence	Idem	3 jours	Idem	Autorità, Italie	Idem	MPA	Ministère du commerce et de l'industrie, Italie
2001 octobre	Conférence sur la concurrence "Définition des frontières du marché"	Helsinki, Finlande	2 jours	Fédération de Russie, pays baltes	Conseil des Etats nordiques	Fonctionnaires spécialistes de la concurrence, avocats, universitaires		Conseil des Etats nordiques

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Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRE	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2001 octobre	Séminaire sur le contrôle des fusions	Tallin, Estonie	3 jours	Fédération de Russie, pays baltes	OCDE	Fonctionnaires spécialistes de la concurrence		OCDE
2001 octobre	Conférence annuelle : Fordham Law Institute	New York, EU	3 jours	Fédération de Russie, membres de l'OCDE	Fordham Law Institute	Fonctionnaires spécialistes de la concurrence, avocats, universitaires		Fordham Law Institute
2001 novembre	Forum mondial sur la gouvernance	Paris, France	4 jours	Idem	OCDE	Idem		OCDE
2001 novembre	Formation "Organisation et pratique du contrôle des aides d'Etat dans le secteur de la métallurgie des métaux ferreux"	Paris, France	5 jours	Fédération de Russie	Commission européenne	Idem		TACIS
2001 novembre	Formation sur les questions touchant à l'OMC	Paris, France	5 jours	Idem	DGCCRF, France	Idem		DGCCRF, France
2001 novembre	Forum mondial sur l'investissement international	Mexico, Mexique	2 jours	Fédération de Russie, membres de l'OCDE	OCDE, gouvernement mexicain	Idem		OCDE
2001 décembre	Formation sur la politique de la concurrence	Rome, Italie	5 jours	Fédération de Russie	Autorità, Italie	Fonctionnaires spécialistes de la concurrence	Ministère du commerce et de l'industrie, Italie	Ministère du commerce et de l'industrie, l'industrie, Italie

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRE	Organisation/Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT
2001 décembre	Consultations de courte durée sur la politique de la concurrence, avec la participation d'arbitres	Moscou, Fédération de Russie	5 jours	Fédération de Russie	OCDE	Fonctionnaires spécialistes de la concurrence	MPA	OCDE

Prévisions en matière d'assistance technique dans le domaine de la politique de la concurrence pour 2002

OCDE Coopération s'inscrivant dans le cadre des objectifs du Programme de coopération entre la Fédération de Russie et l'OCDE pour 2002 : politique de la concurrence ; réforme de la réglementation.

TACIS Projet TACIS "Politique antimonopole et aides d'Etat"

USAID Dispositions bilatérales

APEC Coopération s'inscrivant dans le cadre du Plan de travail de l'APEC

TUNISIE

Année/Mois	Activité	Lieu	Durée	PAYS BÉNÉFICIAIRES	Organisation / Parrainage	Prestataires d'assistance	Partenaires	FINANCEMENT ENT
14-3-01	Atelier; formation	Paris	6 jours	Tunisie	DGCCRF	DGCCRF		ADETEF
2-5-01	Atelier	Paris	1 jour	Tunisie	DGCCRF	DGCCRF		Ministère du commerce (Tunisie)
1-10-01	Atelier; formation	Paris	6 jours	Tunisie	DGCCRF	DGCCRF		ADETEF

2002: Un programme de coopération avec la France est en cours de négociation.

NOTES

1. Estonie, Israël, Kenya, Lettonie, Lituanie, Russie et Roumanie.
2. Ont répondu au questionnaire le Brésil, le Chili, l'Estonie, l'Indonésie, le Kenya, la Lituanie, la Roumanie, la Thaïlande et la Tunisie ; les réponses de ces pays sont regroupées dans les annexes. La Côte-d'Ivoire et la Lettonie ont également fourni une réponse ; celle-ci est examinée dans le corps de la présente note mais ne figure pas dans les annexes.
3. La contribution soumise par M. Ilya Yuzhanov, Ministre russe de la politique antimonopole et du soutien de l'esprit d'entreprise, souligne qu'"[i]l est parfois difficile de déterminer la nature des relations dans lesquelles on est engagé – coopération internationale ou assistance technique". Experience of, and needs for, capacity building and technical assistance : allocution de M. Ilya Yuzhanov, Ministre, Ministère russe de la politique antimonopole et du soutien de l'esprit d'entreprise, devant le Forum mondial de l'OCDE sur la concurrence; 14 février 2002.

Pour en savoir plus sur la coopération en matière de mise en œuvre de la législation, en tant que forme d'assistance technique, cf. Brazilian Actual Experiences in International Co-operation in Cartel Cases : contribution du Brésil au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
4. Questionnaire : contribution de la Thaïlande au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
5. Experience of, and needs for, capacity building and technical assistance : contribution du Chili au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
6. Experience of, and needs for, capacity building and technical assistance : contribution du Chili au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
7. La troisième Rencontre thématique de l'Initiative régionale phare dans le domaine du droit et de la politique de la concurrence pour l'Europe du Sud-Est organisée par l'OCDE à Belgrade (République fédérale de Yougoslavie) en mars 2002 inclura une séance d'une demie-journée ouverte aux responsables politiques locaux, à la presse et au public.
8. Experiences of, and needs for, capacity building and technical assistance : contribution d'Israël au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
9. Experiences of, and needs for, capacity building and technical assistance : contribution d'Israël au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
10. Experiences of, and needs for, capacity building and technical assistance : contribution de la Lituanie au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
11. Selon la Fédération de Russie, les programmes d'assistance qui font intervenir différents aspects de la mise en œuvre des lois relatives à la concurrence et de la politique de la concurrence sont particulièrement utiles, dans la mesure où ils "permettent aux autorités en charge de la concurrence des bénéficiaires d'organiser un certain nombre d'activités en parallèle, comme, par exemple, l'étude des nouvelles tendances de la politique antitrust dans les autres pays, la discussion des modifications à apporter à la législation, l'examen conjoint et la discussion des dossiers les plus importants, etc.". La Russie met également en avant la flexibilité et l'utilité de "consultations juridiques ad hoc de type opérationnel portant sur les projets de loi, la méthodologie à employer et autres documents ou propositions normatifs", comme celles dont elle a

bénéficié de la part de l'OCDE et de l'UE. ". Experience of, and needs for, capacity building and technical assistance : allocution de M. Ilya Yuzhanov, Ministre, Ministère russe de la politique antimonopole et du soutien de l'esprit d'entreprise, devant le Forum mondial de l'OCDE sur la concurrence; 14 février 2002.

12. Experience of, and needs for, capacity building and technical assistance : contribution du Chili au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
13. Ainsi, par exemple, le Séminaire sur les thèmes intéressant la politique de la concurrence organisé tous les ans à Vienne par l'OCDE permet aux responsables du contrôle de la concurrence des Etats baltes, de la Communauté des Etats indépendants et des pays du sud-est de l'Europe de se réunir. Le séminaire sur la politique de la concurrence organisé chaque année dans le cadre du Programme régional pour les pays baltes de l'OCDE, ainsi que les réunions de l'Initiative régionale phare dans le domaine du droit et de la politique de la concurrence organisées par l'OCDE et ses partenaires dans le cadre du Pacte de stabilité pour l'Europe du Sud-Est et les séminaires conjoints OCDE-Afrique du Sud organisés pour la Communauté du Développement de l'Afrique australe constituent également une occasion particulièrement favorable à la tenue de réunions à caractère régional.
14. Answers to OECD Questionnaire on Technical Assistance Experiences and Needs : contribution du Brésil au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
15. Experience of, and needs for, capacity building and technical assistance : contribution de la Lituanie au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
16. Questionnaire : contribution de la Thaïlande au Forum mondial de l'OCDE sur la concurrence, 14-15 février 2002.
17. Experience of, and needs for, capacity building and technical assistance : allocution de M. Ilya Yuzhanov, Ministre, Ministère russe de la politique antimonopole et du soutien de l'esprit d'entreprise, devant le Forum mondial de l'OCDE sur la concurrence; 14 février 2002.
18. Experience of, and needs for, capacity building and technical assistance : allocution de M. Ilya Yuzhanov, Ministre, Ministère russe de la politique antimonopole et du soutien de l'esprit d'entreprise, devant le Forum mondial de l'OCDE sur la concurrence; 14 février 2002.



**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

Annule & remplace le même document du 17 juin 2002

Forum mondial de l'OCDE sur la concurrence

COOPERATION INTERNATIONALE DANS LES ENQUETES SUR LES FUSIONS

**RESUME DES REPONSES AU QUESTIONNAIRE SOUMIS AUX INVITES
ET PROPOSITIONS DE QUESTIONS A EXAMINER**

-- Note du Secrétariat, Session IV --

Ce document a été soumis POUR DISCUSSION au cours de la Séance IV du Forum mondial sur la concurrence, qui s'est tenue les 14-15 février 2002.

COOPERATION INTERNATIONALE DANS LES ENQUETES SUR LES FUSIONS

RESUME DES REPONSES AU QUESTIONNAIRE SOUMIS AUX INVITES ET PROPOSITIONS DE QUESTIONS A EXAMINER

1. La présente note résume les réponses à un questionnaire adressé aux pays invités et observateurs sur la coopération internationale dans les enquêtes sur les fusions et les ententes, puis analyse brièvement les réponses relatives aux fusions et propose des questions à examiner sur ce sujet. Le questionnaire est joint en annexe.

Le questionnaire

1. Le questionnaire se présentait en trois parties. Dans la première partie étaient demandées
 - des copies de tous les accords de coopération internationale auxquels le pays répondant était partie ;
 - une description des lois ou réglementations des pays répondants touchant à la capacité de l'organisme chargé de la concurrence d'échanger des renseignements ou de coopérer avec un homologue étranger.

2. La deuxième partie contenait les mêmes questions que celles posées aux pays Membres dans un questionnaire séparé sur la coopération dans les enquêtes sur les ententes. Ces réponses sont décrites dans la note relative au point V du programme du Forum mondial, CCNM/GF/COMP(2002)3. La troisième partie du questionnaire avait trait à la coopération internationale dans les enquêtes sur les fusions. Il y était demandé, pour la période allant du 1er janvier 2000 à aujourd'hui, les renseignements suivants :
 - l'identification de chaque fusion examinée par le répondant qui a été, à sa connaissance, examinée également par l'organisme chargé de la concurrence d'un autre pays ;
 - des renseignements sur chaque enquête ou procédure engagée au sujet d'une fusion et au cours de laquelle l'organisme chargé de la concurrence répondant au questionnaire a communiqué avec un homologue étranger, notamment : l'identité des parties à la fusion et l'organisme étranger avec lequel il y a eu communication, une description des communications, la question de savoir les parties à la fusion sont convenues d'une dérogation concernant l'échange de renseignements confidentiels, et l'effet des communications sur l'enquête ou la procédure engagée par le répondant ;
 - l'identification et la description de toute enquête ou procédure concernant une fusion au cours de laquelle l'organisme répondant a demandé soit une assistance à un homologue étranger soit une dérogation aux règles de confidentialité aux parties ;
 - l'identification des enquêtes ou procédures concernant une fusion au cours desquelles la coopération aurait été utile mais n'a pas eu lieu parce que l'organisme savait qu'elle n'était pas possible.

Description des réponses

3. Douze pays observateurs et invités ont répondu au questionnaire : Brésil, Bulgarie, Chili, Estonie, Israël, Kenya, Indonésie, Lituanie, Roumanie, Fédération de Russie, Taipei chinois et Tunisie.

Accords de coopération internationale

4. Plusieurs pays observateurs et invités sont parties à un ou plusieurs accords de coopération internationale. Le Brsil a des accords avec la Fédération de Russie et les Etats-Unis. La Bulgarie a signé des accords de coopération avec la Macédoine, la Roumanie et la Fédération de Russie. Le Chili a récemment conclu un accord avec le Canada. Israël et les Etats-Unis sont parties à un accord. La Lituanie est partie à des accords bilatéraux avec l'Estonie, la Lettonie, la Pologne et l'Ukraine. La Roumanie a indiqué avoir des accords de coopération avec le Bélarus, la Bulgarie, la République tchèque, la Géorgie et la Fédération de Russie. La Fédération de Russie a mentionné des accords bilatéraux avec la Finlande, la Corée, l'Italie, la France, la République slovaque, la Roumanie, la République tchèque et la Hongrie. Elle a aussi noté que, dans le cadre de la Communauté des Etats indépendants, il existe un traité de coopération internationale en matière d'application du droit de la concurrence. Le Taipei chinois a des accords avec l'Australie et la Nouvelle-Zélande.

Lois touchant à la capacité d'échanger des renseignements et de coopérer

5. Tous les pays n'ont pas répondu à cette question de la même manière. Beaucoup n'ont pas cherché à déterminer comment leurs lois limitant l'utilisation de renseignements confidentiels affectent leur capacité de coopérer avec des organismes étrangers chargés de la concurrence. Ainsi, le Brsil a-t-il déclaré que "la législation antitrust brésilienne ne limite pas notablement notre capacité de coopérer." La Bulgarie a mentionné son Accord européen avec les Communautés européennes et les règles de mise en œuvre de cet accord. Le Chili a indiqué que son organisme chargé de la concurrence, le FNE, était habilité à signer des accords et à prendre d'autres engagements avec des organismes étrangers en matière de coopération internationale. Le FNE peut classer des renseignements spécifiques comme confidentiels, mais en général ses enquêtes sont publiques et les parties y ont pleinement accès sauf si ces renseignements sont déclarés réservés, auquel cas certaines notifications et autorisations sont requises.

6. Israël a indiqué que son organisme chargé de la concurrence, l'IAA, est considéré comme étant "généralement habilité à échanger des renseignements et à coopérer avec des homologues étrangers dans la mesure qui est jugée nécessaire pour lui permettre de remplir ses tâches ordinaires." L'IAA peut conclure des accords de coopération bilatérale, comme celui qui le lie aux Etats-Unis. Il est intéressant de noter que la Loi israélienne sur l'assistance juridique internationale prévoit une vaste coopération avec d'autres pays et organisations, tant dans les affaires civiles que dans les affaires pénales, et n'exige pas que l'entité étrangère soit partie à un traité de coopération particulier. Les domaines de coopération autorisés sont la production de documents, le recueil de preuves, les perquisitions et saisies, les enquêtes, la communication d'informations, la vérification de documents, la confiscation de biens et autres actions juridiques.

7. L'organisme kenyan chargé de la concurrence ne peut pas conclure lui-même un accord de coopération. Seul le Secrétaire permanent du Ministère des finances et de la planification peut le faire. Les Taipei chinois a fourni des extraits de plusieurs de ses lois -- le Code pénal, la Loi sur le secret des affaires, la Loi de procédure administrative et la Loi sur la loyauté des échanges -- qui, à elles toutes, interdisent strictement la divulgation non autorisée de secrets industriels et commerciaux ou professionnels ou d'autres renseignements confidentiels relatifs à des affaires administratives ou publiques.

Identification des fusions examinées également par un autre organisme chargé de la concurrence

8. Tous les pays n'ont pas donné de réponses précises à cette question, car les organismes chargés de la concurrence ne savent pas toujours qu'une transaction donnée peut faire l'objet d'une investigation ailleurs. Parmi les pays répondants, sept ont indiqué avoir enquêté sur une ou plusieurs fusions au cours de la période considérée (2000 et 2001) qui, à leur connaissance, étaient aussi examinées par d'autres pays : Brésil, Bulgarie, Chili, Israël, Lituanie, Taipei chinois et Tunisie. Certains pays ont cité plusieurs fusions, notamment la Bulgarie (9), Israël (20) et le Taipei chinois (9). La Lituanie a mentionné cinq transactions, le Chili trois et la Tunisie deux. Parmi les fusions citées dans ces réponses, certaines sont des fusions bien connues touchant plusieurs pays, comme GE/Honeywell, Citicorp/Traveller Group, Chevron/Texaco, Exxon/Mobil, Glaxo Wellcome/Smith Kline Beecham, Nestlé/Ralston Purina, Coca-Cola/Cadbury Schweppes, Swissair/Sabena, El Fi SA/Moulinex, Dow Chemical/Union Carbide et Philip Morris/Nabisco.

Coopération dans les enquêtes sur les fusions

9. Cinq pays ont déclaré avoir communiqué avec un organisme chargé de la concurrence d'un autre pays au sujet d'une fusion, mais aucun n'a cité plus de deux opérations de ce genre. Le Brésil a répondu à la question de façon générale, indiquant qu'il avait eu des échanges utiles avec d'autres pays au sujet de la définition du marché, des effets de la fusion sur la concurrence et des mesures correctrices. Israël a déclaré avoir eu des communications informelles avec les Etats-Unis et avec la CE au sujet de la fusion Dow Chemical/Union Carbide, sur laquelle les trois pays ont enquêté. Ces échanges ont été de nature générale, entre membres du personnel, et ont porté sur des considérations relatives à l'action des pouvoirs publics et sur les effets potentiels sur la concurrence. Ils se sont révélés utiles pour l'IAA.

10. La Lituanie a décrit une coopération dans deux affaires. L'une portait sur la fusion entre les brasseries Carlsberg et Orkla, qui a touché plusieurs marchés, notamment le Danemark, la Finlande, la Norvège, la Suède et d'autres, ainsi que la Lituanie. Le Conseil lituanien de la concurrence a eu des communications avec l'Autorité suédoise chargée de la concurrence, ce qui lui a permis d'échanger des informations générales sur la définition du marché et les mesures correctrices. Ces échanges ont toutefois été limités pour des raisons de confidentialité. La seconde affaire portait sur la fusion bancaire SEB/FSB, en Suède, qui a été examinée par la DGCOMP. La fusion, qui a finalement été abandonnée par les deux parties, risquait d'avoir des effets anticoncurrentiels en Lituanie et en Estonie, ainsi qu'en Suède. Le Conseil lituanien de la concurrence a consulté à la fois la Suède et la DGCOMP au cours de la période précédent l'abandon du projet de fusion.

11. La Roumanie a décrit une affaire intéressante de fusion entre deux entreprises roumaines de ciment, contrôlées respectivement par une entreprise hongroise et une entreprise allemande. Le Conseil roumain de la concurrence a engagé des discussions avec l'Office hongrois pour la protection de la concurrence au sujet du marché du ciment en Hongrie, et cela s'est révélé utile pour l'organisme roumain, qui a imposé certaines conditions à l'entreprise absorbante. La Fédération de Russie n'a décrit qu'une tentative de coopération qui a été refusée. L'Office territorial de Rostov, du Ministère de la politique antimonopoles, enquêtait sur une fusion dans le secteur de la métallurgie, et il a demandé des renseignements à l'Office régional de Donetsk, du Comité antimonopoles ukrainien, au sujet des participations ukrainiennes dans l'une des parties. L'Ukraine a rejeté la demande, indiquant que les informations demandées étaient confidentielles au regard de sa législation et ne pouvaient être divulguées.

Aucune tentative de coopération

12. Il a été demandé aux autorités chargées de la concurrence de décrire les cas dans lesquels une enquête sur une fusion aurait été facilitée par la coopération internationale mais où il n'y a pas eu de

tentative de coopération car l'Autorité savait qu'elle serait refusée, et d'évaluer les conséquences pour l'enquête de l'absence de coopération. Aucun pays n'a répondu précisément à cette question.

Analyse et questions pouvant être examinées

13. Il serait utile, tout d'abord, d'examiner les enseignements tirés des débats menés par le Groupe de travail N° 3, lors de la table ronde sur la coopération internationale dans les affaires de fusion le 29 mai 2001. La table ronde a révélé que, parmi les pays Membres, les échanges de renseignements et les discussions informelles entre organismes nationaux chargés de la concurrence se multiplient au sujet des fusions faisant l'objet d'enquêtes dans plusieurs pays. (Les documents issus des débats de la table ronde ont été fournis pour la réunion d'octobre du Forum mondial. Voir CCNM/GF/COMP/WD(2001)1). Les Autorités chargées de la concurrence se consultent aussi de plus en plus souvent les unes les autres au sujet de questions générales qui se posent dans le cadre des enquêtes sur les fusions. Par exemple, un organisme menant une enquête sur une fusion dans un secteur donné peut demander de façon informelle à son homologue d'un autre pays de lui faire part des expériences qu'il a acquises dans ses enquêtes dans ce secteur.

14. Le débat a révélé que la forme la plus efficace de coopération dans les enquêtes sur les fusions est l'organisation d'échanges fréquents et informels, y compris des communications directes entre les enquêteurs ainsi qu'entre leurs autorités de tutelle. Cette méthode de coopération nécessite un certain degré de confiance entre les organismes. La mise en place de cette relation peut demander du temps et de l'expérience. La coopération n'est donc pas universelle entre les pays Membres. Elle se produit le plus souvent entre pays qui ont certaines choses en commun : proximité géographique (mais cela n'est pas toujours vrai), liens commerciaux étroits, même passé de fusions, accord de coopération dans le domaine de la concurrence. On peut citer comme exemples actuels de solides relations de coopération : Canada -- Etats-Unis, Commission européenne -- Etats-Unis, pays nordiques, Australie -- Nouvelle-Zélande, et coopération entre divers Etats membres de l'UE.

15. L'efficacité de la coopération dans les enquêtes sur les fusions dépend souvent d'un autre facteur : la volonté des parties à la fusion d'accorder des dérogations aux règles de protection des renseignements confidentiels, autorisant les autorités chargées du respect du droit de la concurrence d'échanger des informations confidentielles et de discuter et d'analyser ces informations. Les parties accordent généralement des dérogations permettant la divulgation d'informations uniquement aux pays qui sont réputés pour avoir des pratiques saines et loyales de contrôle des fusions et de protection des renseignements confidentiels. Les pays qui ne s'intéressent que depuis peu au contrôle des fusions et qui n'ont pas encore acquis cette réputation ont moins de chances d'obtenir la coopération d'autres organismes chargés de la concurrence.

16. Les réponses des observateurs et des invités au questionnaire confirment que les pays du monde en sont à des stades différents de développement de leur politique de la concurrence. Certains, bien entendu, n'ont pas encore de droit de la concurrence : dans d'autres, la législation en matière de concurrence est toute récente. Certains pays ont mis en place des systèmes imposants de contrôle des fusions ; d'autres, en particulier ceux dont la législation en matière de concurrence est récente, ne sont guère avancés dans ce domaine ou n'ont encore rien fait. Les réponses montrent que presque tous les pays observateurs ou invités qui ont une politique active de la concurrence ont conclu des accords de coopération avec un ou plusieurs autres. De fait, dans ce groupe de pays, le nombre de ces accords est comparable à celui des accords entre pays Membres. Comme les pays Membres, les pays observateurs et invité concluent généralement des accords avec ceux qui sont géographiquement proches et/ou qui ont des liens commerciaux étroits avec eux. Les réponses relatives à la protection des renseignements confidentiels n'ont pas été suffisantes pour permettre des généralisations au sujet des législations des pays observateurs

et invités dans ce domaine. Si l'on suppose que la plupart des pays ont des règles suffisantes protection de ces informations, il semble qu'il existe le cadre nécessaire à un renforcement de la coopération internationale entre pays Membres et pays observateurs/invités dont les politiques de la concurrence sont relativement plus développées.

17. Les réponses au questionnaire indiquent toutefois que les pays observateurs et invités pratiquent rarement la coopération internationale dans les enquêtes et procédures concernant des fusions. Une majorité des répondants ont indiqué qu'ils avaient enquêté sur une ou plusieurs fusions qui, à leur connaissance, étaient aussi examinées par d'autres pays. Un petit nombre de pays ont cité plusieurs cas de ce genre qui s'étaient produits au cours de la période de deux ans considérée, mais d'autres n'en ont mentionné que quelques-uns. Cinq pays seulement, cependant, ont indiqué avoir eu des communications avec un autre organisme chargé de la concurrence au sujet d'une fusion, et aucun n'en a cité plus de deux cas.

18. Les réponses au questionnaire n'ont guère fourni d'indications en ce qui concerne la question de savoir si les pays invités avaient souhaité une plus grande coopération. Indiscutablement, dans certains cas, la coopération n'était pas considérée comme nécessaire ni souhaitable. Dans d'autres, toutefois, les pays observateurs et invités s'en seraient peut-être félicités si elle avait été possible. Il serait utile, par conséquent, de voir dans quelle mesure les pays -- Membres, observateurs et invités -- pourraient tirer avantage d'une coopération renforcée avec un autre pays dans les enquêtes sur les fusions, et quels sont les moyens d'instaurer cette coopération.

- Quels sont les types de coopération, dans les enquêtes ou les procédures relatives à des fusions, qui ont été le plus utiles aux pays observateurs et invités ? Ont-ils, comme leurs homologues des pays Membres, développé des relations de coopération permanente avec des pays particuliers et, dans l'affirmative, quelles sont les caractéristiques de ces relations ?
- Les pays observateurs et invités peuvent-ils tirer bénéfice d'initiatives de coopération plus fréquentes avec d'autres pays dans les enquêtes sur les fusions, et les pays Membres peuvent-ils tirer profit d'une coopération accrue avec les pays qui ont moins d'expérience en la matière ? Dans l'affirmative, quels sont les obstacles à cette coopération, et comment les surmonter ?
- Si la coopération entre pays peu expérimentés et pays plus expérimentés n'est pas possible au plus haut niveau, par exemple sous forme d'échanges de renseignements confidentiels (lorsque ces derniers sont autorisés par les parties au moyen de dérogations) ou de discussions délibératives, quels sont les niveaux de coopération qui sont possibles dans la pratique et utiles ?
- Comment peut-on encourager les parties à une fusion à accorder des dérogations pour la divulgation de renseignements à des pays plus petits et ayant moins d'expérience en la matière si ces dérogations étaient utiles ?

ANNEXE

**QUESTIONNAIRE SOUMIS AUX PAYS INVITES SUR LA COOPERATION
INTERNATIONALE DANS LES ENQUETES SUR LES ENTENTES ET LES FUSIONS**

Ce questionnaire couvre la période allant du 1er janvier 2000 à ce jour.

Si vous n'êtes pas en mesure de fournir tous les renseignements demandés, soit parce que cela vous imposerait une charge trop grande, soit pour des raisons de confidentialité, veuillez en fournir autant qu'il vous est raisonnablement possible de le faire.

1. Veuillez fournir une copie de chaque accord de coopération officielle signé entre votre pays ou votre organisme chargé de la concurrence et un pays ou organisme étranger au sujet des enquêtes ou procédures relatives à des affaires de concurrence.
2. Veuillez décrire les lois ou réglementations de votre pays qui touchent à la capacité de votre organisme chargé de la concurrence d'échanger des renseignements ou de coopérer avec un homologue étranger.

Ententes

3. Si votre organisme chargé de la concurrence a adressé à un homologue étranger une ou plusieurs demandes officielles de renseignements ou d'assistance dans une enquête ou une procédure portant sur une entente injustifiable, veuillez fournir au sujet de ces demandes les informations suivantes (il n'est pas nécessaire de citer des affaires particulières) :

1. le nombre de ces demandes ;
2. le ou les pays au(x)quel(s) les demandes ont été adressées ;
3. la description des demandes, par exemple le type de renseignements ou d'assistance demandé ;
4. le nombre de demandes acceptées et, pour celles qui ont été rejetées, la (les) raison(s) donnée(s), le cas échéant, par le pays pour justifier son refus ;
5. pour les demandes acceptées, votre évaluation de l'utilité et de l'importance des renseignements ou de l'assistance reçus, et pour celles qui ont été rejetées, votre évaluation des conséquences du refus pour l'enquête ou la procédure.

4. Si votre organisme chargé de la concurrence a reçu d'un homologue étranger une ou plusieurs demandes officielles de renseignements ou d'assistance dans une enquête ou une procédure portant sur une entente injustifiable, veuillez fournir au sujet de ces demandes les renseignements suivants (il n'est pas nécessaire de citer des affaires particulières) :

- a. le nombre de ces demandes ;
- b. le ou les pays au(x)quel(s) demander ;

- c. la description des demandes, par exemple le type de renseignements ou d'assistance demandé ;
- d. le nombre de demandes acceptées et, pour celles qui ont été rejetées, la (les) raison(s) donnée(s), le cas échéant, pour justifier le refus.

5. Veuillez décrire d'autres cas éventuels de coopération avec un organisme étranger chargé de la concurrence dans une enquête ou une procédure portant sur une entente injustifiable qui n'ont pas été décrits plus haut, tels que réunions, communications téléphoniques ou par messagerie électronique, en indiquant, si possible, le ou les pays coopérant(s), la nature de la coopération et l'importance de la coopération pour votre organisme.

6. Indiquez le nombre de cas où une enquête ou une procédure portant sur une entente injustifiable aurait pu être facilitée par des renseignements ou une coopération fournis par un organisme étranger chargé de la concurrence mais où votre organisme n'a pas demandé d'aide de ce genre car vous saviez que la demande ne pourrait pas être acceptée ou ne le serait pas. Décrivez le type d'assistance qui aurait été utile et les conséquences de l'absence d'assistance pour votre effort d'application du droit de la concurrence.

Fusions

7. Identifiez chaque fusion sur laquelle votre organisme chargé de la concurrence a enquêté et qui, à votre connaissance, a été examinée aussi par l'organisme d'un autre pays.

8. Pour chaque enquête ou procédure relative à une fusion au cours de laquelle il y a eu communication entre votre organisme chargé de la concurrence et celui d'un autre pays, veuillez indiquer ou décrire :

- a. l'identité des parties à la fusion ;
- b. l'organisme ou les organismes étranger(s) chargé(s) de la concurrence avec lesquels il y eu communication ;
- c. la nature des communications, notamment les moyens de communication, les parties aux communications, le sujet des communications et, le cas échéant, le type de renseignements échangés ;
- d. si les parties à la fusion sont convenues d'une dérogation aux restrictions liées à la confidentialité, permettant l'échange de renseignements directement entre votre organisme et un organisme étranger et, s'il y a eu une dérogation, ses modalités et le type d'informations échangées ;
- e. l'effet des communications sur votre enquête ou procédure.

9. Décrivez tous cas, dans une procédure ou une enquête sur une fusion,

- a. où votre organisme chargé de la concurrence a demandé de l'assistance à un homologue étranger mais où cette assistance lui a été refusée ;
- b. où votre organisme chargé de la concurrence a demandé une dérogation aux restrictions liées à la confidentialité à une ou plusieurs des parties à une fusion mais où cette dérogation a été refusée.

10. Décrivez les enquêtes ou procédures relatives à une fusion qui auraient été facilitées par la coopération avec un organisme étranger chargé de la concurrence mais où votre organisme n'a pas demandé de coopération car il savait que cela ne serait pas possible. Décrivez le type de coopération qui aurait été utile et les conséquences de l'absence de coopération pour votre effort de contrôle de l'application du droit de la concurrence.

Non classifié

CCNM/GF/COMP(2002)1



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

13-Feb-2002

Français - Or. Anglais

**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

**CCNM/GF/COMP(2002)1
Non classifié**

Forum mondial de l'OCDE sur la concurrence

ECHANGE DES RENSEIGNEMENTS DANS LES ENQUETES SUR LES ENTENTES

-- Note du secretariat -- (Session IV)

Cette note est soumise POUR EXAMEN a la Session IV du Forum Mondial sur la concurrence, qui aura lieu les 14-15 fevrier 2002.

JT00120779

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Français - Or. Anglais

ÉCHANGE DE RENSEIGNEMENTS DANS LES ENQUÊTES SUR LES ENTENTES

Introduction

1. A la réunion du 13 février 2001 du Groupe de travail n°3, un débat approfondi a eu lieu avec les représentants du BIAC sur les critères applicables pour protéger le caractère confidentiel des renseignements échangés entre les autorités nationales de la concurrence lors des enquêtes sur les ententes. A titre de référence, le Secrétariat avait diffusé une note contenant en annexe un document du BIAC daté d'octobre 2000 et des extraits pertinents du Rapport 2000 sur les ententes injustifiables, DAFPE/CLP/WP3(2001)2. Durant la réunion, le BIAC a aussi présenté plusieurs « points de discussion » qui ne reflétaient pas nécessairement une position consensuelle mais ont servi de base pour les discussions. Si certaines des mesures de sauvegarde proposées par le BIAC n'ont pas soulevé de désaccord, d'autres ont suscité des doutes ou un désaccord. Il a été convenu de poursuivre le débat lors d'une réunion ultérieure.

2. Ce thème est de la plus haute importance pour le Forum mondial. Etant donné que les marchés se développent au-delà des frontières nationales, davantage d'ententes ont un caractère international et bon nombre d'ententes récentes sont véritablement mondiales. Faute d'une coopération internationale renforcée, fondée notamment sur un échange de renseignements confidentiels dans des circonstances appropriées, il sera de plus en plus difficile de punir ces agissements. Les nombreuses économies non membres qui participeront à la réunion du Forum en février sont concernées par le préjudice résultant des ententes, mais aussi par la nécessité d'une coopération dans ce domaine. En outre, le BIAC sera de nouveau présent, comme d'autres organisations non gouvernementales susceptibles de contribuer au débat sur ce thème important.

3. A titre de référence pour la discussion du 15 février au Forum, la note du Secrétariat établie en vue du débat de l'an dernier sera diffusée sur le site web du Forum (et sur OLIS). Après un très bref résumé des situations actuelles dans lesquelles l'échange de renseignements est interdit ou autorisé, cette note présentera quelques questions générales proposées pour discussion à la réunion du Forum de février. Dans la mesure où cela permettra de clarifier les problèmes, l'exposé évoquera la position défendue par le BIAC à la réunion de 2001.

4. Les règles actuelles relatives à l'échange de renseignements dans les affaires d'ententes peuvent être résumées comme suit :

- Deux séries de lois protègent les « renseignements confidentiels », au sens où cette expression est utilisée dans la présente note.
 - Les lois générales sur la confidentialité protègent généralement contre la divulgation ou l'utilisation malveillante de secrets d'affaires et d'autres informations commerciales à caractère confidentiel.
 - En outre, les lois régissant le traitement, par des organismes publics, de renseignements sur les sociétés réglementent généralement l'utilisation a) des renseignements commerciaux confidentiels, notamment les secrets d'affaires et b) de tous renseignements non publics obtenus au cours d'une enquête, même s'ils ne sont pas intrinsèquement confidentiels. En général, ces lois empêchent la divulgation ou l'utilisation inopportune

de ces renseignements, mais elles en autorisent quelquefois le partage avec d'autres organismes nationaux qui sont également tenus de les protéger.

- A de très rares exceptions près, les lois établissant les pouvoirs d'enquête des autorités de la concurrence ne prévoient pas le recours à une procédure obligatoire en vue de recueillir des renseignements pour le compte d'autorités étrangères.
- Les autorités de la concurrence sont normalement autorisées, mais non légalement astreintes, à limiter l'accès à des informations internes, notamment en ce qui concerne la nature ou la portée de leurs enquêtes, leurs principes d'enquête, ou leurs conclusions préliminaires. Dans la présente note ces « informations internes des organismes » ne sont pas considérées comme des renseignements confidentiels.
- L'autorisation de la coopération avec des autorités étrangères pour le partage ou la collecte de renseignements :
 - Quelques traités internationaux de portée générale prévoient le partage des renseignements confidentiels. A titre d'exemple, des lettres rogatoires ont été utilisées pour obtenir des renseignements confidentiels dans des affaires de concurrence. Conformément aux traités d'entraide juridique, des renseignements confidentiels peuvent être échangés dans des affaires pénales de concurrence, et les autorités de la concurrence peuvent recourir à une procédure obligatoire pour le compte d'une autorité étrangère. Les Etats Membres partagent des renseignements confidentiels avec la Commission européenne, et les renseignements confidentiels recueillis par la CE peuvent, dans certaines situations, être partagés avec des Etats membres.
 - Un nombre croissant de conventions bilatérales et de lois consacrées spécialement à la concurrence prévoient aussi l'échange de renseignements confidentiels -- c'est le cas par exemple entre l'Australie et la Nouvelle-Zélande, entre l'Australie et les Etats-Unis, et pour la France, les Pays-Bas et quelques pays nordiques.
 - L'autorisation de l'échange de renseignements confidentiels est beaucoup plus répandue dans les domaines des valeurs mobilières, de la fiscalité, des douanes et des affaires pénales que dans le droit de la concurrence.
- Mesures de sauvegarde :
 - Lorsque cette coopération avec des autorités étrangères fait l'objet d'une autorisation, celle-ci prévoit que l'autorité requise doit prendre des mesures pour faire en sorte que soit protégée la confidentialité de tout renseignement échangé. En général, l'autorité doit s'assurer que l'économie requérante fournit une protection sensiblement équivalente pour les renseignements confidentiels. De plus, l'autorité devra peut-être vérifier que l'échange des renseignements est conforme à l'intérêt national. Aucune des dispositions actuelles en matière d'autorisation n'exige de notification préalable ou a posteriori à la société dont les informations doivent faire l'objet d'un échange.

Obligations liées à la nature de l'affaire

5. Dans le contexte international, il est généralement admis qu'une autorité requise ne peut échanger des renseignements que lorsque l'autorité requérante mène une enquête en vertu du droit de la concurrence

de son pays. Si une autorité requise estime que le comportement allégué ne serait pas anticoncurrentiel, à supposer même qu'il ait eu lieu, elle peut rejeter la demande, et elle est tenue de le faire si elle juge que l'enquête est faussée au point que la coopération ne serait pas conforme à son intérêt national. Allant plus loin, le BIAC a estimé qu'une autorité requise ne devrait jamais être autorisée à partager des renseignements confidentiels si le comportement spécifié dans la demande ne constitue pas une violation de son propre droit national.

Dans quelles catégories d'affaires les autorités de la concurrence devraient-elles avoir le droit d'échanger des renseignements ? A supposer qu'une autorité de la concurrence établisse que le comportement allégué serait anticoncurrentiel s'il était prouvé et que l'échange de renseignements servirait son intérêt national, devrait-elle se voir interdire de coopérer simplement parce que, pour une raison ou pour une autre, le comportement allégué ne violerait pas son droit national ?

Nécessité d'une « protection en aval » des renseignements confidentiels

6. En outre, il est généralement admis qu'avant de fournir des renseignements confidentiels à une autorité requérante, l'autorité requise devrait s'assurer que celle-ci dispose de moyens adéquats pour protéger ces renseignements. En d'autres termes, il s'agit de garantir une « protection en aval » appropriée des renseignements. Des critères quelque peu différents ont été mentionnés, d'aucuns faisant état de dispositifs de protection dans l'économie requérante « comparables » ou « sensiblement équivalents » à ceux de l'économie requise, tandis que le BIAC a proposé que la norme soit une protection « au moins équivalente ». Cette distinction n'est peut-être pas significative. Littéralement, l'expression « au moins équivalente » ne constitue pas une norme plus élevée que le terme « équivalente ». Du reste, que la loi fasse état de mécanismes de protection « sensiblement » ou « au moins » équivalents, il semble peu probable qu'elle soit interprétée de manière à signifier que des différences négligeables en termes de protection empêcheraient l'échange de renseignements.

Quel devrait être le critère applicable pour déterminer s'il existe des mécanismes appropriés de protection de la confidentialité dans l'économie requérante ? Si une autorité requise a établi d'une manière générale que les lois et politiques d'une économie requérante sont équivalentes aux siennes propres, dans quelle mesure devrait-elle revenir sur cette question lors de l'examen d'une affaire spécifique ?

Restrictions relatives à l'utilisation des renseignements dans d'autres affaires -- autres dispositifs de protection au-delà de l'équivalence

7. Aux termes du traité entre l'Australie et les Etats-Unis, en l'absence du consentement spécifique de l'autorité requise, l'autorité de la concurrence requérante ne peut utiliser les renseignements partagés que dans l'enquête qu'elle a mentionnée dans sa demande.¹ Mais de l'avis du BIAC, même avec le consentement de l'autorité requise l'autorité requérante ne devrait pas être en mesure d'utiliser les renseignements de toute autre manière ou dans toute autre affaire. Par conséquent, l'autorité requérante devrait soumettre une autre demande formelle si elle souhaitait, par exemple, (a) utiliser les

1. En général, le traité Australie/Etats-Unis restreint l'utilisation des renseignements à l'enquête ou à la procédure spécifiée dans la demande, mais il prévoit que les renseignements peuvent être utilisés dans d'autres affaires concernant ou non la concurrence sous réserve du consentement préalable écrit de l'économie requise et, dans le cas d'une affaire ne concernant pas la concurrence, à condition que l'économie requérante démontre que ce recours est « indispensable à la réalisation d'un important objectif d'application de la loi. »

renseignements dans toute autre affaire ou (b) mettre les renseignements à la disposition d'un autre organisme qui enquête sur la même entente en vertu d'une législation différente.

En général, quelles restrictions devraient être appliquées à l'utilisation de renseignements confidentiels par l'autorité requérante? Dans quelle mesure, et dans quelles circonstances, ces restrictions devraient-elles être levées si l'autorité requise consent à cette utilisation? Existe-t-il d'autres mécanismes de protection demandés par le BIAC qui vont au-delà de l'équivalence?

Notification au fournisseur des renseignements

8. L'une des positions les plus fermement défendues par le BIAC est que l'autorité requise devrait notifier une demande de renseignements confidentiels émanant d'un organisme étranger au fournisseur de ces renseignements avant que l'échange n'intervienne. Le fournisseur devrait avoir la possibilité de s'opposer à l'échange ou de discuter de modifications de celui-ci et, si nécessaire, de faire appel d'une décision de fournir les renseignements auprès d'une autorité indépendante, par exemple un tribunal. Le BIAC n'exigerait pas de notification préalable si celle-ci "devait compromettre une enquête sur une entente injustifiée flagrante", mais dans cette éventualité il devrait y avoir un droit rétroactif de réexamen et de recours.

9. Lors du débat sur ce point à la dernière réunion de février, quelques délégués s'étaient déclarés en désaccord avec cette position. On avait fait observer qu'aucune des lois ni aucun des traités en vigueur qui autorisent l'échange de renseignements ne comporte une telle obligation, qu'il n'existe pas de preuve d'utilisation abusive ou de divulgation non autorisée de renseignements confidentiels par des autorités de la concurrence qui justifierait pareille règle restrictive, et qu'une telle obligation de notification, même a posteriori, pourrait entraver sérieusement le processus d'investigation.

10. Il existe apparemment un plus large accord sur la disposition suivante : si des renseignements confidentiels sont divulgués d'une manière non autorisée par l'autorité requérante, celle-ci devrait notifier ce manquement à l'autorité de la compétence requise, laquelle devrait informer la partie fournisseuse.²

Le cas échéant, dans quelles circonstances l'autorité de la concurrence requise devrait-elle informer le fournisseur de renseignements confidentiels qu'elle pourrait partager ou qu'elle a partagé ces renseignements avec une autorité étrangère? Dans quelles circonstances devrait-elle l'informer d'une divulgation non autorisée de renseignements confidentiels dans l'économie receveuse?

Accord de coopération obligatoire

11. Aux Etats-Unis, la législation régissant le partage de renseignements par les autorités nationales de la concurrence exige que celles-ci concluent au préalable avec l'autorité étrangère un accord de coopération fixant les conditions dans lesquelles elles échangeront des renseignements confidentiels, ainsi que les procédures applicables. La loi n'exige pas que cet accord constitue un traité international, même si, dans certaines circonstances au moins, un traité peut s'avérer nécessaire pour que les parties s'acquittent de leur obligation statutaire de protéger les renseignements en aval. Le BIAC a fait valoir que des traités internationaux ayant force obligatoire devraient toujours être exigés, au motif qu'ils sont nécessaires pour garantir une protection en aval appropriée ainsi que d'autres mesures de sauvegarde.

2. Aux Etats-Unis, l'International Antitrust Enforcement Assistance Act renferme une obligation de ce type.

12. Les lois récemment promulguées par quelques Membres -- Danemark, France, Islande, Norvège et Pays-Bas -- exigent la mise en évidence de dispositifs de protection en aval équivalents et renferment généralement des critères similaires à ceux du droit des Etats-Unis, mais n'exigent pas que les autorités nationales incorporent leurs conclusions et les procédures applicables dans des accords de coopération formels. Dans certains cas, des renseignements ont été échangés en vertu d'une loi peu après son entrée en vigueur, et certaines de ces actions de coopération n'auraient peut-être pas été possibles si des accords formels avaient été exigés. Le Danemark, l'Islande et la Norvège ont conclu un accord formel relatif à ces échanges, bien qu'aucun accord ne soit requis.

Quels sont les avantages et les coûts de l'établissement d'accords de coopération qui précisent de façon détaillée les circonstances dans lesquelles une autorité de la concurrence partagera des renseignements confidentiels? Lorsque des accords de ce type existent, quelles mesures les autorités prennent-elles ou devraient-elles prendre pour veiller à ce que le droit national d'une autorité requérante fournisse une protection équivalente et pour communiquer leurs conclusions au public? L'absence de ces accords a-t-elle entraîné des problèmes? Dans quelle mesure des échanges de renseignements ont-ils eu lieu qui auraient été impossibles si un accord formel avait été requis? Dans les pays où existent des accords qui n'étaient pas requis par la loi, qu'est-ce qui a motivé la décision de négocier ces accords, et quels avantages en ont résulté?

Divulgence de renseignements en aval

13. Il peut s'avérer nécessaire de divulguer des renseignements confidentiels au cours d'une procédure judiciaire relative à la concurrence, par exemple lors d'une audition ou du jugement de l'affaire. Le droit national impose des conditions variables dans ce domaine. Dans de nombreux pays, le défendeur a accès aux éléments de preuve pertinents détenus par l'agence de la concurrence, y compris les renseignements confidentiels. Beaucoup de pays ont instauré des obligations concernant les procès ou auditions en public, au cours desquels les preuves pourraient être divulguées. Dans la plupart des pays, la loi autorise la non-divulgence de renseignements confidentiels dans des circonstances appropriées, mais au moment où est prise la décision sur le partage des renseignements, l'autorité requise ne peut pas savoir avec précision quels renseignements pourront être divulgués lors du procès. De surcroît, les tierces parties ayant des intérêts dans une affaire de concurrence, y compris les tiers plaignants dans des poursuites engagées par un organisme de concurrence ou les tierces parties réclamant des dommages-intérêts, peuvent faire valoir leur droit de consulter le dossier de l'autorité de la concurrence pour obtenir des éléments de preuve, y compris confidentiels. Dans ce cas également, lorsqu'elle décide de partager ou non des renseignements confidentiels, l'agence requise ne peut pas savoir avec certitude si la demande d'une tierce partie sera agréée.

14. Le traité entre l'Australie et les Etats-Unis prévoit que l'autorité requise peut divulguer des renseignements qu'elle reçoit d'un défendeur au cours d'une procédure judiciaire si le droit de l'autorité requérante l'exige. Le traité fait obligation à l'autorité requérante de s'opposer, dans la mesure où sa législation le permet, à toute demande de divulgation de renseignements confidentiels émanant d'une tierce partie. Le BIAC s'est opposé à la divulgation en dehors de l'affaire de concurrence pour laquelle ces renseignements ont été fournis, mais on ne voit pas clairement quelle est sa position au sujet des éventuelles restrictions qui devraient s'appliquer à la divulgation dans le cadre de ces actes de procédure.

Quelles limites devraient être imposées à la divulgation de renseignements confidentiels dans le contexte de l'affaire ou de la procédure de concurrence dans laquelle ces renseignements sont utilisés? Comment les autorités requises peuvent-elles s'assurer que la législation de l'autorité

requérante renferme des dispositifs appropriés de protection de la confidentialité dans ces circonstances ?

Préservation des privilèges juridiques

15. Le BIAC est d'avis que tous les privilèges juridiques qui s'appliquent aux renseignements détenus par l'autorité requise devraient s'appliquer également aux renseignements reçus par l'autorité requérante. Aux yeux du BIAC, il s'agit aussi bien des privilèges de l'agence de la concurrence requise (par exemple, le privilège d'enquête ou le privilège concernant la documentation créée en vue d'une instance) que des privilèges de la partie fournisseuse (par exemple le privilège du secret professionnel de l'avocat). On ne voit pas bien pourquoi les parties privées auraient intérêt à protéger les privilèges de l'organisme auteur de la divulgation, ni pourquoi cet organisme ne pourrait pas se protéger lui-même intégralement à cet égard. Quant aux privilèges protégeant les parties privées, le BIAC pourrait se demander dans quelle mesure, pour autant que ces privilèges continuent de s'appliquer aux renseignements détenus par les enquêteurs de l'autorité requise, les mécanismes habituels de protection de la confidentialité en aval ne seraient pas appropriés.

Dans quelle mesure les privilèges juridiques devraient-ils s'appliquer en aval aux renseignements qui sont échangés ?

Demandes de clémence en aval

16. Au cours de la réunion de l'an dernier, le BIAC avait affirmé que les échanges de renseignements ne devraient pas avoir d'incidence sur les demandes de clémence dans l'économie requérante. En d'autres termes, l'éligibilité d'une partie fournisseuse à un programme de clémence dans l'économie requérante ne devrait pas être affectée par le fait que cette économie a reçu de l'économie requise des renseignements confidentiels sur l'entente ou sur la partie en question. Ce point de vue a suscité une certaine controverse, et le BIAC a été interrogé de près par plusieurs délégués qui étaient manifestement en désaccord avec lui. Si l'éligibilité à un programme de clémence dépend de savoir si un organisme détient déjà des renseignements sur une entente, il n'importe pas a priori de savoir d'où viennent ces renseignements. En tout état de cause, la plupart sinon la totalité des programmes de clémence prévoient une stricte confidentialité de l'identité du demandeur mais aussi des renseignements qu'il fournit. Il n'est donc pas vraisemblable qu'une économie requérante reçoive des renseignements résultant directement d'une demande de clémence dans l'économie requise.

Le cas échéant, quel effet un échange de renseignements confidentiels entre les autorités de la concurrence devrait-il avoir sur une demande de clémence dans l'économie requérante ?

Informations internes de l'autorité de la concurrence, y compris la documentation créée en vue d'une instance et les "tuyaux"

17. Ainsi qu'on l'a déjà noté, les autorités de la concurrence sont normalement autorisées, mais non astreintes par la loi, à limiter l'accès aux renseignements internes, notamment en ce qui concerne la nature ou la portée de leurs investigations, leurs principes d'enquête ou leurs conclusions préliminaires. D'autres restrictions peuvent s'appliquer pour les affaires pénales, mais dans la plupart des pays les ententes injustifiées ne sont pas des infractions pénales. Comme on le voit se produire dans les affaires de fusions, il apparaît que certaines autorités de la concurrence discutent assez fréquemment de ce type de renseignements avec les autorités étrangères.

18. En revanche, si une autorité de la concurrence a obtenu des preuves d'agissements illégaux dans une juridiction étrangère à partir de renseignements qu'elle n'est pas autorisée à partager avec son homologue étrangère, certaines législations peuvent être interprétées comme interdisant à l'autorité en question de donner à son homologue ne serait-ce qu'un "tuyau", en lui suggérant d'enquêter dans telle branche d'activité. Il en va de même si le « tuyau » peut être fourni sans qu'aucun véritable renseignement confidentiel ne soit communiqué.

Dans quelles circonstances les autorités de la concurrence partagent-elles les informations internes des organismes avec des autorités étrangères dans des affaires d'ententes ? Quel type de renseignements fait l'objet d'un échange ? Dans quelle mesure ces échanges sont-ils utiles ? Est-il courant que les autorités se voient interdire de fournir des "tuyaux" qui ne contiennent aucun renseignement confidentiel ? Les autorités de la concurrence ont-elles été mises dans l'impossibilité de fournir de tels "tuyaux" ?

Non classifié

CCNM/GF/COMP/WD(2002)18



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

05-Feb-2002

Français - Or. Français

**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

**CCNM/GF/COMP/WD(2002)18
Non classifié**

Forum mondial de l'OCDE sur la concurrence

CONTRIBUTION DE LA CÔTE D'IVOIRE

Cette note est soumise par la Côte d'Ivoire comme document de référence pour la seconde réunion du Forum Mondial sur la concurrence, qui doit se tenir les 14 et 15 février 2002.

JT00120335

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Français - Or. Français

I. - CONTRIBUTION DE LA CÔTE D'IVOIRE

Durant les deux années 2000 et 2001 les activités des autorités de la concurrence de la Côte d'Ivoire ont baissé de manière significative, en raison de la situation sociopolitique du pays.

Cette situation a entraîné la mise en veilleuse de la coopération de la Côte d'Ivoire avec un certain nombre d'institutions internationales à caractère économique.

En conséquence, nous ne saurions remplir efficacement le questionnaire relatif à la coopération internationale dans les enquêtes sur les ententes et les fusions.

En tout état de cause, la Côte d'Ivoire n'a pas conclu, même dans la période antérieure, d'accord formel de coopération avec d'autres pays sur les ententes ou les fusions.

Mais la Côte d'Ivoire est membre de plusieurs organisations d'intégration sous-régionale notamment l'Union Economique et Monétaire Ouest-Africaine (UEMOA) et la Communauté Économique des États de l'Afrique de l'Ouest (CEDEAO), dont certains États disposent de législations sur la concurrence.

Avec la reprise ou la normalisation des relations de coopération avec les organisations internationales, la consolidation des structures de concurrence des pays membres des organisations sous-régionales, il est probable que dans les années à venir la coopération dans les domaines de fusions et d'ententes s'intensifie.

La Côte d'Ivoire, il convient de le souligner, a opté depuis les années 1960 pour le libéralisme économique. Cependant, il a fallu attendre 1978 pour qu'apparaissent les premiers textes sur la concurrence.

En 1991, sous l'impulsion des bailleurs de fonds, a été adoptée la loi N° 91-999 du 27 décembre 1991 relative à la concurrence.

Cette loi a été modifiée par la loi N° 97-10 du 06 janvier 1997 afin de permettre l'extension du pouvoir de saisine à des entreprises privées.

Il existe en Côte d'Ivoire deux structures impliquées dans la mise en œuvre de la politique de la concurrence, à savoir :

- la Commission de la Concurrence créée par la loi du 27 décembre 1991 ;
- et la Direction de la Concurrence créée par décret pris en conseil des Ministres.

Les compétences de la Commission de la Concurrence s'exercent, pour l'essentiel, dans la surveillance, la régulation des marchés afin d'y réprimer les pratiques anticoncurrentielles (ententes illicites, abus de position dominante, concentrations économiques excessives).

Quant à la Direction de la Concurrence, elle est spécialisée dans le traitement des affaires relevant des pratiques individuelles restrictives de concurrence et en leur répression.

Après sa création en décembre 1991, la Commission de la Concurrence n'est devenue opérationnelle qu'en janvier 1994. Elle a fait l'objet de 24 saisines et a émis 21 avis dont 7 consultatifs et 14 contentieux. Plusieurs saisines sont actuellement en examen.

Tous les ans, la Commission dresse un rapport d'activité publié au Journal Officiel de la République de Côte d'Ivoire.

Les actions conjuguées de la Commission de la Concurrence et de la Direction de la Concurrence ont de manière significative exercé un impact notable sur l'économie du pays, appréciable à plusieurs niveaux :

- la chute des prix des produits de grande consommation malgré la dévaluation du franc C.F.A. en 1994 ;
- la restauration d'un climat de confiance se traduisant par la disparition chez les opérateurs économiques de la crainte d'être écrasés par les plus puissants ;
- la création d'un environnement favorable à la promotion des investissements, ayant encouragé le gouvernement à mettre en place le Centre de Promotion des Investissements en Côte d'Ivoire (CEPICI) pour une meilleure coordination des politiques d'investissement.
- l'éclosion des mouvements de consommateurs.

Le coup d'État militaire du 24 décembre 1999 va porter malheureusement un coup d'arrêt à cette marche vers le progrès.

Un Gouvernement civil ayant été mis en place après les élections d'octobre 2000, de nouveaux responsables ont été nommés pour redynamiser les structures de concurrence en Côte d'Ivoire.

Cependant, à la pratique il est apparu la nécessité de formation de ce personnel d'où le besoin pour la Côte d'Ivoire de solliciter une assistance.

1. BESOINS D'ASSISTANCE TECHNIQUE

Comme pour le questionnaire relatif à la coopération internationale en matière d'ententes et de fusion, il convient de faire observer que la Côte d'Ivoire n'a bénéficié en 2000 et 2001 d'aucune assistance.

Les années précédentes notamment lors du démarrage de la Commission de la Concurrence en 1993 – 1994, celle-ci a bénéficié pour la formation de son personnel, d'un certain nombre de stages auprès du Conseil Français de la Concurrence, ainsi que de missions auprès de l'Autorité Belge de la Concurrence et auprès de la CNUCED.

Avec la mise à sa disposition d'un nouveau personnel, d'autres problèmes de formation se posent.

Toute forme d'assistance est réputée utile, cependant, nous privilégions actuellement pour notre institution :

- la mise à niveau des rapporteurs nouvellement nommés ;

- le recyclage des anciens ainsi que du Secrétaire Général de la Commission.

Par rapport aux conférences et séminaires, nous jugeons les stages plus utiles à cause du temps plus long qui leur est consacré et du fait qu'ils permettent d'appréhender plusieurs aspects dans la formation.

Quant aux conseillers venant dispenser la formation sur place, leur présence peut permettre l'acquisition de connaissances sur des questions ponctuelles, des techniques d'actualité. Mais on peut déplorer que leur arrivée ne coïncide pas souvent avec le moment où la demande est exprimée.

2. DOMAINES DANS LESQUELS NOS BESOINS SONT URGENTS

- la remise à niveau des nouveaux rapporteurs ;
- le recyclage des anciens y compris le Secrétaire Général de la Commission de la Concurrence ;
- l'équipement des services en ordinateurs et en véhicules de liaison ;
- l'assistance à l'abonnement à des revues périodiques, études et publications diverses pour une documentation en droit et politique de la concurrence ;
- la formation des formateurs pour un besoin de formation permanente, eu égard à la mutation fréquente du personnel dans les structures de l'Administration.

Il convient de noter cependant, que la Côte d'Ivoire a déjà engagé des démarches dans ce sens auprès de la CNUCED.

II. - NOTE

Cette note porte sur les trois thèmes :

- la coopération internationale dans les affaires de fusions et d'ententes ;
- les préoccupations relatives à la politique de la concurrence et au développement économique ;
- l'assistance technique en matière de politique de la concurrence.

1. LA COOPERATION INTERNATIONALE DANS LES AFFAIRES DE FUSIONS ET D'ENTENTES

Cette note est relative à l'Annexe A qui concerne le questionnaire sur la coopération internationale dans les enquêtes sur les ententes et les fusions.

Ce questionnaire comme précisé dans ladite annexe, couvre les deux années 2000 et 2001.

Il convient de faire remarquer à cet égard que durant les années 2000 et 2001 les activités des autorités de la concurrence de la Côte d'Ivoire ont baissé de manière significative en raison de la situation sociopolitique du pays.

Cette situation a entraîné la mise en veilleuse de la coopération de la Côte d'Ivoire avec un certain nombre d'États et d'institutions internationales à caractère économique.

En conséquence, nous ne saurions remplir efficacement le questionnaire relatif à la coopération internationale dans les enquêtes sur les ententes et les fusions. Il en est de même pour la communication sur les « expériences concrètes en matière de coopération internationale dans les affaires de fusions ou d'ententes » puisque la Côte d'Ivoire n'a pas conclu d'accord formel avec d'autres pays en ces matières, même antérieurement à ces deux années.

Il faut cependant rappeler que la Côte d'Ivoire est membre de plusieurs organisations d'intégration sous-régionale telles que l'Union Économique et Monétaire Ouest-Africaine (UEMOA) la Communauté Économique des États de l'Afrique de l'Ouest (CEDEAO), dont certains États disposent de législations sur la concurrence.

Avec la reprise des relations économiques avec les organisations internationales, le développement des structures de la concurrence des pays membres des organisations sous-régionales, voire régionales, il est probable que dans les années à venir la coopération dans les domaines de fusions et d'ententes s'intensifie.

2. LES PREOCCUPATIONS RELATIVES A LA POLITIQUE DE LA CONCURRENCE ET AU DEVELOPPEMENT ECONOMIQUE

La Côte d'Ivoire a opté, dès les années 1960 pour le libéralisme économique.

Cependant, il a fallu attendre 1978 pour qu'apparaissent les premiers textes sur la concurrence.

L'option en faveur d'une politique d'ouverture des marchés implique la mise en place de structures dont la mission est de veiller au bon fonctionnement des secteurs d'activité économique.

Ainsi furent créées :

- la Commission de la Concurrence par la loi n° 91-999 du 27 décembre 1991 relative à la concurrence ;
- et la Direction de la Concurrence par décret pris en Conseil des Ministres.

Les compétences de la Commission de la Concurrence s'exercent, pour l'essentiel dans la surveillance, la régulation des marchés afin d'y réprimer les pratiques anticoncurrentielles (ententes illicites, abus de position dominante, concentrations économiques excessives).

Quant à la Direction de la Concurrence, elle est spécialisée dans le traitement des affaires relevant des pratiques individuelles restrictives de concurrence et en leur répression.

Après sa création en 1991, la Commission de la Concurrence n'est devenue opérationnelle qu'en janvier 1994.

Elle a fait l'objet de 24 saisines, émis 21 avis dont 14 contentieux et 7 consultatifs.

Ce résultat de huit années de fonctionnement peut être jugé relativement faible même si l'on considère les années 2000 et 2001 comme une traversée du désert.

La faiblesse de ces résultats s'explique par des obstacles à l'exécution des missions de la Commission de la Concurrence qui sont principalement de deux ordres :

- les pesanteurs sociologiques ;
- l'absence d'autonomie de décision de l'institution.

En ce qui concerne les pesanteurs sociologiques, la Commission de la Concurrence est, aux yeux des opérateurs économiques une structure mandatée par les autorités administratives pour « juger » et sanctionner ceux des leurs, coupables d'infractions aux règles de libre concurrence.

Ainsi une entreprise victime d'une pratique anticoncurrentielle hésiterait à saisir la Commission soit par crainte de représailles, soit paradoxalement par souci de protéger celui qui est à l'origine de son malheur.

Un tel état de chose montre que la Côte d'Ivoire fait partie des économies dotées d'un droit de la concurrence, encore en phase de transition. Le pays garde les séquelles d'un régime strict de planification centralisée. On observe les stigmates d'une économie de structure monopolistique dans laquelle n'existent que très peu de concurrents dans un même secteur d'activité et où, les pratiques anticoncurrentielles horizontales sont peu dénoncées.

En ce qui concerne l'absence d'autonomie de décision, il faut indiquer que la Commission de la Concurrence ivoirienne n'est qu'un organe consultatif du Gouvernement. Le pouvoir de décision

n'appartient qu'à l'autorité de tutelle : le Ministre en charge du Commerce, la Commission ne pouvant qu'émettre des avis à la suite de chaque saisine.

Le problème est que la décision du Ministre intervient souvent tardivement ou n'intervient même pas parfois.

Cela empêche les parties d'exercer des recours éventuels.

Ces carences sont de nature à décourager l'introduction de toute requête auprès des autorités de la concurrence. Elles demeurent sans aucun doute une des causes de la rareté des saisines en dépit des modifications apportées à la loi du 27 décembre 1991 par celle du 06 janvier 1997 étendant le droit de saisine aux entreprises et associations d'entreprises privées.

La concurrence déloyale constitue le domaine où les affaires sont plus nombreuses et les plaintes plus fréquentes, mais elle relève de la compétence des juridictions de droit commun.

Malgré les difficultés dans l'accomplissement de leurs missions, le droit et la politique mis en œuvre par les autorités de la concurrence ont, de manière sensible affecté la transition et exercé un impact sur le développement économique perceptible à plusieurs niveaux :

- la chute des prix des produits d'équipement d'importation et l'injonction faite aux distributeurs détaillants d'assurer un affichage systématique des prix ;
- l'éclosion des mouvements de consommateurs ;
- la concrétisation des principaux projets de privatisation ;
- l'instauration d'un climat de confiance se traduisant par la disparition chez les opérateurs économiques, de la crainte d'être écrasés par les plus puissants ;
- la création d'un environnement favorable à la promotion des investissements.

La principale difficulté réside dans l'intensification des actions de sensibilisation auprès des opérateurs économiques. L'assistance dans ce domaine est une nécessité :

3. L'ASSISTANCE TECHNIQUE EN MATIERE DE POLITIQUE DE LA CONCURRENCE

Comme pour le questionnaire relatif à la coopération internationale en matière d'ententes et de fusions, il convient de faire observer que la Côte d'Ivoire n'a bénéficié en 2000 et 2001 d'aucune assistance.

A défaut d'expérience en la matière, nous ne saurions répondre au questionnaire de l'annexe B.

En ce qui concerne l'année 2002, des demandes d'aide sont en cours et portent notamment sur :

- la formation du personnel des autorités de la concurrence ;
- la formation de formateurs ;

- l'équipement en matériels de travail (ordinateurs, véhicules de liaison)
- abonnement pour la documentation.

Les domaines dans lesquels notre économie a les plus gros besoins en matière d'assistance sur le droit et la politique de la concurrence restent :

- l'intensification des actions de sensibilisation par des séminaires à l'intention des opérateurs économiques ;
- la formation adéquate des animateurs des autorités de la concurrence.

Pour conclure, il convient de souligner qu'il est plus que jamais nécessaire que les autorités de la concurrence en Côte d'Ivoire accroissent leur audience auprès des opérateurs économiques. Les manifestations visant à faire connaître l'existence de ces structures, l'importance de leur rôle sont un impératif.

L'octroi d'un pouvoir de décision à la Commission est primordial pour la crédibilité de cette Institution.

L'élargissement de la compétence de la Commission au domaine de la concurrence déloyale est un enjeu pour l'avenir de ladite structure.

Une formation appropriée des agents des autorités de la concurrence, la garantie d'un profil de carrière constituent des leviers indispensables à l'exécution des tâches assignées à ces Institutions.

Non classifié

CCNM/GF/COMP/WD(2002)12



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

30-Jan-2002

Français - Or. Français

**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

**CCNM/GF/COMP/WD(2002)12
Non classifié**

Forum mondial de l'OCDE sur la concurrence

CONTRIBUTION DE LA TUNISIE

Cette note est soumise par la Tunisie comme document de référence au second Forum Mondial sur la Concurrence, qui doit se tenir les 14 et 15 février 2002.

JT00120139

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Français - Or. Français

I. - LE RAPPORT ENTRE LA CONCURRENCE ET LE DEVELOPPEMENT ECONOMIQUE

1. Rappel historique

Le développement économique de la Tunisie a l'instar de celui des autres pays en développement et des pays à économie dirigée, a été marqué jusqu'en 1986 par l'omniprésence de l'Etat dans la réglementation, le contrôle et la direction de la quasi totalité de l'activité économique.

Cette omniprésence se matérialise à travers les aspects suivants :

1. La prise en charge directe de la majeure partie des activités économiques et industrielles notamment dans les secteurs stratégiques (ou industrie industrialisante) tels que les hydrocarbures, les cimenteries, la sidérurgie, le transport, l'énergie, etc.).
2. Le contrôle direct de la commercialisation des produits de base à travers les offices créés à cet effet : céréales et dérivés, huiles, sucre, café, épices...
3. Le contrôle des investissements privés tant au niveau des secteurs qu'au niveau de l'implantation géographique des projets et ce à travers les autorisations préalables d'investissement.
4. La protection de l'industrie locale naissante par le biais de l'instauration des autorisations d'importation et de droits de douane élevés.
5. Le contrôle du niveau des prix sur le marché local à travers la fixation par l'administration des prix des produits de base et la délimitation du niveau des marges bénéficiaires pour les autres produits.
6. La réglementation des activités de commerce et de distribution au niveau du gros et du détail, ces activités étant soumises à l'accord et l'autorisation préalable de l'administration.
7. La protection du consommateur tunisien contre les aléas des cours mondiaux relatifs aux produits de base importés et ce à travers l'institution de la caisse générale de compensation appelée à prendre en charge la différence entre les prix à l'importation et ceux appliqués sur le marché local (céréales, huiles, lait, sucre, engrais, papier).

2. Les reformes législatives, réglementaires et institutionnelles introduites depuis 1986

L'adoption par la Tunisie de l'accord d'ajustement structurel (P-A-S) en 1986 en accord avec la Banque mondiale et le fonds monétaire international, et son adhésion en 1994 à l'organisation mondiale du commerce ainsi que la signature en 1995 de l'accord de libre échange avec l'Union Européenne ont progressivement conduit l'économie Tunisienne à une nécessaire et inévitable mutation dans le sens de son adaptation à la concurrence internationale et de son « attelage » à l'économie mondiale marquée par la libéralisation des échanges et par la mondialisation.

Ce passage d'une économie protégée à une économie de marché régie par les règles de la concurrence et de la compétitivité s'est opéré par le biais d'un éventail de réformes législatives, réglementaires et institutionnelles.

L'objectif recherché à travers ces réformes est d'instaurer les fondements d'une économie ouverte à la concurrence au niveau national et international par le biais d'un démantèlement tarifaire progressif, d'une déréglementation des principales activités économiques et par un désengagement graduel de l'état de la majeure partie des secteurs économiques (de production et de service).

Les réformes sus-visées touchent principalement les volets suivants :

1. La libéralisation de l'investissement dans le cadre du code des investissements de 1993, l'agrément préalable a en effet été remplacé par un système d'incitation fiscale en faveur de certains secteurs prioritaires et des régions économiques défavorisées.
2. La libéralisation progressive à partir de 1994 d'environ 80 % des importations des produits étrangers.
3. Le démantèlement tarifaire graduel par la baisse du niveau des droits de douane de la majorité des produits importés.

Cette baisse devant épargner à titre transitoire et pour une période limitée les produits fabriqués localement et ce en accord avec les organismes étrangers partenaires de la Tunisie (union européenne, OMC, banque mondiale, fonds monétaire international).

4. La libéralisation du commerce de distribution en 1991 et le remplacement de l'accord de l'administration par le respect d'un cahier des charges pour certains secteurs ou produits.
5. L'instauration du principe de la liberté des prix en 1991. L'exception de la fixation des prix par l'administration a été maintenue pour une liste de produits de base et pour des situations où certains secteurs économiques connaissent des dysfonctionnements et des perturbations conjoncturelles graves.
6. Le recentrage des activités de la caisse générale de compensation pour limiter son intervention aux produits de première nécessité consommés par les catégories sociales les plus démunies. Ainsi plusieurs produits ne bénéficient plus des interventions de la caisse tels que les engrais, les pommes de terre de semences, les viandes bovines, le sucre en morceaux, les aliments de bétail...
7. L'élimination progressive de la préférence accordée aux entreprises tunisiennes lors de l'octroi des marchés publics.
8. La privatisation de 158 entreprises publiques jusqu'au 31 octobre 2001.
9. La création en 1991 du conseil de la concurrence :

L'ouverture du marché local aux produits étrangers, la libéralisation des initiatives privées dans les secteurs de production et de services, l'introduction de la compétitivité et de la concurrence en tant que vecteurs devant régir la vie économique et le désengagement de l'état de la gestion directe de l'économie impliquent nécessairement la création d'un organisme chargé de veiller au respect des règles de la

concurrence et de s'opposer à toutes les pratiques anti-concurrentielles. D'où la création par le législateur tunisien du conseil de la concurrence à l'instar de plusieurs autres pays.

La création de ce conseil s'est accompagnée de la mise en place du premier noyau du droit tunisien de la concurrence. Ce droit fortement inspiré du droit français, y a néanmoins dérogé sur plusieurs points importants.

Il a ainsi interdit systématiquement certaines pratiques anti-concurrentielles tout en accordant une dérogation à certains comportements qui bien qu'anti-concurrentiels génèrent un progrès technique ou économique et engendrent des avantages pour les consommateurs.

A travers ces dispositions, le législateur affirme le principe selon lequel la concurrence n'est pas une fin en soi et qu'elle trouve ses limites dans les impératifs du progrès technique et économique et dans l'intérêt du consommateur qui reste la finalité de toute politique économique.

Ainsi la loi de 1991 telle que modifiée ultérieurement a interdit systématiquement les abus de position dominante et les abus de dépendance économique.

Elle a par ailleurs interdit :

- les contrats de distribution exclusive.
- Les ententes lorsqu'elles tendent à atteindre un objectif anti-concurrentiel (limitation de l'accès au marché, limitation et contrôle de la commercialisation, de l'investissement, partage des marchés etc.).

Toutefois la loi a autorisé le ministre du commerce à accorder des dérogations pour des situations spécifiques.

Par ailleurs le législateur tunisien a soumis à l'accord préalable du Ministre du Commerce toute opération de concentration qui risque de créer ou de renforcer une position dominante en faveur d'une entreprise.

3. Les limites du droit de la concurrence en tant que vecteur de développement économique

Certes, il est unanimement admis, à la lumière de la faillite des systèmes économiques des pays dits socialistes ou à économies dirigées, que la compétitivité de l'entreprise reste la base de toute réussite et de tout développement économique, toutefois le respect total et inconditionnel des règles de la concurrence en tant condition nécessaire du développement économique et l'interdiction par les pays dits à économie libérale de toute forme de pratiques et de comportements anticoncurrentiels sont plus discutables.

En effet, l'effacement de l'Etat en matière économique dans les pays en développement n'est pas relayé par des forces économiques nationales capables de prendre en charge les activités économiques délaissées par l'Etat et d'en créer de nouvelles. Dans ces conditions l'ouverture du marché local aux produits étrangers représente un véritable danger pour des économies encore fragiles et risque d'en provoquer l'effondrement.

Par ailleurs, l'institution de la concurrence comme seule règle devant régir la vie économique risque, à la lumière du désengagement de l'Etat, d'entraîner des conséquences sociales graves en termes d'emplois d'autant plus que l'Etat était le principal employeur.

La Tunisie qui a opté irréversiblement pour l'économie de marché basée sur la libre concurrence et ce en vertu de ses engagements internationaux, a subi à l'instar des autres pays émergents un coût social élevé se traduisant notamment par la liquidation de 37 entreprises publiques irrécupérables et par la compression de milliers de postes d'emploi soit dans le cadre de la privatisation de certaines entreprises publiques soit dans le cadre de la restructuration des entreprises publiques en difficultés.

Par ailleurs, les pays en développement comme la Tunisie sont-ils protégés et ont-ils les moyens de se protéger de la concurrence déloyale de certains produits des pays développés, et des comportements anticoncurrentiels exercés par certaines des entreprises de ces mêmes pays sur les marchés des pays en développement?

Et même dans les cas où cette concurrence déloyale comme le dumping et où ces comportements anti-concurrentiels comme la distribution sélective et même exclusive sur les marchés des pays en développement sont constatés et vérifiés, ces derniers ont-ils les moyens de sanctionner les entreprises mères ou les holdings d'autant que ces dernières sont installées dans les pays développés et qu'elles imposent filiales ou à leurs partenaires installés dans les pays en développement ?

De plus les pays dits développés et à économies libérales et qui ont imposé au reste du monde l'instauration et le respect des règles de la libre concurrence et de l'ouverture des marchés, respectent-ils eux-mêmes ces règles de la libre concurrence ? Ouvrent-ils totalement leurs marchés aux produits d'importation comme ils l'exigent des pays en développement?

Le contingentement des produits en provenance des pays en développement notamment agricoles, la mise en place par les pays développés d'obstacles non tarifaires divers, la fixation de périodes limites pendant lesquelles l'importation est autorisée (agrumes, légumes, fruits...) pour ne pas gêner leur production locale ne sont-ils des comportements anticoncurrentiels destinés à entraver l'accès au marché ?

Dans ces conditions n'aurait-il pas été préférable, avant d'imposer aux pays en développement l'ouverture de leurs marchés aux produits étrangers, d'élaborer au préalable un code ou une charte internationale du droit de la concurrence définissant d'une façon précise le contenu des règles de la concurrence ainsi que les pratiques anticoncurrentielles et mettant en place un mécanisme efficace pour lutter contre ces pratiques et sanctionner toute entrave à la concurrence.

De plus et en vue de permettre aux pays en développement de se protéger contre les abus des holdings, qui occupent incontestablement une situation de position dominante sur les secteurs ou les parts de marché relevant de leurs activités et qui abusent de cette position en imposant à leurs distributeurs dans le pays en développement des conditions draconiennes anticoncurrentielles, n'aurait-t-il pas été opportun de mettre en place un accord international d'entraide judiciaire en matière de concurrence ?

Cet accord n'aurait-il pas aidé les pays en développement de sanctionner les comportements anticoncurrentiels commis par des sociétés étrangères dans leurs pays en les aidant à mener des enquêtes dans les pays où ces "sociétés mères" ont leur siège social et à exécuter les sanctions qui seraient prononcées contre elles ?

Il apparaît donc à travers ce qui a précédé, que la libre concurrence même dans les pays développés n'est pas une fin en soi et qu'elle trouve ses limites dans la nécessité de protéger l'intérêt économique et social du pays concerné en fonction de ses propres spécificités et de ses contraintes.

C'est dans ce contexte que le législateur tunisien, préalablement à l'ouverture totale du marché tunisien à l'importation, a mis en place une série de mesures d'accompagnement et a introduit dans le texte de la loi sur la concurrence des exceptions au principe de la libre concurrence.

4. Les mesures d'accompagnement et les exceptions aux règles de la libre concurrence

- A.** Le passage d'une économie protégée à une économie de marché impliqué nécessairement la préparation des entreprises tunisiennes à affronter la concurrence sur leur propre marché et à investir les marchés extérieurs en vue de pallier à l'exiguïté du marché. Cette préparation s'est effectuée par une série de mesures :

La mise à niveau

Un vaste programme d'assistance a été établi depuis 1996 en faveur des entreprises tunisiennes en vue de leur permettre d'améliorer leurs performances à tous les niveaux (gestion, production, acquisition et maîtrise des nouvelles technologies, etc.).

Ce programme qui s'étale jusqu'en 2007 concerne 5000 entreprises environ.

Jusqu'en 2001, les entreprises ayant bénéficié de ce programme sont au nombre de 2000 pour un montant global de 2000 millions de dinars. Ce programme qui a touché dans une première phase les entreprises de production, a été, élargi depuis l'an 2000 aux entreprises de services.

Le fonds de développement de la compétitivité :

Créé en 1995, ce fonds est destiné à aider les entreprises à améliorer leur gestion par l'octroi de primes allant de 10 à 20 % de l'investissement envisagé.

Le fonds de Promotion et de maîtrise de la technologie :

Il a été institué en 1991 pour contribuer au financement des actions d'acquisition et de maîtrise de la technologie par les entreprises industrielles. Son concours est accordé sous forme d'aide financière directe pouvant atteindre 50 % du coût du financement.

Le fonds de Promotion des Exportations :

Créé en 1984, ce fonds vise à aider l'entreprise à se placer sur les marchés extérieurs et notamment nouveaux à travers le financement des actions de prospection des marchés, des campagnes publicitaires à l'étranger et la participation aux foires et salons à l'étranger.

Le fonds d'insertion et d'adaptation professionnelle :

Institué en 1991, ce fonds intervient à travers plusieurs formules pour favoriser la préservation des emplois, stimuler la création de nouveaux emplois et encourager la mobilité géographique de la main d'œuvre.

- B.** La libre concurrence étant un vecteur de développement économique et non un objectif en soi, le législateur tunisien a prévu des exceptions à ce principe lorsque l'application des règles de la concurrence risque de perturber dangereusement un secteur ou lorsque la dérogation à ce principe est de nature à contribuer au développement économique et technologique.

1. Une exception au principe de la fixation des prix par les lois du marché a été prévue par l'article 3 de la loi de 1991 pour une liste de produits de base à forte consommation par les couches les plus défavorisées de la population.

2. Le Ministre du Commerce a été autorisé dans le cadre de l'article 4 de la loi à prendre des mesures provisoires et dérogatoires pour une période de 6 mois lorsque des perturbations graves sont constatées au niveau d'un secteur économique à l'effet de lutter contre des augmentations excessives des prix.
3. Le législateur tunisien qui a interdit les ententes et les représentations commerciales exclusives a permis au ministre du commerce de les autoriser lorsqu'il est prouvé que ces pratiques engendrent un progrès économique ou technologique et qu'elles génèrent un bénéfice pour les utilisateurs.
4. Les concentrations économiques ont été soumises à l'accord préalable du ministre du commerce lorsqu'elles risquent d'engendrer ou de renforcer une situation de position dominante sur le marché.

II. -ASSISTANCE TECHNIQUE DANS LE DOMAINE DE LA CONCURRENCE

La Tunisie s'est engagée depuis 1986 dans des réformes économiques ayant pour objectif la création d'un environnement favorisant le développement d'une dynamique de Concurrence sur le marché intérieur. Parmi ces réformes, nous citons le système institutionnel chargé d'appliquer les règles de la Concurrence. Il est composé de l'administration (Direction Générale de la Concurrence et du Commerce Intérieur et les Directions Régionales du commerce) et du Conseil de la Concurrence.

L'administration est chargée notamment de la mise en oeuvre de la politique de la concurrence et de la protection des consommateurs ainsi que de l'élaboration des réglementations y afférentes, le suivi du fonctionnement du marché et la conduite des enquêtes économiques.

Le conseil de la concurrence a une double mission :

- Une mission juridictionnelle dans la mesure où il constitue une autorité de jugement pour les pratiques anti-concurrentielles.
- Une mission Consultative dans la mesure où il est appelé à donner son avis sur les projets de textes législatifs et réglementaires et sur toutes les questions afférentes au domaine de la concurrence.

Malgré l'évolution de l'environnement juridique et institutionnel, l'application des règles de la concurrence connaît une mise en oeuvre difficile. En général, les causes sont liées à la structure du marché, aux comportements des opérateurs économiques et des consommateurs et à l'absence de vecteurs de communication efficaces. Conscient de cette situation le conseil compte établir un large programme qui a les objectifs suivants :

1. Le renforcement de la capacité d'intervention du conseil en cas de dysfonctionnement du marché intérieur.
2. La sensibilisation des agents économiques et du monde judiciaire aux règles de la concurrence.

Le programme comprend quatre composantes essentielles :

- La formation du personnel du conseil.
- L'assistance technique pour la réalisation d'enquêtes et études.
- La promotion de la culture de la concurrence.
- Equipements.

1. La composante formation :

Elle a pour objectif l'amélioration de la compétence du personnel du conseil pour mener à bien les investigations et les enquêtes sur les pratiques anti-concurrentielles et pour se prononcer sur la légalité des pratiques en cause. Les activités prévues dans ce cadre comportent notamment l'organisation :

- de conférences et des stages en Tunisie et à l'étranger ;
- de séminaires régionaux ;
- d'ateliers à effectifs limités sur des thèmes techniques spécifiques. Parmi les thèmes à développer on peut citer :
 - les critères d'appréciation d'un marché concurrentiel ;
 - les techniques d'investigations des pratiques anti-concurrentielles ;
 - l'utilisation des concepts économiques pour l'analyse du marché concurrentiel.

2. La composante "Enquêtes et études sectorielles" :

Il s'agit à ce niveau de conduire des enquêtes sectorielles dans l'objectif de constituer une base de données sur la structure des secteurs qui sera mise à profit par le conseil dans son activité.

Parmi les secteurs qui pourraient être concernés par ces enquêtes, il importe de citer :

- le secteur des matériaux de construction ;
- le secteur de l'agro-alimentaire ;
- le secteur du transport.

3. La Composante "culture de la concurrence" :

L'objectif de cette composante est de diffuser la politique de la concurrence, notamment, en direction des opérateurs économiques concernés par les bienfaits résultant de cette politique.

Cette composante devrait s'articuler autour de la vulgarisation des règles et du bienfait de la concurrence via une campagne de communication s'adressant :

- à un public large (les consommateurs) ;
- aux structures professionnelles via les organisations associatives ;
- aux opérateurs économiques et leurs structures d'encadrement (secteur par secteur) ;
- à l'administration publique et les collectivités locales ;
- aux professions et aux corps concernés par le droit de la concurrence (universités, avocats, magistrats).

Tous les supports possibles (RADIO TV Prospectus, création d'une association du droit de la concurrence...) seront mis à profit pour assurer cette vulgarisation.

4. La Composante "équipements" :

Il est prévu dans ce cadre d'acquérir du matériel informatique pour renforcer les moyens matériels du conseil et servira à accroître la capacité d'intervention du personnel du Conseil. Le matériel informatique sera composé de 10 ordinateurs fixes et portables.

Il est à noter que le coût de ce programme (hors taxes) est estimé à 300.000 Euros.

III. - APERCU SUR LE CONSEIL DE LA CONCURRENCE TUNISIEN

Le respect des pratiques anti-concurrentielles en droit Tunisien relève de la compétence du Conseil de la Concurrence à côté de la Direction Générale de la Concurrence et du Commerce Intérieur qui assume en fait les pouvoirs de police économique.

Deux questions font l'objet des développements ci-après :

1. **Présentation du Conseil de la Concurrence et aperçu sur ses relations avec la Direction Générale de la Concurrence et du Commerce Intérieur à travers la procédure qu'il applique :**

Le Conseil de la Concurrence est créé par la loi n°95-42 du 24 Avril 1995 modifiant la loi n° 91-64 du 29 Juillet 1991 relative à la concurrence et aux prix qui crée en son article 9 la commission de la concurrence. Celle-ci ne fonctionnait pas d'une façon permanente et elle a été remplacée par le conseil qui est défini comme une autorité indépendante ayant des attributions Contentieuses et Consultatives en matière de concurrence.

A. *Composition :*

Le Conseil de la Concurrence comprend 13 membres nommés par Décret.

1. Un Président à plein temps nommé parmi les Magistrats ou parmi les personnalités reconnues en matière économique, de concurrence ou de consommation et ce pour une période de 5 ans non renouvelable pour les magistrats et renouvelable une seule fois pour les autres.
2. Deux Vice-Présidents :
 - Un conseiller au tribunal Administratif en qualité de premier Vice-Président.
 - Un conseiller à l'une des chambres de la cour des comptes chargée du contrôle des Etablissements publics en qualité de deuxième Vice-Président.

Leur mandat est également de 5 ans renouvelable une seule fois.

3. Quatre magistrats de 2e grade au moins.
4. Quatre personnalités ayant exercé ou exerçant dans les secteurs de la Production, de la Distribution et des Services pour un mandat de 4 ans non renouvelable.
- 5) Deux personnes choisies leur compétence dans le domaine de l'Economie, de la Concurrence ou de la Consommation et ce pour une durée de 6 ans non renouvelable.

La composition du Conseil de la Concurrence est donc diversifiée et toutes les parties intéressées au libre jeu de la concurrence y sont représentées.

A côté des Magistrats, siègent actuellement un professeur de gestion, des représentants du monde économique et professionnel et un représentant de l'Organisation de la Défense des Consommateurs.

Un commissaire de gouvernement est désigné auprès du Conseil de la Concurrence. Actuellement, il est le Directeur de la Concurrence et du Commerce Intérieur ou son représentant.

Les affaires sont instruites par des rapporteurs permanents ou par des rapporteurs contractuels désignés à l'occasion d'une ou plusieurs affaires. Ces rapporteurs sont supervisés par un rapporteur général.

Le secrétariat est assuré par le secrétaire permanent qui a rang du Directeur d'administration centrale.

Le Conseil est actuellement présidé par un magistrat. Il est assisté par deux vice-présidents qui exercent leurs fonctions à plein temps.

B. Attributions :

Le conseil de la concurrence a une double missions: l'une contentieuse, et l'autre consultative.

Au sujet de son activité contentieuse, le conseil est compétent pour examiner et réprimer les pratiques anticoncurrentielles qui sont fondées sur les ententes illicites et les abus de position dominante auxquelles il faut ajouter l'abus de la dépendance économique ; la limitation à l'accès des marchés par le choix de circuits de distribution sélectifs ou exclusifs sans raison d'être ; la fixation de prix minimum ; la vente avec des conditions discriminatoires ; le refus de vente et les ventes liées et la répartition des marchés ou des sources d'approvisionnements.

Bien entendu, cette liste n'est pas limitative.

Toutefois, l'article 8 ne considère pas comme anti-concurrentielles, les pratiques dont les auteurs justifient auprès des autorités compétentes qu'elles ont pour effet d'assurer un programme économique et qu'elles produisent aux utilisateurs une partie équitable du profit qui en résulte. Ces pratiques sont limitées dans le temps.

L'autorisation est accordée par le Ministre du Commerce, qui peut demander l'avis du Conseil sur la question.

En ce qui concerne sa mission consultative, le Conseil a un rôle très important :

Il donne son avis sur :

- Les textes législatifs et réglementaires relatifs à la concurrence.
- Les projets de concentration entre entreprises.
- Toute question de concurrence et particulièrement les exemptions.

La demande d'avis est facultative pour le Ministre du Commerce sauf pour les autorisations de demande de concession ou de représentation exclusive.

La saisine du conseil est soumise à un certain nombre de règles en matière contentieuse ou en matière consultative.

Procédure :

Les personnes habilitées à saisir le conseil :

En matière contentieuse, ne peuvent saisir le conseil de la concurrence que les personnes énumérées à l'article 11 (nouveau) de la loi relative à la concurrence et aux prix.

Elles sont au nombre de six catégories :

- Le Ministre chargé du Commerce sur son initiative ou sur demande du gouvernement ;
- Les entreprises économiques ;
- Les organisations professionnelles ;
- Les organisations syndicales ;
- Les organisations de consommateurs agréés ;
- Les chambres d'Agriculture ou de commerce et d'industrie.

Les entreprises doivent être comprises dans un sens large ; elles sont considérées comme telles non seulement les personnes morales de droit privé ou public poursuivant un but lucratif mais également toutes les entités économiques désintéressées de la recherche du profit telles les associations agréées La personne physique exploitant à titre individuel ou membre d'une profession libérale est considérée comme une entreprise.

Egalement, le Conseil de la Concurrence peut se saisir de lui-même en cas de désistement d'un plaignant de son action ou s'il découvre des infractions sur d'autres marchés ayant un lien avec le marché visé objet d'une affaire en cours d'instruction.

Le dossier de saisine :

Les modalités de saisine du Conseil de la Concurrence sont fixées par l'article 11 (nouveau) précité.

La saisine est introduite par une requête signée soit par le Ministre chargé du Commerce soit par le responsable légal de l'entreprise ou de l'organisme demandeur soit par toute personne dûment mandatée à cet effet par le responsable légal soit par un avocat pour le compte duquel il agit.

- la requête doit être accompagnée des présomptions préliminaires de preuve ;
- la requête peut être déposée au secrétariat du Conseil contre récépissé ou envoyée par lettre recommandée avec accusé de réception.

La partie saisissante n'a ni à informer les autres parties de la saisine ni à leur communiquer les pièces du dossier.

Le Ministère d'avocat est facultatif devant le conseil et la procédure ne donne pas à des débours financiers ; elle aboutit à une "Décision" rendue par une section. Elle peut faire l'objet d'un recours de cassation devant le tribunal administratif.

La décision du conseil est revêtue de la formule exécutoire. Elle est notifiée par un huissier notaire et exécutée par le Ministre chargé du Commerce.

La saisine consultative :

Le conseil de la concurrence peut être consulté par toutes les personnes qui ont qualité à le saisir aux contentieux à l'exception des entreprises et ce par l'intermédiaire du Ministre chargé du Commerce.

Le Conseil siégeant en assemblée plénière émet un avis, mais il n'est pas un avis conforme. Toutefois, dans la pratique, le Ministre a toujours tenu compte de l'avis du conseil notamment en matière de concentration d'entreprises où le conseil est normalement consulté à titre d'expert sur les seules questions de concurrence que pose l'opération de concentration.

En conclusion, la compétence du Conseil en matière consultative s'étend à tous les secteurs d'activités économiques sur toutes les questions de concurrence, mais en matière contentieuse, il ne peut être saisi que des pratiques dites "anti-concurrentielles".

Il n'est donc pas compétent pour constater et sanctionner les pratiques dites "restrictives de Concurrence" sauf lorsqu'elles sont mises en oeuvre dans le cadre d'ententes ou lorsqu'elles sont la manifestation d'un abus de position dominante ou de dépendance économique. Il n'est pas également compétent pour juger des plaintes en concurrence déloyales ou pour examiner les actions en nullités de contrat.

Non classifié

CCNM/GF/COMP/WD(2002)30



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Feb-2002

Français - Or. Français

CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES

CCNM/GF/COMP/WD(2002)30
Non classifié

Forum mondial de l'OCDE sur la concurrence

CONTRIBUTION DE L'UEMOA

-- Session II --

Cette contribution est soumise par M. Jean-Luc SENOU (Union Economique et Monétaire de l'Ouest Afrique - UEMOA -) pour la session II du Forum Mondial sur la Concurrence qui doit se tenir les 14 et 15 février 2002.

JT00120644

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Français - Or. Français

**ELABORATION DE LA LEGISLATION COMMUNAUTAIRE DE LA CONCURRENCE
A L'INTERIEUR DE L'UEMOA : ROLE DE L'ASSISTANCE TECHNIQUE**

**Par
Monsieur Jean-Luc SENOU,
Directeur du Commerce
et de la Concurrence
à la Commission de l'UEMOA**

Mesdames et Messieurs,

Permettez-moi avant tout, de remercier les responsables de l'OCDE, et particulièrement Madame Hélène CHADZYNSKA, de la Division des lois et politiques de concurrence de l'OCDE, d'avoir bien voulu associer la Commission de l'Union Economique et Monétaire Ouest Africaine (UEMOA) aux travaux du présent Forum.

Mesdames et Messieurs,

Comme vous le savez, l'Union Economique et Monétaire Ouest Africaine est composée de huit pays¹ qui, se fondant sur l'usage d'une monnaie unique, le Franc CFA depuis plusieurs décennies, ont décidé de renforcer leur coopération monétaire en y adjoignant un volet économique.

A cet égard, l'Union s'est fixée quatre objectifs majeurs devant concourir à la réalisation d'un objectif plus global, à savoir, « le renforcement de la compétitivité des activités économiques et financières des Etats membres, dans le cadre d'un marché ouvert et concurrentiel et d'un environnement juridique rationalisé et harmonisé ».

Parmi ces quatre objectifs spécifiques, figure la création d'un marché commun, basé sur la libre circulation des personnes, des biens, des services, des capitaux et le droit d'établissement, ainsi que sur un tarif extérieur commun (TEC) et une politique commerciale commune.

Dans le cadre de la réalisation de ce marché commun, l'UEMOA a procédé, depuis mai 1996, date de la première réunion de la Conférence des Chefs d'Etat et de Gouvernement, à une série de réformes ayant notamment transformé la zone en une union douanière depuis le 1^{er} janvier 2000.

A ce effet, les Etats membres de l'Union ont consenti d'importants efforts pour procéder en trois ans et demi, de juillet 1996 à décembre 1999, à l'élimination complète des barrières tarifaires sur les échanges commerciaux intra-communautaires.

Cet effort de libéralisation interne a été conjugué avec un important effort de libéralisation externe puisque, vis-à-vis du reste du monde, la mise en place du TEC/UEMOA s'est traduite par un

¹ L'UEMOA comprend huit pays de l'Afrique de l'Ouest : le Bénin, le Burkina Faso, la Côte d'Ivoire, la Guinée-Bissau, le Mali, le Niger, le Sénégal et le Togo.

désarmement tarifaire externe ramenant la fiscalité globale de porte, d'un pic tarifaire de 65,5%² à 22%, et le taux moyen de taxation, de 13,6% à 11,2%.

Le marché régional induit par l'Union douanière et la politique commerciale commune permet aux entreprises de produire à grande échelle, de mettre en œuvre des moyens modernes de production et de réduire leurs coûts, au bénéfice des consommateurs. Ces mutations, qui doivent se traduire par une réallocation des ressources à l'intérieur de l'espace communautaire, impliquent un bouleversement des conditions de l'offre et un renoncement aux habitudes et comportements traditionnels conduisant au cloisonnement des marchés nationaux.

Or, l'on a pu observer que des entreprises, insuffisamment préparées au nouvel environnement concurrentiel, se livrent à des pratiques visant à conserver leurs situations de rente, préjudiciables tant pour la compétitivité de la production communautaire que pour le bien être des consommateurs. De même, les législations des Etats permettent à des entreprises nationales de continuer à se soustraire à la concurrence de produits originaires d'autres pays de l'Union. C'est donc pour assurer le bon fonctionnement du marché commun que le Traité a prévu en son article 76, l'institution de règles communes de concurrence applicables aux entreprises publiques et privées, ainsi qu'aux aides publiques.

A cet effet, la Commission a entrepris, depuis 1999, un ensemble de travaux destinés à faire adopter par le Conseil des Ministres les Règlements et Directives d'application des principales dispositions du Traité relatives à la concurrence.

Le soutien de la coopération technique, et particulièrement de l'Union Européenne, a tenu une place importante dans la réalisation de ce chantier. C'est pourquoi il m'a paru intéressant, au regard des termes de référence que m'a communiqués Madame CHADZYNSKA, de partager avec vous cette expérience singulière qu'a connue la Commission de l'UEMOA dans l'élaboration de la législation communautaire de la concurrence à l'intérieur de l'Union.

A cet effet, j'ai structuré ma communication en deux points :

- Analyse de l'assistance technique au niveau du processus d'élaboration de la législation communautaire de la concurrence à l'intérieur de l'UEMOA,
- Besoins actuels et futurs de l'UEMOA en matière d'assistance technique.

ANALYSE DE L'ASSISTANCE TECHNIQUE DANS LE PROCESSUS D'ELABORATION DES REGLES COMMUNAUTAIRES DE LA CONCURRENCE A L'INTERIEUR DE L'UEMOA

L'élaboration des règles communautaires de la concurrence à l'intérieur de l'UEMOA a été une expérience particulièrement enrichissante, tant pour les cadres de la Commission de l'UEMOA que pour les Administrations des Etats membres de l'Union.

Ce processus a comporté plusieurs phases :

- élaboration, par la Commission, des termes de référence de l'étude relative à l'élaboration de la législation communautaire ;

² La Guinée-Bissau avait une crête tarifaire de 105% au 1^{er} janvier 1998.

- réalisation, sur financement de l'Union Européenne, de cette étude par un consortium³ de cabinets de consultants ;
- détermination, par la Commission, des options à retenir pour la finalisation de l'avant-projet de législation ;
- discussion avec les Experts des Etats membres ;
- consultation de la Cour de Justice de l'UEMOA sur l'interprétation des articles 88, 89 et 90 du Traité, relatifs au règles de concurrence ;
- interventions d'autres partenaires : Banque Mondiale, Cnuced, etc.
- adoption par le Conseil des Ministres.

L'étude réalisée grâce à l'appui de l'Union Européenne, sur la base des termes de référence préparés par la Commission de l'UEMOA, a permis notamment :

- de faire l'état des lieux en ce qui concerne le dispositif existant en matière de contrôle de la concurrence dans les Etats membres ;
- de proposer un avant-projet de législation communautaire de la concurrence, sur la base des forces et faiblesses des dispositifs nationaux, des règles de concurrence prescrites par les articles 88 à 90 du Traité UEMOA, et au regard des expériences de l'Union Européenne, du Mercosur et des résultats des travaux menés, sous l'égide de la CNUCED, par le Groupe Intergouvernemental d'Experts du droit et de la politique de concurrence.

Il convient de souligner d'entrée que, sur plusieurs dizaines de projets d'assistance technique financés depuis 1996 par l'Union Européenne, l'étude relative à l'élaboration de la législation communautaire de la concurrence est considérée comme l'une de celles qui ont le plus donné satisfaction à la Commission de l'UEMOA. Deux raisons essentielles ont été avancées à cet effet, à savoir la qualité des termes de référence élaborés par la Commission, et le bon niveau de professionnalisme des bureaux d'études commis à cette opération.

Le plus grand apport de cette forme particulière d'assistance technique développée a été le dialogue permanent entre la Commission de l'UEMOA et le Bureau d'études, en vue de choisir les options les plus pertinentes au regard des dispositions du Traité de l'UEMOA, de l'expérience de l'Union Européenne et des contraintes de l'environnement spécifique aux Etats membres de l'UEMOA.

Cette approche a assurément renforcé les capacités des cadres de la Commission de l'UEMOA et des Experts des Etats membres impliqués ultérieurement dans le processus de validation des résultats de l'étude.

Cependant, l'assistance technique développée n'en révèle pas moins certaines limites :

- En premier, la sélection du cabinet d'études n'a pas été facile à cause de l'inexistence dans les Etats membres de l'UEMOA de structures privées répondant au profil requis ; ce qui

³ Le consortium comprenait un Cabinet d'Avocats belge, responsable des aspects juridiques et un Bureau d'Etudes américain, qui s'est occupé des aspects économiques.

explique le choix de cabinets du Nord qui ont dû travailler avec beaucoup de contraintes de délais. En conséquence, certains aspects liés à l'application effective des lois nationales n'ont pas été abordés dans l'étude. Or, une telle information aurait facilité les arbitrages effectués en ce qui concerne la répartition des compétences entre la Commission et les Etats membres. Cette question essentielle a dû être tranchée ultérieurement par la Cour de Justice de l'UEMOA dans son avis n° 03/2000/CJ/UEMOA.

- La deuxième limite concerne le choix du modèle européen en matière de réglementation de la concurrence, sans une évaluation correcte des moyens que cela exige pour sa mise en œuvre. Il convient de relever que cette lacune s'observe également au niveau de certains Etats membres, qui ont bénéficié d'un apport technique considérable de la part de la CNUCED ou de la Coopération Française au moment de la formulation de leurs lois, mais qui se sont retrouvés confrontés à des difficultés liées à l'inadéquation du volume de règles adoptées avec les capacités internes de mise en œuvre.

Cette dernière observation n'enlève en rien la valeur fort appréciable des séminaires que la CNUCED a pu organiser dans la sous-région, ni ses avis techniques sur les projets de textes que nos Etats ont eu à lui soumettre. De même, il convient de préciser que les voyages d'études financés par la coopération Française au profit de cadres africains auprès de la Direction Générale de la Concurrence et du Conseil français de la Concurrence sont généralement bien appréciés.

Cependant, il y a des ajustements à faire dans le cadre de cette assistance technique qui serait plus efficace si l'on insistait davantage sur les pré-requis de la mise en œuvre. Ceux-ci concernent tant le personnel que le matériel dont disposent les Autorités de Concurrence.

Pour le personnel, il y aurait lieu d'allonger la durée des formations dispensées qui doivent être plus détaillées et orientées vers la pratique. Il est aussi impératif de veiller à fixer ce personnel dont la mobilité d'une administration à une autre constitue un grand facteur de déperdition de capacités en matière de contrôle de la concurrence. Cela engage principalement les Etats, qui doivent veiller sur la stabilisation des carrières des personnes formées, mais également les Bailleurs de fonds dans une moindre mesure.

Concernant des équipements acquis aussi bien sur ressources extérieures que sur ressources nationales, il conviendrait de veiller à ce qu'ils soient effectivement utilisés par les institutions nationales chargées de la concurrence.

En conclusion à cette première partie, je pense que le développement de la concurrence dans les pays africains grâce à l'assistance technique ne pourra se réaliser efficacement qu'à partir de projets bien élaborés, dont l'exécution s'étalerait sur une période d'au moins trois ans.

Ces projets devraient indiquer clairement tous les volets que recourent les domaines de l'assistance technique et en particulier :

- le nombre de bénéficiaires des programmes de formation, leurs profils et les conditions relatives à leur utilisation future ;
- le financement temporaire et transitoire des activités de démarrage des structures de concurrence sur la période ;

- les modalités de la relève par les Etats, qui devraient s'engager clairement à inscrire dans leurs budgets les montants nécessaires au fonctionnement de ces structures une fois que les projets auront pris fin.

BESOINS DE L'UEMOA EN MATIERE D'ASSISTANCE TECHNIQUE

Avec l'adoption des règles communautaires de la concurrence, prévue pour mars 2002, la Commission de l'UEMOA devra faire face à plusieurs urgences, les unes relatives à la formulation d'actes complémentaires d'application des règles de base, les autres relatives à la mise en œuvre de la législation communautaire.

Dans cette perspective, la Commission a conçu un plan d'actions autour de trois domaines :

- le cadre institutionnel et technique,
- les études sectorielles,
- l'information, l'éducation et la communication.

Le cadre institutionnel et technique

La nécessaire coopération entre la Commission et les structures de concurrence des Etats membres conduit à aborder cette question selon un programme global qui comportera les volets suivants :

- l'achèvement de l'uniformisation des règles et procédures en matière de concurrence, en particulier par le suivi des réformes institutionnelles attendues des Etats membres ;
- le renforcement des capacités humaines et logistiques des structures communautaires et nationales de la concurrence.

Dans le cadre du renforcement des capacités, l'accent doit être mis sur la formation comportant des modules relatifs aux principes et pratiques de la concurrence, ainsi que sur la documentation technique appropriée. Cette formation englobe aussi bien les séminaires destinés aux agents, la formation de formateurs que les voyages d'études qui facilitent la familiarisation des bénéficiaires avec la pratique des enquêtes, de la production de rapports et d'autres tâches administratives à effectuer au sein d'une structure de concurrence.

Outre la formation qui doit être permanente, des moyens suffisants d'intervention des structures de concurrence communautaires et nationales devront être mis en place. *L'objectif de la Commission, c'est de parvenir à mettre en place un réseau interactif de coopération entre elle et les structure nationales de la Concurrence.*

Par ailleurs, le projet d'Accord de Partenariat Economique entre l'UEMOA et l'Union Européenne nécessite un rapprochement des deux législations, notamment dans les domaines des

concentrations. Les travaux en cours à l'OMC et les négociations de l'OMC dans le cadre du Doha Development Round⁴ devraient constituer une bonne base de travail.

Etudes des secteurs prioritaires

Pour assurer une mise en œuvre efficace de la législation communautaire de concurrence, l'UEMOA doit opérer, en matière de secteurs à examiner en priorité, les choix stratégiques ayant un impact positif sur la lutte contre la pauvreté.

Les secteurs prioritaires sont ceux qui présentent dans le marché un caractère transversal important et dont le fonctionnement influence celui des autres secteurs de façon sensible. Il faut y inclure également ceux présentant des spécificités pouvant justifier l'adoption de Règlements d'exemptions par catégories.

Une bonne connaissance de ces secteurs et l'identification claire des pratiques commerciales qui y ont cours peuvent faciliter le travail des autorités de concurrence de l'Union. Sur financement FED, la Commission de l'UEMOA a programmé, au titre de l'année 2002, la réalisation d'études dans le secteur du transport terrestre et dans celui des banques et établissements financiers. Ces deux secteurs, ainsi que ceux de l'énergie et des télécommunications, sont considérés comme des domaines où l'action de la Commission sera rapidement visible, avec un impact tangible sur la réduction des coûts des facteurs de production.

Comme on peut le voir, l'intérêt de ces études sur les secteurs prioritaires réside aussi dans le fait qu'elles permettent une mise en cohérence de la politique de la concurrence avec les autres politiques sectorielles et les programmes sociaux tels que la lutte contre la pauvreté et la bonne gouvernance.

L'Information, l'Education et la Communication (IEC)

L'information joue un rôle capital en matière de mise en œuvre des règles de concurrence qui ont la particularité d'impliquer les autorités administratives, les entreprises publiques ou privées et la société civile. En effet, pour être sûr que les mécanismes de surveillance et de régulation du marché sont compris par tous, il est essentiel que des échanges réguliers s'opèrent entre ces acteurs.

La nature des règles de concurrence, dont l'application suppose qu'il soit procédé à des arbitrages entre des intérêts pas toujours convergents, exige que des explications suffisantes soient fournies aux différents acteurs que sont les entreprises et les consommateurs. Cette sensibilisation sur les enjeux et les objectifs poursuivis conditionne la réussite de la mise en œuvre des règles de concurrence.

Elle peut s'opérer à partir de séminaires ou grâce à l'utilisation de supports audiovisuels et de publications périodiques qui concourent à créer un cadre d'échanges interactifs par lequel on peut espérer développer la culture de la concurrence.

Ces activités dont l'objectif essentiel est de développer une culture de la concurrence dans l'espace UEMOA, nécessitent la mobilisation de moyens techniques et financiers pour la disponibilité desquels l'Union attend beaucoup de l'assistance technique.

⁴ Il convient de rappeler que dans les positions communes de négociations arrêtées par le Conseil des Ministres de l'UEMOA pour Seattle et Doha, les Etats membres de l'Union étaient favorables à l'ouverture de négociations sur le Commerce et la Concurrence.

CONCLUSION

Les réformes entreprises dans le cadre de la réalisation du marché commun de l'UEMOA soumettent les Etats membres à différents ajustements portant aussi bien sur leurs budgets que sur la compétitivité de leurs entreprises. L'Union douanière a exercé sur les entreprises de l'Union un double mouvement d'accroissement de la pression concurrentielle, qui a augmenté, tant de la part des entreprises des autres Etats membres de l'Union, que de la part des produits importés du reste du monde.

Pour accompagner l'union douanière et assurer le bon fonctionnement du marché commun de l'UEMOA, il était devenu indispensable de doter l'Union d'une législation communautaire pour la mise en œuvre d'une politique de concurrence qui doit :

- garantir l'unité du marché commun en empêchant les entreprises de se le partager au moyen d'ententes illicites ;
- éviter la monopolisation de certains marchés en empêchant les grandes entreprises d'abuser de leur position dominante pour imposer leurs conditions ou absorber leurs concurrents ;
- empêcher les gouvernements de fausser les règles du jeu au moyen d'aides aux entreprises du secteur privé ou de discriminations en faveur d'entreprises publiques ;
- favoriser l'efficacité économique en créant un climat propice à l'innovation et au progrès technique.

Cette législation, dont l'adoption est prévue en mars 2002, relève d'un domaine nouveau, dans lequel le Traité a donné à la Commission de l'UEMOA un pouvoir original de décision, incluant des sanctions à l'encontre des entreprises, privées comme publiques, et à l'encontre des Etats. Elle contribuera assurément à transformer l'espace économique de l'UEMOA en une « communauté de droit » et à accroître la visibilité pour l'investisseur étranger.

Le projet de législation prévoit un mécanisme de coopération entre la Commission et les structures nationales de concurrence des Etats membres, en vue de l'application uniforme du droit communautaire de la concurrence sur l'étendue du territoire de l'Union.

En conséquence, les besoins de l'Union en matière d'assistance technique et de capacity building portent prioritairement sur :

- la mise en place d'un réseau interactif et opérationnel de coopération entre la Commission et les structures nationales de concurrence ;
- le financement d'études sur les secteurs prioritaires en vue d'assurer à la politique communautaire de concurrence un impact tangible sur la lutte contre la pauvreté et sur la réduction des coûts des facteurs de production ;
- le développement d'une culture de la concurrence dans l'espace UEMOA grâce au financement de programmes intégrés d'Information, d'Education et de Communication (IEC).

Mesdames et messieurs,

Je voudrais clore mes propos en renouvelant mes préoccupations quant à l'importance des questions de la mise en œuvre. La pratique du droit de la concurrence dans les pays africains a montré que l'on accorde bien peu d'importance aux sanctions, quand bien même elles sont prévues dans les législations.

Or, compte tenu de l'importance des sanctions, un droit économiquement justifié peut être complètement dévoyé et produire des effets pervers si les garanties d'indépendance et de procédure, qui sont un complément indispensable au droit de la concurrence n'existent pas.

C'est pour cette raison que les concepteurs du Traité de l'UEMOA ont donné un rôle central à la Commission, en lui donnant les pouvoirs les plus étendus, pour appliquer, sous le contrôle de la Cour de Justice, les règles communautaires de la concurrence. Il importe que la coopération technique apporte son appui au renforcement des capacités de cet organe supranational, pour assurer au système ces garanties d'indépendance et de procédure.

Je vous remercie pour votre attention.

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- to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
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- à réaliser la plus forte expansion de l'économie et de l'emploi et une progression du niveau de vie dans les pays Membres, tout en maintenant la stabilité financière, et à contribuer ainsi au développement de l'économie mondiale ;
- à contribuer à une saine expansion économique dans les pays Membres, ainsi que les pays non membres, en voie de développement économique ;
- à contribuer à l'expansion du commerce mondial sur une base multilatérale et non discriminatoire conformément aux obligations internationales.

Les pays Membres originaires de l'OCDE sont : l'Allemagne, l'Autriche, la Belgique, le Canada, le Danemark, l'Espagne, les États-Unis, la France, la Grèce, l'Irlande, l'Islande, l'Italie, le Luxembourg, la Norvège, les Pays-Bas, le Portugal, le Royaume-Uni, la Suède, la Suisse et la Turquie. Les pays suivants sont ultérieurement devenus Membres par adhésion aux dates indiquées ci-après : le Japon (28 avril 1964), la Finlande (28 janvier 1969), l'Australie (7 juin 1971), la Nouvelle-Zélande (29 mai 1973), le Mexique (18 mai 1994), la République tchèque (21 décembre 1995), la Hongrie (7 mai 1996), la Pologne (22 novembre 1996), la Corée (12 décembre 1996) et la République slovaque (14 décembre 2000). La Commission des Communautés européennes participe aux travaux de l'OCDE (article 13 de la Convention de l'OCDE).

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Le Centre de l'OCDE pour la coopération avec les non-membres (CCNM) a pour mission de promouvoir et de coordonner la coopération et le dialogue sur les politiques à suivre entre l'OCDE et les économies extérieures à la zone de l'OCDE. L'Organisation entretient actuellement des liens de coopération avec quelque 70 économies non membres.

A travers ses programmes de coopération avec les non-membres le but essentiel du CCNM est de mettre les ressources, riches et variées, que l'OCDE a développées pour ses propres Membres, à la disposition des économies non membres intéressées. Au nombre de ces ressources, on peut citer, par exemple, ses méthodes de coopération sans équivalent qui sont le fruit d'une longue expérience ; l'inventaire des pratiques optimales dans la plupart des domaines de l'action publique qui a été dressé à partir de l'expérience des pays Membres ; le dialogue permanent entre hauts responsables venus des capitales, renforcé par le processus des examens mutuels ; la capacité de l'OCDE de traiter les questions pluridisciplinaires. Toutes ces activités s'appuient sur une vaste base de données rétrospectives et sur les solides capacités d'analyse du Secrétariat. De la même manière, les pays Membres eux-mêmes bénéficient des échanges d'expériences avec des experts et de hauts responsables des économies non membres.

Les programmes du CCNM couvrent les principaux domaines d'action des gouvernements dans lesquels l'OCDE dispose de compétences et qui présentent un intérêt mutuel pour les Membres et les non-membres. Parmi ces domaines figurent le suivi de l'évolution économique, l'ajustement structurel par le biais de politiques sectorielles, la politique commerciale, l'investissement international, la réforme du secteur financier, la fiscalité internationale, l'environnement, l'agriculture, le marché du travail, l'éducation et la politique sociale, ainsi que l'innovation et le développement technologique.

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