COMPETITION COMMITTEE

Competition and Procurement

Key Findings

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2011

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FOREWORD

The OECD Competition Committee, Working Party 3 and the Global Forum on Competition have discussed competition and procurement extensively in recent years. Among the participants in these discussions were senior competition officials, leading academics and representatives of the business community.

This publication presents the key findings resulting from the roundtable discussions held on Collusion and Corruption in Public Procurement (2010); Public Procurement: The Role of Competition Authorities in Promoting Competition (2007); Competition in Bidding Markets (2006); and Competition Policy and Procurement Markets (1998). The key findings from each roundtable have now been organised into a cohesive narrative, putting the Competition Committee's work in this area into perspective and making it useful to a wider audience.

The executive summaries on which this document is based, as well as a bibliography, the Guidelines for Fighting Bid Rigging and the Third report on the implementation of the 1998 recommendation are included in this publication. The full set of materials from each roundtable, including background papers, national contributions and detailed summaries of the discussions, can be found at www.oecd.org/competition/roundtables.

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By the Secretariat

Introduction

(1) *Public procurement is the process of purchasing goods or services by the public sector, the aim of which is to secure the best value for public money. Public procurement involves the expenditure of large sums of public money, and given its magnitude, can impact on the structure and functioning of competition in a market more generally. It is critical, therefore, to protect the integrity of the public procurement process, so as to maximise the resulting benefits for society and to protect competitive markets.*

Procurement is the process of purchasing goods or services. The primary objective of an effective procurement policy is the promotion of efficiency, i.e. the selection of the supplier with the lowest price or, more generally, the achievement of the best "value for money". Both public and private organizations often rely upon a competitive bidding process to achieve better value for money in their procurement activities. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. However, the competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete, that is, they set their terms and conditions honestly and independently.

* This section is based on meaningful findings extracted from the executive summaries compiled in this publication. They were reorganised into a cohesive narrative that captures the different aspects covered.

Public procurement comprises government purchasing of goods and services required for State activities which accordingly aims to secure the best value for public money. Public procurement generally accounts for a large share of public expenditure in a domestic economy: in OECD countries, public procurement accounts for approximately 15% of GDP. In many non-OECD countries that figure is even higher. Due to the magnitude of the spending involved, public procurement can have a market impact beyond the mere quantities of goods and services purchased: through its procurement policies, the public sector can affect the structure of the market and the incentives of firms to compete more or less fiercely in the long run. Procurement policy therefore may be used to shape the longer term effects on competition in an industry or sector.

(2) *While collusive or corrupt conduct may occur during any procurement procedure, whether public or private, certain aspects of the public procurement process render it particularly vulnerable to distortion via anticompetitive conduct. On the one hand, the sheer volume of high value public procurement projects – many of which relate to sectors that have, historically, been prone to anticompetitive conduct – creates attractive opportunities for corruption and collusion. On the other hand, public entities are typically more constrained as to their range of permissible actions than private procurers, because of the highly regulated nature of public procurement, and therefore have limited strategic options available to address these threats.*

Collusion and corruption can arise in any procurement procedure, whether occurring in the public or private sectors. Yet, the distinctiveness of public procurement renders it particularly vulnerable to anticompetitive and corrupt practices, and magnifies the resultant harm. It is for this reason that the problems of collusion and corruption within the field of public procurement specifically have merited particular attention by the OECD Competition Committee in its work.

The competition concerns arising from public procurement are largely the same concerns that can arise in an "ordinary" market context: the reaching of collusive agreements between bidders during the tender process or across tenders. A key peculiarity of the public purchaser as

compared to a private purchaser is that the government has limited strategic options. Whereas a private purchaser can choose his purchasing strategy flexibly, the public sector is subject to transparency requirements and generally is constrained by legislation and detailed administrative regulations and procedures on public procurement. These rules are set as an attempt to avoid any abuse of discretion by the public sector. However, full transparency of the procurement process and its outcome can promote collusion. Disclosing information such as the identity of the bidders and the terms and conditions of each bid allows competitors to detect deviations from a collusive agreement, punish those firms and better coordinate future tenders. Moreover, regulatory requirements dictating particular procurement procedures can render the process excessively predictable, creating further opportunity for collusion. This lack of flexibility limits the opportunities for the public purchaser to react strategically when confronted with unlawful cooperation among potential bidders seeking to increase profits.

Other aspects of the public procurement process compound this particular vulnerability to anticompetitive and corrupt practices. Public procurement frequently involves large, high value projects, which present attractive opportunities for collusion and corruption. Certain sectors frequently subject to public procurement, including construction and medical goods and services, may be particularly prone to anticompetitive or corrupt practices. Finally, the sheer quantity of goods and services that are contracted by the State creates monitoring difficulties and increases the likelihood that the public procurement process may fall prey to collusion or corruption.

(3) Distortion of the procurement process via collusion or corruption typically has a particularly detrimental effect in the public sector context. The resulting failure to achieve best value for money has a negative impact on the range and depth of services and infrastructure that a State can provide. Moreover, corruption and collusion in public procurement can diminish public confidence in the government and the market, ultimately inhibiting a State's economic development.

That public procurement is particularly vulnerable to anticompetitive interference is a state of affairs that is made all the more problematic by the fact that the harm caused by corruption and collusion has an

especially detrimental impact in the public sphere. Effective public procurement determines the quality of public infrastructure and services and it impacts on the range and depth of infrastructure and services that the State can provide to its citizens. Public procurement is an issue of key importance for a State's economic development: (i) the goods and services involved typically affect a large section of the population; (ii) public procurement often involves physical infrastructure or public health, which support other forms of economic activity; (iii) it impacts on international competitiveness; (iv) it can impact on the investment climate; (v) distortion of public procurement typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public services and infrastructure to the greatest extent; and (vi) public procurement often concerns "public goods", and so government failures cannot be addressed by private market mechanisms.

The effects of collusion and corruption in public procurement are therefore arguably more problematic than in private procurement. Moneys lost because of subversion of the public procurement process represent wastage of public funds. The resulting loss to public infrastructure and services, whether in quality or range, typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public provision to the greatest extent. Collusion in public procurement may diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace. Moreover, distortion of the public procurement process is detrimental for democracy and for sound public governance, and it inhibits investment and economic development. In this way, deficiencies in public procurement impact on the wider economy in a way that does not occur with private procurement.

Generic pharmaceuticals in Mexico:
Improved procurement securing better value for money

Between 2003 and 2006, procurement of generic pharmaceuticals by the Mexican social security agency, IMSS, was on the basis of fragmented and wholly domestic (that is, reserved to national firms) tendering procedures: there were, on average, nearly 100 auctions per product per year, with each consuming area (region or general hospital) holding its own tenders separately and, in some instances, several times a year for the same product. Many of these auctions included multiple provision rules and relatively high reference prices.

In 2007, however, IMSS revised its procurement strategy. It began opening tenders to international bidders, consolidating purchases into only one or several annual national contracts per product, including aggressively low maximum prices based on market research, and eliminating multiple provision. As a result, evidence of collusion among bidders declined greatly, and winning tender prices for generic pharmaceuticals decreased dramatically: 18 of the 20 most important products, representing 42% of purchases, registered an average price decrease of 20%.

Collusion and Corruption in Public Procurement

(4) Collusion between firms that are bidding in a public procurement allows them to avoid the pressures of competition, with the result that the public purchaser gets less for its money, or pays more for what it gets. Bid rigging is the typical mechanism of collusion in public contracts, which leads to the predetermination of the outcome of the procurement process by its participants rather than the competitive process. Strategies for implementation of a bid rigging cartel include cover bidding, bid allocation, bid suppression and market allocation.

Collusion involves a horizontal relationship between bidders in a public procurement, who conspire to remove the element of competition from the process. In the normal course, independent bidders in a procurement process compete against each other to win the contract, and it is via this mechanism that best value for money for the purchaser is achieved. Anticompetitive collusion occurs when businesses, that would otherwise be expected to compete, form a cartel; they secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or

services through the bidding process, with the result that the purchaser gets less for its money.

Bid rigging is the typical mechanism of collusion in public contracts: the bidders determine between themselves who should "win" the tender, and then arrange their bids in such a way as to ensure that the designated bidder is selected by the purportedly competitive process. Bid rigging is an illegal practice in all OECD member countries and can be investigated and sanctioned under the competition law and rules. In a number of OECD countries, bid rigging is also a criminal offence.

Although individuals and firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one or more of several common strategies. These strategies are not mutually exclusive and may be used in tandem by firms. Use of these strategies in turn may result in patterns that procurement officials can detect and which can then help uncover bid-rigging schemes. *Cover bidding* (also called complementary, courtesy, token, or symbolic bidding), occurs when firms agree to submit bids that involve at least one of the following: (i) a bid that is higher than the bid of the designated winner, (ii) a bid that is known to be too high to be accepted, or (iii) a bid that contains special terms that are known to be unacceptable to the purchaser. *Bid-suppression* schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In *bid-rotation* schemes, conspiring firms continue to bid, but they agree to take turns being the winning bidder. Alternatively or additionally, competitors may carve up the market – *market allocation* – and agree not to compete for certain customers or in certain geographic areas.

(5) Certain sector characteristics facilitate collusion (bid rigging) between firms, and therefore make it more likely to occur successfully. These include market conditions that allow firms to reach agreement on a common course of anticompetitive conduct, to monitor adherence (or cheating) by other firms to the agreement, and to punish firms that have deviated from the cartel.

In order for firms to implement a successful collusive agreement, they must agree on a common course of action for implementing the

agreement, monitor whether other firms are abiding by the agreement, and establish a way to punish firms that cheat on the agreement. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids.

Sector characteristics that are likely to facilitate collusion include: (i) a small number of companies operating in the market; (ii) little or no new entry into the market; (iii) certain market conditions, insofar as while a constant, predictable flow of demand from the public sector tends to increase the risk of collusion, at the same time during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains; (iv) the presence of industry or trade associations, which although in many instances perform legitimate and precompetitive functions, can in other circumstances be subverted to illegal, anticompetitive purposes; (v) repetitive bidding by firms; (vi) identical or simple products or services; (vii) few if any substitute products or services available; and (viii) little or no technological change in the sector.

(6) *Public procurement may furthermore be subverted by corruption of the public official(s) with responsibility for organisation of the procedure and selection of the winning bid. The key facilitating factor for corruption in public procurement is a lack of transparency of the process.*

Corruption occurs where public officials use public powers for personal gain, for example, by accepting a bribe in exchange for granting a tender. While usually occurring during the procurement process, instances of post-award corruption can also arise. Corruption constitutes a vertical relationship between the public official concerned, acting as buyer in the transaction, and one or more bidders, acting as sellers in this instance.

As with bid rigging, corruption of a public procurement procedure means that the purchaser fails to achieve the best value for money, because the winning firm has been protected from the full rigours of competition by its interference in the competitive process. A lack of transparency within the procurement process is considered to be the key facilitating factor for corruption of procurement officials – with

the result that, historically, public procurement rules have put a strong emphasis on transparency of process. Corruption is generally prohibited by the national criminal justice rules, legislation on ethics in public office or by the specific public procurement regulations.

(7) *Collusion and corruption are distinct problems within public procurement, yet they may frequently occur in tandem, and have mutually reinforcing effect. Thus, they are best viewed as concomitant threats to the integrity of public procurement with a need to accommodate avoidance of both within any strategy to protect the procurement process.*

Both collusion and corruption prevention are necessary aspects of any overall strategy aimed at protecting the integrity of the public procurement process. While collusion and corruption constitute distinct problems in the area of public procurement, ultimately these discrete offences have the same effect: a public contract is awarded on a basis other than fair competition and the merit of the successful contractor, so that maximum value for public money is not achieved.

There is empirical evidence that corruption and collusion can occur in tandem, and certainly, these offences have a mutually reinforcing effect. Where corruption occurs in a public contract, collusion between bidders – for example, in the form of compensatory payments or the granting of subcontracts – may be necessary to ensure that losing bidders do not expose the illegal conduct to the public authorities. Equally, economic rents derived from collusion may foster corruption, while collusion is also facilitated by having an "insider" in the public agency that provides the bidders with information necessary to rig bids in a plausible manner and may even operate as a cartel enforcement mechanism. Moreover, as these problems are mutually reinforcing, reducing the likelihood of one offence will also decrease the risk of the other.

Given that tackling collusion and corruption are not mutually exclusive goals, there is a need to accommodate both in order to better protect the public procurement process. Collusion and corruption are typically pursued under separate but largely compatible legal frameworks. Nonetheless, approaches to the prevention of collusion and corruption within public procurement diverge significantly with respect to the role of transparency, and the resulting tensions between

these sometimes competing positions may necessitate trade-offs to achieve both effectively.

Protecting the Integrity of the Procurement Process: Design of the Procurement Procedure

(8) *Preventing the distortion of a public procurement procedure through collusive or corrupt behaviour begins at an early stage in the process, with the selection of the bidding model, and continues through to the post-award phase. Procurement tenders, by their nature, are more susceptible to anticompetitive practices than ordinary posted-price markets. Nonetheless, by careful tender design, procurement officials can minimise the risks of collusion and corruption in the process. The OECD's Guidelines for Fighting Bid Rigging in Public Procurement provide procurement officials with a comprehensive framework for procurement design, from the initial selection of the procurement model, through the running of the procurement procedure, to detecting anticompetitive conduct during the tender process.*

Because their formal rules reduce "noise" and make communication among rivals easier, public procurement via tender can promote collusion, compared with ordinary posted-price markets. Choices about procurement design can therefore affect how susceptible the tender process is to collusion or corruption, or how widespread is participation in the tender. Designing procurement tenders with competition in mind – in particular, careful consideration of the various features and their impact on the likelihood of collusion – allows the creation of an environment where the bidders' ability and incentives to reach collusive arrangements are significantly reduced, if not eliminated. Two fundamental prescriptions for effective procurement design follow from the theoretical literature: induce bidders to truthfully reveal their valuations by making what they pay not depend entirely on what they bid, and maximize the information available to each participant before he bids.

To the extent permitted by the regulatory framework, public procurement officials can behave strategically, choosing tender formats or practices that favour competition. It is important, therefore, that the legislative and regulatory framework on public procurement be designed to allow sufficient flexibility on the purchasing side. As a result, however, the design of a tender can become the object of

lobbying pressure, and excessive discretion granted to procurement officials can create opportunities for corruption in the procurement process. The OECD's Guidelines for Fighting Bid Rigging in Public Procurement provide public officials with a comprehensive overview of procurement design issues relating to collusion, including a checklist for designing the procurement process to reduce the risks of bid rigging.

(9) *Selection of the tender procedure is the first pivotal first step in the fight against collusion and corruption in public procurement. A key policy question is whether to utilise an open tender procedure, which is more susceptible to collusion insofar as it creates opportunities for communication between bidders, or a sealed-bid procedure, which is more susceptible to corruption insofar as there is a lack of transparency in the process. The most appropriate procurement procedure depends, in large part, on market conditions*

There are numerous different forms of tenders that might be adopted in the procurement context, but not all bidding models are equal from the point of view of competition. Where there are enough firms in the procurement market to sustain reasonable competition, efficient procurement outcomes can usually be achieved through a simple tender process (either sealed or open bid). When there are not enough firms to sustain competition, more sophisticated arrangements may be necessary to achieve an efficient outcome. The choice of the most suitable bidding model given the circumstances of the procurement is therefore the starting point of any attempt to prevent collusion in public procurement.

Prior to selecting the tender process, procurements officials should first of all inform themselves about market conditions to the greatest extent possible. Collecting information on the range of products and/or services available in the market that would suit public requirements as well as information on the potential suppliers of these products is the best way for procurement officials to design the procurement process to achieve the best "value for money". In-house expertise should be developed as early as possible. Procurement officials, as well as competition authorities, should be particularly alert to the presence of those sector characteristics that indicate heightened risk of a collusive outcome in a procurement market. These factors may facilitate the

formation of a collusive outcome, although not all of these factors must be present for collusion to be likely.

When it comes to choice of the procurement process, open tenders are potentially more susceptible to collusion than sealed-bid tenders insofar as open tenders create opportunities for communication between bidders during the tender process and therefore make it easier for them to reach a collusive understanding. Sealed-bid tenders make the selection process more uncertain, so that deviation from coordination is harder to detect and cannot be punished immediately, thus inhibiting anticompetitive collusion. However, the resulting lack of transparency in the process makes corruption on the part of public officials more difficult to prevent or detect. Conversely, disclosing the identities of losing bidders helps bidders monitor possible collusion but makes it easier to identify possible corruption between bid-takers and bidders.

(10) *The efficiency of the procurement process not only depends upon the bidding model adopted but also on how the tender is designed and carried out. The design of the precise features of the competitive bidding process can also have a strong influence on the efficiency of the outcome.*

Beyond the initial selection of the bidding model, the efficiency of the procurement process also depends upon how the tender is designed and carried out. Procurement procedures may even, inadvertently, make coordination easier. While procurement design is not "one size fits all", the risk of collusion can be reduced when the procurement agency ensures that the procurement activity is designed and carried out to achieve three main objectives: (i) reducing barriers to entry and increasing bidders' participation; (ii) reducing transparency and the flows of competitively sensitive information; and (iii) reducing the frequency of procurement opportunities.

Just as in non-bidding situation, more entry improves effective competition: where a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. The tender process should therefore be designed to maximise the potential participation of genuinely competing bidders. Participation in the tender can be facilitated if procurement officials reduce the costs of bidding, establish participation requirements that

do not unreasonably limit firm involvement, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract. Entry could be subsidized, for example, by paying for proposals in an architectural competition. Or entry can be promoted by providing bidding credits or low-cost financing, or making resale easier. The cost of bidding could be reduced by, for example, providing centralised information about future bidding opportunities.

It is important to design the tender process in a manner which reduces communication among bidders, and so procurement officials should be aware of the various factors that can facilitate collusion. Tender requirements should be defined clearly, but in a manner that avoids predictability. The drafting of the specifications and the terms of reference (TOR) is a stage of the public procurement cycle which is vulnerable to bias, fraud and corruption. Specifications/TOR should, as a general rule, be clear, comprehensive, non-discriminatory, and focus on functional performance, namely on what is to be achieved rather than how it is to be done. On the other hand, clarity should not be confused with predictability. More predictable procurement schedules and unchanging quantities sold or bought can facilitate collusion. By contrast, higher value and less frequent procurement opportunities increase the bidders' incentives to compete. Collusion is furthermore made more difficult where there is no advance notice of tender procedures.

The selection criteria for the evaluation and awarding of the tender affect the intensity and effectiveness of competition in the tender process, impacting not merely on the project at hand but also on the maintaining of a pool of potential credible bidders with a continuing interest in bidding on future projects. Qualitative selection and awarding criteria should therefore be chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily. Monitoring adherence to coordination can be made more difficult by having multidimensional criteria, thus making it harder to predict exactly how the winner will be chosen. However, decreasing transparency can facilitate corruption or collusion between the bid taker and some bidders, and so the advisability of decreasing transparency depends on the setting.

Vancouver Winter Olympics – "No Collusion" Clauses

Following discussions with the Canadian Competition Bureau, the Vancouver Organising Committee ("VANOC") for the 2010 Vancouver Winter Olympics decided to include a "no collusion requirement", similar to a Certificate of Independent Bid Determination (CIBD), in its tender documents for contractors. The "no collusion requirement" stipulated that bidders were required to arrive at their bids independently and that communications with other bidders must be disclosed. VANOC also reserved the right to request a formal CIBD, in addition to the "no collusion requirement", if it had reason to suspect that bids were not arrived at independently.

(11) Strategies to address collusion and corruption in public procurement must address a fundamental tension: while transparency of the process is considered to be indispensible to corruption prevention, excessive and unnecessary transparency in fact facilitates the formation and successful implementation of bid rigging cartels. The extent to which transparency is a desirable aspect of a procurement process therefore depends on the circumstances, and may require trade-offs between best practice approaches to avoidance of collusion and corruption.

At an operational level, best practice approaches to avoidance of collusion and of corruption in public procurement can differ. While a pattern of regular small tenders is seen to facilitate collusion, for example, large lumpy tenders can foster corruption. A significant difference is the role and importance of transparency in the procurement process. The principle of transparency – which relates to the availability of information on contract opportunities, the rules of the process, decision-making and verification and enforcement – is of critical importance in preventing corruption. In certain instances, however, transparency is inconsistent with the need to ensure maximum competition within the procurement process. Transparency requirements can result in unnecessary dissemination of commercially sensitive information, allowing firms to align their bidding strategies and thereby facilitating the formation and monitoring of bid rigging cartels. Transparency may also make a procurement procedure predictable, which can further assist collusion.

This may lead to tensions between the sometimes competing approaches to prevention of collusion and corruption within public procurement and require trade-offs in terms of how to achieve these objectives. While transparency of the process is indispensible to limit corruption, excessive or unnecessary transparency should be avoided in order not to foster collusion. There is some uncertainty, however, as to what information can facilitate collusion. Sound procurement design can go a long way towards achieving effective procurement and mitigating this trade-off. For example, procurement rules might require only information on winning bids to be released and not require bidder identities to be disclosed. Bidding procedures should not provide participants with sensitive information regarding the actions of others tenders, but, conversely, should allow for review of decisions of public officials by independent public agencies. Insofar as there is no single rule about the design of a procurement procedure, each one should be designed to fit the specific circumstances.

(12) *Even the most robustly designed procurement procedure may not fully eliminate the risks of distortion via collusion or corruption. It is additionally necessary, therefore, to monitor and review the bidding process and performance of the contact constantly, in order to identify and penalise instances of anticompetitive conduct in the procurement procedure. Procurement officials should be aware of the telltale signs of bid rigging and/or corruption, which may indicate that the procurement procedure has been compromised. A number of more formal review tools also exist, including data analysis and auditing of the procurement procedure.*

Procurement design, even when in accordance with best practice standards, cannot alone eliminate the risks of collusion or corruption within the procurement procedure. In addition, it is important to monitor and review the conduct of the process itself, so as to identify instances of possible anticompetitive conduct. Given the covert nature of such practices, this is no easy task for procurement officials or competition authorities. Corruption is facilitated, and thus most likely to occur, where there is a lack of openness or transparency in the procurement process. Bid-rigging agreements are typically negotiated in secret, making them similarly difficult to detect. In industries where anticompetitive conduct is common, however, suppliers and purchasers may be aware of longstanding corrupt or collusive practices. In most industries, moreover, certain telltale signs may

indicate that the competitive process is not functioning normally and suggest the possibility of bid rigging or corruption.

Indicators of a bid-rigging conspiracy may be found in the various documents submitted by bidding companies, and so documentation should be compared carefully to identify evidence that suggests that the bids were prepared by the same person or were prepared jointly. Bid prices also can be used to help uncover collusion. For example, a pattern of price increases that cannot be explained by cost increases may suggest that companies are coordinating their efforts. When losing bids are much higher than the winner's bid, conspirators may be using a cover bidding scheme. A common practice in cover pricing schemes is for the provider of the cover price to add 10% or more to the lowest bid. Bid prices that are higher than the engineering cost estimates or higher than prior bids for similar tenders may similarly indicate collusion. In addition, subcontracting and undisclosed joint venture practices can raise suspicions. When working with vendors, procurement officials should watch carefully for suspicious statements that suggest collusion, and be alert to suspicious behaviour at all times, for example references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms.

More formal mechanisms by which to protect the integrity of the procurement process include: (i) data analysis tools, such as comparisons of public databases to identify indicators of anticompetitive or corrupt activity, and (ii) auditing of public procurement procedure, whether conducted internally by a separate wing of the relevant public agency, or externally by an independent State body with specific powers of audit. Quantitative analyses of bid data can help procurement agencies (with the support of competition authorities) to identify up-front those sectors where infringements of the competition rules are more likely. In order to do so, it is crucial to examine the bids that have been submitted in the past to determine if the patterns are consistent with a fully competitive process. These analyses would allow procurement and competition authorities to maximise their efforts, optimising tender design in those industry sectors which are at risk and allocating law enforcement resources to the detection of collusion in those sensitive sectors. Retaining data from prior tenders may also help in any later bid-rigging prosecutions.

Where this is the case, knowing the data has been retained may have a deterrent effect, and thus help to discourage bid-rigging.

While bid rigging indicators identify suspicious bid and pricing patterns as well as suspicious statements and behaviours, they should not, without more, be taken as proof that firms are engaging in bid rigging. For example, a firm may have not bid on a particular tender offer because it was too busy to handle the work. High bids may simply reflect a different assessment of the cost of a project. Nevertheless, when suspicious patterns in bids and pricing are detected or when procurement agents hear odd statements or observe peculiar behaviour, further investigation of bid rigging is required. A regular pattern of suspicious behaviour over a period of time is often a better indicator of possible bid rigging than evidence from a single bid, and so all information should be recorded so that a pattern of behaviour can be established over time. A number of countries, as well as the OECD, have developed check lists to help procurement agencies to spot instances of possible collusion. While these check lists contain indications of potentially collusive conduct, they are not, in themselves, conclusive.

Korea's Bid Rigging Indicator Analysis System

In September 2006, the Korea Fair Trade Commission (KFTC) began using a bid rigging indicator analysis system, to monitor evidence of bid-rigging in public procurement. This system represents an evolution of the KFTC's earlier practice, begun in 1997, of analysing manually bidding data from public procurement procedures. The bid rigging indicator analysis system automatically and statistically analyses bid-rigging indicators based on data regarding procurement processes run by public institutions. Since 1 January 2009, under the amended Monopoly Regulation and Fair Trade Act, all public bodies have been legally required to provide this bid-related information to the KFTC. The data is delivered online to the KFTC, and the analysis system then calculates the probability of bid rigging by giving weightings to various indicators like bid-winning probability, the number of bidders, bid prices, competition methods, the number of unsuccessful bids and hikes in reserve prices, and transition into private contracts.

The analysis system helps the KFTC to identify bid-rigging activity by enabling it to monitor public sector tenders chronologically, and to conduct on-site investigations where there is significant evidence of bid rigging. The system is also considered to have a deterrent effect, insofar as it signals the constant oversight by the KFTC of the public procurement process.

Protecting the Integrity of the Procurement Process: Actors and Actions

(13) *Procurement officials are the frontline defenders of the integrity of the public procurement process against the negative effects of collusion and corruption. In order to perform this role effectively, public officials require (i) education about bid rigging and how to identify it; (ii) the establishment of clear processes to be followed where suspected bid rigging has been identified; and (iii) mechanisms for cooperation with the competition authority. In order to avoid corruption, procurement officials should be made aware of the consequences for officials who themselves engage in corrupt practices.*

Equipping procurement officials – those at the frontline of the procurement process – with the skills and tools to identify, avoid and seek redress for collusion and corruption in public procurement is an indispensible element in the fight to protect the process from anticompetitive conduct. First and foremost, professional training of public officials at all levels of government is important to strengthen procurement agencies' awareness of competition issues in public procurement. Public procurement officials need to be made aware of the possibility and the harm caused by bid rigging; to be able to identify the signs of bid rigging; as well as to have a working understanding of the law on bid rigging in their jurisdiction. From the perspective of corruption prevention, education also serves as a warning of the likely consequences for officials who might otherwise be tempted to themselves engage in corrupt practices.

On the operational side, public agencies should establish internal procedures that encourage or require officials to report suspicious statements or behaviour to the competition authorities as well as to the procurement agency's internal audit group and comptroller. Agencies should, moreover, consider developing incentives to encourage officials to do so. Where bid rigging is suspected, there should be in a place a clearly defined procedure for public officials to follow, which will allow bid rigging to be uncovered and stopped. The OECD's Guidelines for Fighting Bid Rigging in Public Procurement advises procurement officials who suspect bid rigging to refrain from discussing their concerns with suspected participants; keep all documentation, as well as a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and what precisely occurred or was said; contact the relevant competition authority in the jurisdiction; and after consulting with the

public agency's internal legal staff, consider whether it is appropriate to proceed with the tender offer. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data, in order to assist procurement agencies in identifying problematic situations.

Establishing a collaborative relationship between procurement officials and the competition authority is a worthwhile step. This might comprise, for example, setting up a mechanism for communication, as well as listing information to be provided when procurement officials contact competition authorities. Moreover, where competition authorities get involved in the procurement process at an early stage, they can help procurement agencies to identify signs of anticompetitive behaviour early on, thus increasing the effectiveness of competition law enforcement.

Procurement advocacy & outreach in Australia

Australia's national competition authority, the Australian Competition and Consumer Commission (ACCC), has developed an extensive education and advocacy programme for officials, at all levels of government, who are involved in public procurement. Efforts to promote awareness of competition issues among procurement officials have included:

- Development of education material for procurement officials, in particular a multi-media CD-ROM, which was provided to public sector procurement agencies, as well as private companies involved in procurement. The CD-ROM was interactive and allowed procurement officials to access a variety of different levels of information, including information on: how to identify cartel activity; the process for reporting suspected cartel or bid-rigging behaviour; the statutory provisions; and what a person should do if a cartel operation is suspected. The CD-ROM also included a checklist for procurement officials to determine whether or not there is any suspected cartel activity;
- Presentations by ACCC staff, at all levels, to procurement officials from Commonwealth, state and local governments; and

Advocacy efforts directed toward high level government officials, aimed at seeking support for the ACCC's education and compliance programme at the top levels within central and regional governments, and also in order to request all governments to examine their procurement frameworks and introduce measures requiring officials to take into account competition laws when designing their procurement policies and guidelines.

(14) *Competition authorities play a variety of roles in support of public procurement processes. These range from education and technical assistance for public agencies running a procurement process, as well as advocacy efforts directed towards business and the wider community, through to competition law enforcement where bid rigging has been identified. Additionally, merger control presents an opportunity to shape competition in procurement markets more generally.*

The optimal strategy to tackle both collusion and corruption in public procurement appears to require a three–pronged approach: development of best practice rules for public procurement; extensive advocacy efforts; and vigorous enforcement action taken against any instances of corruption and/or collusion that are uncovered. The competition authority's role within the public procurement process therefore typically begins long before any discrete violation of the competition rules has been identified. Given the importance of educating public procurement officials about the risks of bid rigging and how to avoid it, many competition authorities are involved in advocacy efforts to increase awareness of the risks of bid rigging in procurement tenders, directed at public agencies. For example, some authorities have regular bid rigging educational programs for procurement agencies; others organise ad hoc seminars and training courses. This education effort includes documentation describing collusion and bid rigging, the forms it can take and how to detect it, as well as best practices for procurement design. The theory is that, through early intervention and smart procurement design, the necessity for *ex post* competition law intervention will be reduced. Similarly, advocacy efforts directed towards business, the media and the wider community can generate public support for enforcement efforts and promote a shift towards a "culture of compliance" by business. Education of public officials, business and civil society is perceived to be especially relevant in economies where rules against collusion and/or corruption in public tendering are relatively new or under-enforced.

Where bid rigging has already occurred, vigorous enforcement of the competition rules (either the general rules prohibiting cartels, or specific prohibitions prohibiting bid rigging) is needed, in order to punish the immediate violation and to deter future competition law violations.

Merger control is a further mechanism by which competition authorities can have an impact on procurement markets. When it comes to mergers in markets related to public procurement, the analysis is not significantly changed by the existence of a bidding process. Most of the instruments competition authorities use in merger analysis are robust and seem to provide good results in such markets, provided that account is taken of the specifics of the bidding process, in particular the fact that *ex post* market shares do not necessarily reflect the intensity of competition in the market during the bidding process. Quantitative techniques, such as frequency analysis or reduced form estimation, can be applied to data that come out of the bidding processes to identify competitive constraints.

The United Kingdom's Construction Cartel: Case Management & Prioritisation

In 2009, the national competition authority in the United Kingdom, the Office of Fair Trading (OFT), issued an infringement decision imposing fines on 103 companies for involvement in a bid rigging cartel in the construction industry in England. The cartel involved cover pricing – whereby bidders colluded with competitors during a tender process to obtain prices that were intended to be too high to win the contract, thereby also inflating the "winning" tender price – and associated compensation payments – whereby the successful bidders paid agreed sums of money to the unsuccessful bidders. The infringements affected both public and private sector building projects across England worth in excess of £200 million, including building projects for schools, universities and hospitals.

One of the more challenging aspects of the case was the sheer amount of evidence uncovered, which implicated many more companies on thousands of tender processes. The OFT was forced to prioritise and focus its investigation to a more limited number of infringements by using objective prioritisation criteria, with a view to reaching a decision comparatively swiftly, while still ensuring that the scale and scope of the investigation reflected the endemic nature of the practices in question so as to maximise the deterrent effect of its investigation. In order to do so, the OFT narrowed the scope of the case by firstly categorising the initial evidence according to "evidential weight" in order to focus on those parties where evidence of bid rigging was greatest and strongest. Secondly, the OFT proceeded to investigate only those companies where there were reasonable grounds to suspect their involvement in bid rigging on at least five tenders. The eventual defendants in the case represented a broad spread of companies, both in terms of firm size and location. The OFT also made a decision to pursue both companies that had and companies that had not received leniency to ensure that companies are not deterred from coming forward as leniency applicants (with 70 companies that had not applied for leniency as well as the 33 that had applied).

(15) *Cooperation between the various national enforcement agencies with jurisdiction over collusion and corruption in public procurement is paramount, in order to achieve a coherent overall strategy and ensure its full implementation, and additionally, to facilitate efficient prosecution of these offences.*

Incidents of collusion and corruption are typically investigated and sanctioned by separate national agencies: collusion generally comes within the remit of the competition authority, whereas corruption is pursued by public prosecutors or specialised anti-corruption agencies. Due to the mutually reinforcing nature of collusion and corruption plus the likelihood that such offences occur in tandem, however, the most effective approach requires cooperation between the various enforcement agencies, whether by means of a formal memorandum of understanding, notification requirements or other mechanisms.

The benefits to a coordinated approach are considerable. Evidence of collusion may come to light during a corruption investigation, and vice versa; having in place a knowledge-sharing policy ensures that this information is brought to the attention of the appropriate enforcement body. Evidence-sharing, where compatible with national evidentiary rules, also assists those enforcement agencies (typically, competition authorities) that have more limited evidence-gathering powers than the public prosecutor or other criminal justice agencies. The introduction of a formal cooperation policy can improve knowledge of misconduct in public procurement amongst enforcement agencies more generally. Cooperation between enforcers can go some way towards addressing the deleterious effects of cumulative attacks on public procurement through collusion and corruption. In certain jurisdictions, a single agency may have both collusion and corruption remits, thus internalising this cooperation. While a combined approach is not a necessary requirement of an effective strategy, whatever the structure of the cooperation mechanism utilised, it should ensure: (i) comprehensive coverage of all forms of malfeasance in public procurement, and (ii) efficient prosecution of any such offences that arise in practice.

(15) *Sanctions for collusion and/or corruption in public procurement range from fines and imprisonment to more specialised penalties like debarment from participation in future public procurement procedures. A key factor to achieving deterrence is to ensure a*

credible prospect of detection and prosecution, coupled with a sufficiently severe penalty. However, generating a "culture of compliance" should be a key objective for enforcement agencies.

In fighting collusion and corruption in public procurement, there must be a credible threat of discovery and prosecution, coupled with strong sanctions upon conviction. Typical penalties imposed for corruption are fines and imprisonment, and dismissal within the employment context. Bid rigging is generally subject to the same penalties as other hard core cartels, meaning fines and, depending on the jurisdiction, imprisonment. Many countries have competition leniency programmes in place which grant immunity or reduced fines to firms that reveal the existence of cartels and participate in their subsequent investigation. A number of sanctions that are specific to the public procurement context may also be available. In many jurisdictions, a conviction for participation in collusion and/or corruption in public procurement leads to debarment from future procurement procedures for a certain period of time. Particularly in smaller economies, however, this penalty may have the paradoxical effect of reducing the number of qualified bidders to an uncompetitive level. In those jurisdictions that utilise Certificates of Independent Bid Determination (CIBD) in public procurement, prosecution for false statements in certification can provide a straightforward means of penalising collusion in tendering.

For some businesses, fines imposed for anticompetitive or corrupt behaviour are considered simply a cost of doing business. In certain situations, the adverse publicity and the possibility of disqualification from holding certain company offices may represent a greater harm and therefore function as a greater deterrent for firms. More generally, while eliminating collusion and corruption entirely is a very challenging goal for any legal system, the development of a "culture of compliance" is an important step towards reducing such behaviours. As competing firms are often best placed to identify irregularities in public procurement, getting business on board in the fight against collusion and corruption can reap benefits in terms of both deterrence and detection.

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT [1]

-- February 2010 --

Executive Summary by the Secretariat

A roundtable discussion on Collusion and Corruption in Public Procurement was held at the Ninth Global Forum on Competition. In light of this discussion, the Secretariat's background paper, the country submissions and several individual contributions, a number of key points regarding the topic emerge.

(1) *Collusion and corruption are distinct problems within public procurement, yet they may frequently occur in tandem, and have mutually reinforcing effect. They are best viewed, therefore, as concomitant threats to the integrity of public procurement.*

Public procurement comprises government purchasing of goods and services required for State activities, the basic purpose of which is to secure best value for public money. In both developed and developing economics, however, the efficient functioning of public procurement may be distorted by the problems of collusion or corruption or both.

Collusion involves a horizontal relationship between bidders in a public procurement, who conspire to remove the element of competition from the process. Bid rigging is the typical mechanism of collusion in public contracts: the bidders determine between themselves who should "win" the tender, and then arrange their bids – for example, by bid rotation, complementary bidding or cover pricing – in such a way as to ensure that the designated bidder is selected by the purportedly competitive process. In most legal systems, bid

[1] OECD (2010), *Collusion and Corruption in Public Procurement*, Series Roundtables on Competition Policy, No. 108, OECD, Paris. The full set of material from this roundtable discussion is also available at http://www.oecd.org/dataoecd/35/16/46235399.pdf

rigging is a hard core cartel offence, and is accordingly prohibited by the competition law. In many countries bid rigging is also a criminal offence.

Corruption occurs where public officials use public powers for personal gain, for example, by accepting a bribe in exchange for granting a tender. While usually occurring during the procurement process, instances of post-award corruption also arise. Corruption constitutes a vertical relationship between the public official concerned, acting as buyer in the transaction, and one or more bidders, acting as sellers in this instance. Corruption is generally prohibited by the national criminal justice rules, legislation on ethics in public office or by the specific public procurement regulations.

Ultimately, however, these discrete offences have the same effect: a public contract is awarded on a basis other than fair competition and the merit of the successful contractor, so that maximum value for public money is not achieved. The country contributions (including those of Colombia, France, Latvia and the United States) provided some empirical evidence that corruption and collusion can occur in tandem, and certainly, these offences have a mutually reinforcing effect. Where corruption occurs in a public contract, collusion between bidders – for example, in the form of compensatory payments or the granting of subcontracts – may be necessary to ensure that losing bidders do not expose the illegal conduct to the public authorities. Equally, economic rents derived from collusion may foster corruption, while collusion is also facilitated by having an "insider" in the public agency that provides the bidders with information necessary to rig bids in a plausible manner and may even operate as a cartel enforcement mechanism.

(2) The distinctiveness of public procurement and its context makes the process particularly vulnerable to collusion and corruption, while also increasing the magnitude of harm that these offences cause.

Collusion and corruption can arise in any procurement procedure, whether occurring in the public or private sectors. Yet, the distinctiveness of public procurement renders it particularly vulnerable to anticompetitive and corrupt practices, and magnifies the resultant harm. It is for this reason that the problems of collusion and

corruption within the field of public procurement specifically merit individual attention.

Public procurement is vitally important to the economic system of a State: the country contributions indicated that it typically accounts for between 15-20% of Gross Domestic Product. Effective public procurement determines the quality of public infrastructure and services and it impacts on the range and depth of infrastructure and services that a State can provide to its citizens, as money wasted because of collusion and/or corruption ultimately results in fewer public funds. In this way, public procurement is an issue of key importance for a State's economic development.

Aspects of the public procurement process nevertheless render it particularly vulnerable to anticompetitive and corrupt practices. Public procurement frequently involves large, high value projects, which present attractive opportunities for collusion and corruption. Regulatory requirements dictating particular procurement procedures can render the process excessively predictable, creating opportunity for collusion. Certain sectors frequently subject to public procurement, including construction and medical goods and services, may be particularly prone to anticompetitive or corrupt practices. Finally, the sheer quantity of goods and services that are contracted by the State creates monitoring difficulties and increases the likelihood that the public procurement process may fall prey to collusion or corruption.

The effects of collusion and corruption in public procurement are arguably more problematic than in private procurement. Moneys lost because of subversion of the public procurement process represent wastage of public funds. The resulting loss to public infrastructure and services, whether in quality or range, typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public provision to the greatest extent. Distortion of the public procurement process is detrimental for democracy and for a sound public governance, and it inhibits investment and economic development. Thus, deficiencies in public procurement impact on the wider economy in a way that does not occur with private procurement.

(3) Tackling collusion and corruption are not mutually exclusive goals, so there is a need to accommodate both in order to better protect the public procurement process. Tensions between the sometimes

competing approaches to the prevention of collusion and corruption within public procurement may necessitate trade-offs to achieve both effectively. For example, while transparency is indispensible for corruption prevention, excessive or unnecessary transparency should be avoided.

Both collusion and corruption prevention are necessary aspects of any overall strategy aimed at protecting the integrity of the public procurement process: that is, ensuring that no party to a public procurement transaction acts in a manner contrary to the objective of securing best value for public money. Collusion and corruption are typically pursued under separate but largely compatible legal frameworks. Moreover, as these problems are mutually reinforcing, reducing the likelihood of one offence will also decrease the risk of the other.

At an operational level, however, best practice approaches to avoidance of collusion and corruption can differ. In terms of designing the procurement process, for example, while a pattern of regular small tenders is seen to facilitate collusion, large lumpy tenders can foster corruption. A significant difference is the role and importance of transparency in the procurement process. The principle of transparency – which relates to the availability of information on contract opportunities, the rules of the process, decision-making and verification and enforcement – is of critical importance in preventing corruption. In certain instances, however, transparency is inconsistent with the need to ensure maximum competition within the procurement process. Transparency requirements can result in unnecessary dissemination of commercially sensitive information, allowing firms to align their bidding strategies and thereby facilitating the formation and monitoring of bid rigging cartels. Transparency may also make a procurement procedure predictable, which can further assist collusion.

This may lead to tensions between the sometimes competing approaches to prevention of collusion and corruption within public procurement and require trade-offs in terms of how to achieve these objectives. While transparency of the process is indispensible to limit corruption, excessive or unnecessary transparency should be avoided in order not to foster collusion. There is some uncertainty, however, as to what information can facilitate collusion, and so further research on this is desirable. Nevertheless, sound procedural design can go a long

way towards achieving effective procurement and mitigating this trade-off. For example, procurement rules might require only information on winning bids to be released and not require bidder identities to be disclosed. Bidding procedures should not provide participants with sensitive information regarding the actions of others tenders, but, conversely, should allow for review of decisions of public officials by independent public agencies.

(4) *Co-operation between the various national enforcement agencies with jurisdiction over collusion and corruption in public procurement is paramount, in order to achieve a coherent overall strategy and ensure its full implementation, and additionally, to facilitate efficient prosecution of these offences.*

Incidents of collusion and corruption are typically investigated and sanctioned by separate national agencies: collusion generally comes within the remit of the competition authority, whereas corruption is pursued by public prosecutors or specialised anti-corruption agencies. However, due to the mutually reinforcing nature of collusion and corruption plus the likelihood that such offences occur in tandem, the most effective approach to protecting the integrity of the public procurement process requires co-operation between the various enforcement agencies, whether by means of a formal memorandum of understanding, notification requirements or other mechanisms.

The benefits to a co-ordinated approach are considerable. Evidence of collusion may come to light during a corruption investigation, and vice versa; having in place a knowledge-sharing policy ensures that this information is brought to the attention of the appropriate enforcement body. Evidence-sharing, where compatible with national evidentiary rules, also assists those enforcement agencies (typically, competition authorities) that have more limited evidence-gathering powers than the public prosecutor or other criminal justice agencies. The introduction of a formal co-operation policy can improve knowledge of misconduct in public procurement amongst enforcement agencies more generally. Co-operation between enforcers can therefore go some way towards addressing the deleterious effects of cumulative attacks on public procurement through collusion and corruption. In certain jurisdictions, a single agency may have both a collusion and corruption remit, thus internalising this co-operation. While a combined approach is not a necessary requirement of an

effective strategy for the protection of public procurement, whatever the structure of the co-operation mechanism utilised, it should, as basic principle, ensure: (i) comprehensive coverage of all forms of malfeasance in public procurement; and (ii) efficient prosecution of any such offences that arise in practice.

Enforcement agencies should also seek to establish a collaborative relationship with front line public procurement officials. The purpose of such co-operation is two-fold. There is an educative effect, alerting officials to the possibility and warning signs of collusion, as well as warning of the consequences for officials who themselves engage in corrupt practices. Additionally, co-operation establishes channels of communication between procurement officials and enforcers, thus further facilitating efficient prosecution of suspected instances of collusion and/or corruption.

(5) *In addition to the existing framework of competition law, criminal justice legislation and public procurement regulations, a variety of more specialised mechanisms have been developed to protect and improve the integrity of the public procurement process. Nevertheless, such techniques must balance the sometimes competing requirements of collusion and corruption prevention, and the need to achieve a mutual accommodation of these objectives.*

In addition to enforcement of the general competition law, criminal justice provisions and any public procurement rules, there exist a variety of methods by which integrity of the public procurement process, specifically, might be protected or improved. Such mechanisms include:

- *Opening national markets to international competition*, thus increasing the number of bidders in any tendering process.
- *Redesign of the procurement process*, maximising transparency without allowing sharing of commercially-sensitive information. Generally, sealed bid tenders are less prone to collusion than dynamic or open tender mechanisms; whereas individual negotiation has greater potential for corruption or favouritism than competitive bidding, although in certain circumstances it may be the most efficient procurement tool.

- *E-procurement*, that is, the organisation of tenders by electronic means via an internet portal. Care must be taken to ensure that the e-procurement procedure itself does not facilitate collusion, especially as this method eliminates the paper trail that might otherwise have provided evidence of bid rigging in the process.
- *Certificates of Independent Bid Determination (CIBD)*, which require bidders to certify that they have arrived at their tender price absolutely independent of other bidders. CIBDs operate as both a reminder of the relevant legislation and as a commitment by the bidder that these rules have been complied with, and are of particular value in situations where tender participants may be less aware of national legislation prohibiting corruption and collusion. Prosecution of CIBD violations can also be a possibility where absence of proof of an agreement makes it impossible to charge an antitrust violation.
- *Education* of public officials, business and civil society. This is perceived to be especially relevant in economies where rules against collusion and/or corruption in public tendering are relatively new or under-enforced.
- *Data analysis tools*, such as comparison of public databases to identify indicators of anti-competitive or corrupt activity.
- *Specialised review mechanisms for public contract awards*, whereby unsuccessful bidders who suspect flaws in the procurement procedure can challenge the award before a specialised tribunal. While such procedures can identify individual instances of corruption or collusion, they are generally unsuitable for detecting patterns of corruption and/or collusion across a number of contracts.
- *Auditing* of public procurement procedures, whether conducted internally by a separate wing of the relevant public agency, or externally by an independent State body with specific powers of audit.

(6) Sanctions for collusion and/or corruption in public procurement range from fines and imprisonment to more specialised penalties like debarment from participation in future public procurement procedures. A key factor to achieving deterrence is to ensure a credible prospect of detection and prosecution, coupled with a

sufficiently severe penalty. However, generating a "culture of compliance" should be a key objective for enforcement agencies.

In fighting collusion and corruption in public procurement, there must a credible threat of discovery and prosecution, coupled with strong sanctions upon conviction. The typical penalties imposed for corruption in the contributing country submissions are fines and imprisonment, and dismissal within the employment context. Bid rigging is generally subject to the same penalties as other hard core cartels, meaning fines and, depending on the jurisdiction, imprisonment. Many countries have competition leniency programmes in place which grant immunity or reduced fines to firms that reveal the existence of cartels and participate in their subsequent investigation.

A number of sanctions, specific to the public procurement context, can be identified. In many jurisdictions, a conviction for participation in collusion and/or corruption in public procurement leads to debarment from future procurement procedures for a certain period of time. Particularly in smaller economies, however, this penalty may have the paradoxical effect of reducing the number of qualified bidders to an uncompetitive level. In those jurisdictions that utilise Certificates of Independent Bid Determination (CIBD) in public procurement, prosecution for false statements in certification can provide a straightforward means of penalising collusion in tendering. While the possibility of civil suits against corrupt officials and/or firms that participated in collusion was mentioned in the contributions, quasi private action of this nature is utilised to a lesser extent in the public context.

For some businesses, fines imposed for anticompetitive or corrupt behaviour are considered simply a cost of doing business. The United Kingdom's contribution suggests that the adverse publicity and the possibility of disqualification from holding certain company offices may represent a greater harm, and function as a greater deterrent, for firms. More generally, while eliminating collusion and corruption entirely is a very challenging goal for any legal system, the development of a "culture of compliance" is an important step towards reducing such behaviours. As competing firms are often best placed to identify irregularities in public procurement, getting business on board in the fight against collusion and corruption can reap benefits in terms of both deterrence and detection.

(7) *The optimal strategy to tackle both collusion and corruption in public procurement appears to require a three–pronged approach: development of best practice rules for public procurement; extensive advocacy efforts; and vigorous enforcement action taken against any instances of corruption and/or collusion that are uncovered.*

The optimal strategy to protect the integrity of public procurement that emerges from the contributions is a three-pronged approach, combining development of best practice rules with wide-ranging advocacy efforts and vigorous law enforcement.

Co-ordinated efforts to develop best practices rules for public procurement can utilise the benefits of hands-on experience to shape balanced and effective regulations for this complex area. Knowledge-sharing can occur on at least three levels: as part of a co-operation strategy between enforcement agencies at the national level; through transnational networks of national enforcement agencies; and through the work of international organisations, including the OECD.

With regard to advocacy efforts, a broad range of useful target areas can be identified: education of public officials; of business; of the media; and of the wider community. Effective advocacy can promote a change of culture in State practices and generate public support for enforcement efforts. More generally, enforcement agencies should identify and advocate for the removal of any public procurement rules or procedures that facilitate or foster collusion or corruption. Business also has a role in this process, in terms of the education of its personnel and the development of internal compliance mechanisms.

As regards enforcement, the principles already outlined – including credible likelihood of discovery and prosecution, strong sanctions, use of specialised detection mechanisms and inter-agency co-operation – should govern such procedures. Moreover, enforcement should extend to the frontline of public procurement – namely, procurement officials themselves – so as to develop a synergy between all State agencies charged with the protection of the public procurement process.

PUBLIC PROCUREMENT: THE ROLE OF COMPETITION AUTHORITIES IN PROMOTING COMPETITION [1]

-- June 2007 --

Executive Summary by the Secretariat

Considering the discussion at the roundtable, the member country submissions, and the background paper of the Secretariat, a number of key points emerge:

(1) *Public procurement is a key economic activity of governments, accounting for a large proportion of Gross Domestic Product worldwide. Effective public procurement avoids mismanagement and waste of public funds.*

"Public procurement" is the purchase of goods or services by the public sector and it generally accounts for a large share of public expenditure in a domestic economy. Existing statistics suggest that public procurement accounts, on average, for 15% of Gross Domestic Product (GDP) worldwide, and is even higher in OECD countries where that figure is estimated at approximately 20% of GDP. Through its public procurement policy, the public sector can affect the structure of the market and the incentives of firms to compete more or less fiercely in the long run. Procurement policy therefore may be used to shape the longer term effects on competition in an industry sector.

The primary objective of an effective procurement policy is the promotion of efficiency, i.e. the selection of the supplier with the lowest price or, more generally, the achievement of the best "value for

[1] OECD (2007), *Public Procurement: the role of competition authorities in promoting competition*, Series Roundtables on Competition Policy, No. 71, OECD, Paris. The full set of material from this roundtable discussion is also available at http://www.oecd.org/dataoecd/25/48/39891049.pdf

money". It is therefore important that the procurement process is not affected by practices such as collusion, bid rigging, fraud and corruption. Anticompetitive conduct affecting the outcome of the procurement process is a particularly pernicious infringement of competition rules. Through bid-rigging practices, the price paid by public administration for goods or services is artificially raised, forcing the public sector to pay supra-competitive prices. These practices have a direct and immediate impact on public expenditures and therefore on taxpayers' resources.

(2) The formal rules governing public procurement can make communication among rivals easier, promoting collusion among bidders. While collusion can emerge in both procurement and "ordinary" markets, procurement regulations may facilitate collusive arrangements.

The competition concerns arising from public procurement are the largely the same concerns that can arise in an "ordinary" market context: the reaching of collusive agreements between bidders during the auction process or across actions. The peculiarity of a public purchaser as compared to a private purchaser is that the government has limited strategic options. Whereas a private purchaser can choose his purchasing strategy flexibly, the public sector is subject to transparency requirements and generally is constrained by legislation and detailed administrative regulations and procedures on public procurement. These rules are set as an attempt to avoid any abuse of discretion by the public sector. However, full transparency of the procurement process and its outcome can promote collusion. Disclosing information such as the identity of the bidders and the terms and conditions of each bid allows competitors to detect deviations from a collusive agreement, punish those firms and better coordinate future tenders.

The lack of flexibility which may result from strict regulation of the procurement process limits the opportunities for the public purchaser to react strategically when confronted with unlawful cooperation among potential bidders seeking to increase profits. It is therefore important that the legislative and regulatory framework on public procurement be designed to allow sufficient flexibility on the purchasing side. Introducing new and different procurement

procedures (e.g. reverse auctions or direct negotiations) or allowing the procurement entity to adapt the standard procurement procedures according to the market situation with which it is confronted, may achieve positive results.

(3) *The risks for competition in public procurement can be reduced by careful consideration of the various auction features and their impact on the likelihood of collusion. Designing auction and procurement tenders with collusion in mind may significantly contribute to the fight against anticompetitive behaviour, as it allows the creation of an environment where the bidders' ability and incentives to reach collusive arrangements are significantly reduced, if not eliminated.*

There are numerous different forms of tenders that might be adopted in the procurement context but not all bidding models are equal from the point of view of competition. Where there are enough firms in the procurement market to sustain reasonable competition, efficient procurement outcomes can usually be achieved through a simple auction or tender process (either sealed or open bid). When there are not enough firms to sustain competition, more sophisticated arrangements may be necessary to achieve an efficient outcome. The choice of the most suitable bidding model given the circumstances of the procurement is therefore the starting point of any attempt to prevent collusion in public procurement.

Open tenders, for example, are more susceptible to collusion than sealed-bid tenders. Open tenders allow ring members to communicate during the course of the tender and therefore make it easier for them to reach a collusive understanding at the auction (so called in-auction collusion). In a sealed-bid tender, in which each bidder simultaneously makes a single "best and final" offer, collusion is much harder and it requires ex-ante communication that is not needed at an open tender. From the perspective of encouraging entry, sealed-bid tenders have the merit of making the selection much more uncertain than in an open tender. Sealed-bid tenders encourage participation of "weaker" or smaller participants since they have a chance of winning if the highest-value bidder is seeking a bargain and does not bid the maximum amount it would have in an open tender.

(4) *The efficiency of the procurement process not only depends upon the bidding model adopted but also on how the tender is designed and*

carried out. The design of the precise features of the competitive bidding process can also have a strong influence on the efficiency of the outcome.

While auction design is not "one size fits all", the risk of collusion can be reduced when the procurement agency ensures that the procurement activity is designed and carried out to achieve three main objectives: (1) reducing barriers to entry and increasing bidders' participation; (2) reducing transparency and the flows of competitively sensitive information; and (3) reducing the frequency of procurement opportunities.

- Increasing the opportunity for potential bidders to participate in a tender can improve the efficiency of the bidding process and reduce the likelihood of collusion. If participation in a tender is limited to a small number of bidders, the costs of organizing a sustainable cartel will be lower. In procurement markets, barriers to entry can be lowered by designing tender participation criteria which are not unnecessarily restrictive and by reducing the bid preparation costs (e.g. through electronic bidding systems).

- Collusion can be established and sustained if firms have complete information on the main variables of competition. A high degree of transparency over the procurement process may facilitate collusion by facilitating the detection and punishment of deviations from a cartel agreement. Because of the potentially destabilizing effect of non-identifiable bidders on bid rigging, procurement officials should consider keeping undisclosed the identities of the bidders, perhaps referring only to bidder numbers or allowing bids to be telephoned in or mailed in, rather than requiring that bidders turn in their bids in person at a designated time and place where all can observe.

- A collusive equilibrium is only possible if the same firms regularly meet and interact in the market place. Only in this case are firms capable of adapting their respective strategy by acting and reacting to competitors' strategies. Collusion is therefore facilitated if bidders meet each other repeatedly in a number of procurement opportunities. Reducing the number of such opportunities therefore may facilitate competition. This might be

achieved, for example, by holding fewer and larger tenders. If the distance in time between one tender and the next is sufficiently long, the individual firms have less reason to fear retaliation in the future for undercutting the cartel price today. On the contrary, holding tenders at short and regular time intervals may favour collusion.

(5) When designing public tenders, procurement officials should consider limiting joint bids and sub-contracting and imposing a reserve price. Depending on the facts of each procurement activity, these considerations may promote efficient procurement outcomes.

Some jurisdictions allow joint bidding by firms in the same market only if bidding is costly or if the performance of the contract would require a certain size. In these circumstances, joint bidding is a way to enable smaller firms to participate in larger tenders, from which they would otherwise be excluded. A bidding consortium should not be permitted if each firm in the consortium has the economic, financial and technical capabilities to supply on its own the procured products.

If possible, bids should be free of sub-contracting. Allowing the winning bidder to enter into sub-contracting arrangements has a potentially important effect on the likelihood of bid rigging. In particular, the mechanisms of the cartel may be such that bidders who agree not to lower their bid or not to participate at all might be compensated by being awarded a subcontract by the winning bidder.

Imposing an aggressive but credible reserve price, i.e. a maximum price above which the procurement tender is not awarded may reduce collusion as it reduces the illegal gains. In addition, reserve prices can reduce the number of rounds in an open auction, thereby reducing the opportunity for signalling.

(6) Reducing collusion in public procurement requires strict enforcement of competition laws and the education of public procurement agencies at all levels of government to help them design efficient procurement processes and detect collusion.

Collusion in public procurement may be reduced through strict, effective competition law enforcement. Many jurisdictions have specific prohibitions in their competition laws forbidding bid rigging

or considering bid rigging as a per se violation of the competition rules. Other countries simply base their enforcement practice against bid rigging on the general antitrust laws against anti-competitive agreements.

Many competition authorities are also involved in advocacy efforts to increase awareness of the risks of bid rigging in procurement tenders. There are many examples of educational programs to this end. Some authorities have regular bid rigging educational programs for procurement agencies; others organise ad hoc seminars and training courses. This education effort includes documentation describing collusion and bid rigging, the forms it can take and how to detect it.

These outreach programs have proved extremely useful for a number of reasons: (i) they help competition and public procurement officials to develop closer working relationships; (ii) they help educate procurement officials about what they should look for in order to detect bid-rigging through actual examples of bidding patterns and conduct which may indicate that bid-rigging is occurring; (iii) they train procurement officials to collect evidence that can be used to prosecute better and more effectively bid rigging conduct; (iv) they help educate public procurement officials and government investigators about the cost of bid rigging on the government and ultimately on the taxpayers; and, finally, (v) they warn procurement officials not to participate in bid rigging and other illegal conduct which undermines competition in procurement tenders.

(7) *Public procurement officials should be aware of a number of signs of bid rigging. Competition authorities can help procurement agencies to identify these signs at an early stage of the procurement process, increasing the effectiveness of competition law enforcement.*

A number of factors can alert procurement agencies and antitrust agencies to the risk of a collusive outcome in a procurement market: concentrated market structure, a high level of market transparency, high entry barriers, limited residual competition, limited buyer power, stable demand and supply conditions, opportunities for repeated interaction between market participants and symmetrical firm characteristics. These factors may facilitate the formation of a collusive outcome, although not all of these factors must be present for collusion to be likely.

However, bid rigging, price fixing, and other collusion can be very difficult to detect; collusive agreements are usually reached in secret. Suspicions may be aroused though by unusual bidding or pricing patterns or something a vendor says or does. A number of countries (such as Canada, Switzerland, Sweden and the U.S.) have developed check lists to help procurement agencies to spot instances of possible collusion. These check lists contain indications of potentially collusive conduct, but they are not conclusive. For example, the fact that the level of bids is too high compared to the estimate should not be viewed as evidence of collusion as it may simply reflect an incorrect estimate. Thus, these indicators should simply alert agencies that further investigation is required to determine whether collusion exists or whether there are other plausible explanations for the events in question.

Another way to detect and prevent bid rigging in public procurement is to monitor constantly bidding activities and perform quantitative analyses on the bid data. This can help procurement agencies (with the support of competition authorities) to identify up-front those sectors where infringements of antitrust rules are more likely. In order to do so, however, it is crucial to examine the bids that have been submitted in the past to determine if the patterns are consistent with a fully competitive process. These analyses would allow procurement and competition agencies to maximise their efforts, optimising tender design in those industry sectors which are at risk and allocating law enforcement resources to the detection of collusion in those sensitive sectors.

COMPETITION IN BIDDING MARKETS [1]

-- October 2006 --

Executive Summary by the Secretariat

Considering the discussion at the roundtable, the delegates' submissions and the background paper, several key points emerge:

Merger analysis in bidding markets

(1) The term "bidding market" does not contribute to understanding competition in a market.

Definitions of "bidding markets" typically include the following concepts:

- "Winner takes all," so each supplier either wins all or none of the order. There is therefore no smooth trade-off between the price offered and the quantity sold.
- "Lumpy competition," that is, each contest is large relative to a supplier's total sales in a period.
- "Every contest is a new contest". In other words, there is no "lock-in in" by which the outcome of one contest importantly determines another.
- Sometimes, "entry of new suppliers into the market is easy."
- Involves a bidding process.

1 OECD (2006), *Competition in Bidding Markets*, No. 66, OECD, Paris. The full set of material from this roundtable discussion is also available at http://www.oecd.org/dataoecd/44/1/38773965.pdf

Markets having the first three characteristics experience Bertrand price-setting competition, where indeed "two is enough" to ensure a competitive outcome. Markets having the first four characteristics are like contestable markets, where one supplier—and many potential suppliers—is enough to ensure a competitive outcome. The use, or not, of a bidding process is irrelevant. A market that involves a bidding process does not necessarily have any of the other four features. Therefore, one cannot assume that markets where bidding processes are used will have the characteristics implied by Bertrand competition or a constable market. That is, one cannot assume that bidders have no market power or that any market power can be easily eroded.

(2) Merger analysis is not significantly changed by the existence of a bidding process. Markets where bidding processes are used are subject to similar economic forces as those in other markets. As in any merger analysis, it is important to understand the competitive constraints to which the merging parties are subject and to ground the choice of economic model in an analysis of the factual circumstances.

Most of the instruments competition authorities use in merger analysis are robust and seem to provide good results in markets with bidding processes.

Existing market shares are not always informative about competition in the future, whether in markets with bidding or markets without bidding. It can be useful to separate the concepts of competition *ex ante* and market share *ex post*, and note that the *ex post* market share does not necessarily reflect the intensity of competition in the market during the bidding process.

The key is to identify likely credible bidders in future bidding opportunities. This is equivalent to the standard analysis of existing and potential competition. Likely potential bidders are identified and their likely entry barriers are assessed. It is not necessarily the case that each potential bidder is an equally likely future winner of a bidding competition.

Where there are incumbency advantages, so having sold to a particular customer in the past makes it substantially more likely to

sell to him in the future, then a larger existing market share indicates market power in the normal way.

Market definition by use of the SSNIP test ("small but significant and non-transitory increase in price" test) can sometimes be difficult in markets characterised by bidding processes for two reasons. First, the price is different potentially for each contract. The same is true in any other market in which prices are set individually for each contract. Second, there is no obvious price on which to add the SSNIP since competition occurs simultaneously rather than through sequential moves. Notwithstanding these difficulties, the notion of substitutability which underlies the SSNIP test can be used in defining the relevant market. Non-price factors can help to identify the extent of substitutability on both the demand and supply side. These may include *inter alia* distinct product characteristics and uses, unique production facilities or processes, distinct purchasers, specialisation of sellers and the views of industry participants.

In markets with differentiated products, the analysis of the impact of a merger revolves around the closeness of competition between the merging parties that is, on whether the merging parties exert important competitive constraints on each other. There may be an important subset of customers for whom the merging parties' products are their first and second choices and for whom the merger has a competitive effect. Even if there is only a possibility that the merging parties' products are first and second choice, the merger has a competitive effect. (The same analysis would hold for undifferentiated products where there are cost differences among competitors, perhaps due to differences in transport costs.)

(3) Quantitative techniques can be applied to data that come out of the bidding processes to identify competitive constraints.

One such technique is frequency analysis. One can take all, or a large number, of sales of the relevant product to see how frequently the merging parties face each other. Or one may be able to learn how frequently or for which customers the merging parties were the first and second choices. One may also be able to detect patterns where firms do not bid to supply certain customers, which could prompt further investigation as to whether they are unable to supply. Other

techniques for assessing the closeness of two differentiated products remain relevant, whether that is assessment of product characteristics, the use of surveys or other instruments to gauge the opinions of customers or, in some occasions, "natural experiments," i.e., what happens if one product suddenly disappears from the market for temporary reasons. Even if the merging parties offer close substitutes, if a third party always participates in each bidding competition and offers a close substitute, then this would indicate a likely limited competitive effect of the merger.

Another such technique is reduced form estimation. This means, for example, to estimate the relationship between the prices (or discount) that are bid and the number of bidders, the identity of bidders and the characteristics of the buyer or product. A possible data problem is that one may not know how many bidders there are, since in an ascending or open auction some bidders may drop out before they actively submit a bid. Another possible data problem is that there may be unobservable factors that cause changes in price rather than, or in addition to, changes in factors like the number of bidders. For example, there may be characteristics that affect the desirability of winning an auction. While this technique assumes that firms are behaving non-cooperatively, the possible presence of collusion presents a lesser problem for this technique than for structural modelling of competitive effects, like merger simulation. A slightly more subtle issue is "repositioning:" If suppliers offer differentiated products, then the post-merger entity may choose to reposition and offer products with different characteristics from those that were offered pre-merger. This would be a change in competition due to the merger in addition to raising price.

The analysis of an auction can be affected by what the bidders observe during the bidding—do they know the identity of their rivals or what they are offering, and when do they learn that? It can be difficult to learn who knew what when. One example where differences of view about what bidders observe during the bidding had an effect on the choice of economic model, and thus on the merger analysis, was the merger between Oracle and Peoplesoft. In that merger, some analysts found that the bidders knew the identity of their rivals and could submit additional bids to undercut their rivals, but other analysts found that the bidders did not have good

information about their rivals to enable them to submit undercutting bids. The first set of analysts modelled the market as open or ascending auctions and the second set as sealed-bid auctions. The different models yielded different predictions of the competitive effect of the merger. It should be noted that various analytical techniques unrelated to bidding were applied to evaluate the merger.

(4) Mergers in markets with so-called "common value auctions" increase competition only in special, implausible circumstances.

In a "common value auction," bidders do not know the value of what they are bidding for. The basic idea is that, by combining the information different bidders have, this gives them greater confidence in estimating the value and therefore they will bid more aggressively. But competition is increased only in special cases which are not very plausible; in general we would expect such a merger to reduce competition for the usual kinds of reasons.

(5) Bid-takers may be unable to protect themselves from the anticompetitive effect of a merger by changing the auction rules in their favour.

They may not be able to choose an auction form. They are subject to constraints of various types.

- There are legal constraints. E.g., state aid rules prohibit discrimination in a straightforward way between bidders in the European Union.
- There may be political constraints.
- There are organisational constraints. Principal-agent problems may mean that the designer of a bidding process today may design the bidding in a way that is ideal in terms of the short-run effects but may overlook lock-in effects that leave the institution in a very weak position in the future.
- It may be impossible, for political or organisational reasons, to commit to a particular design. There may be lobbying pressure. Or it may be impossible for the bid taker to commit to its own future behaviour, e.g., in not allowing further bids after the bidding process is supposed to end.

Given these constraints, it cannot be assumed that bid-takers can counter anticompetitive mergers with changes in the design of auctions.

2. The design of auctions and tenders

Choices about auction design can affect how susceptible an auction is to collusion or concerted practices, or how widespread is participation in the auction. Thus, the design of an auction can be the object of lobbying pressure. Auctioneers can also behave strategically, choosing auction formats or practices that favour competition. Other considerations include how costly it is for bidders to take part, how large is the threat of collusion between bid-taker and bidders, and how costly and how much time it takes to run the auction.

(6) In designing a bidding process, the competition concerns are the same as for any other market process: entry, coordinated effects, abuse of dominance, and so on.

The analysis of bidding process involves standard economic analysis. But there is no checklist since each situation is different. One must go into the details of the specific situation and bidding process.

The European UMTS auctions are examples where different situations led to different "right answers." When it was thought that only four licenses would be awarded in the United Kingdom's auction, the designers, recognizing that there were only four incumbents, proposed a design that had special features to encourage entry, the so-called "Anglo-Dutch design." Subsequently the technology changed and five licences could be allocated. This guaranteed that an entrant would win, so it guaranteed that entrants would participate in the bidding. Not having to be as concerned about encouraging entry, the designers proposed a standard ascending design that would have greater efficiency. Later, in the Netherlands auction, there were exactly the same number of licenses and incumbents but the entry-deterring ascending design was chosen, and this yielded poor results. Yet later, Demark held an auction with the same number of licenses and incumbents but chose a sealed-bid design. This yielded good results: They were successful in getting entry where otherwise they may not have had it. These were examples of different choices in different circumstances.

Just as in non-bidding situations, more entry improves competition. Thus, rule changes to attract more entrants are generally beneficial. Entry could be subsidized, e.g., by paying for proposals in an architectural competition. Or entry can be promoted by providing bidding credits or low-cost financing, or making resale easier. Reducing the cost of bidding, such as providing centralised information about future bidding opportunities, can promote entry. Entry can be promoted by providing information, for example about the costs and risks of performing the contract up for bid, either public information or in the form of scoping contracts to potential bidders in a later competition. In addition, less restrictive tender specifications or pre-selection criteria can enable more bidders to participate in the competitions. Generally, sealed-bid auctions favour entry more than do ascending auctions, all else being equal.

Coordinated effects can be reduced by rule changes.

- Division may be made harder by infrequent repetition, different sizes of auctions, and not announcing a series of auctions in advance.
- Monitoring adherence to coordination can be made more difficult by having multidimensional criteria, thus making it harder to predict exactly how the winner will be chosen. However, decreasing transparency can facilitate corruption or collusion between the bid taker and some bidders. Hence, the advisability of decreasing transparency will depend on the setting.
- Signals and threats may be possible if the auction rules give bidders a language in their bids. In one auction, bidders used insignificant digits in the bid amount to communicate. Changing the rules can eliminate this language.
- Auction theory suggests that sealed bids are less open to collusion than ascending bids, since deviation from coordination is harder to detect and cannot be punished immediately.
- Disclosing the identities of losing bidders helps bidders monitor possible collusion but makes it easier to monitor possible corruption between bid-takers and bidders. Retaining auction data may help in any later bid-rigging prosecution. If so, knowing the data has been retained may help to discourage bid-rigging.

- Imposing a high but credible reserve price, that is, the price above (below) which no sales (purchases) will occur, reduces returns to collusion.
- Procurement procedures can inadvertently make coordination easier. For example, a bid-taker announcing a reference price can provide a price on which rivals can base their coordination. Or requiring split awards reduces rivals' incentives to bid aggressively, as they will still get a partial contract even if their bids are high.

Auction design can affect competition in other markets. For example, the auctions for telecommunications 3G (third generation mobile) licenses determined how many competitors there would be in the UMTS markets. Another example is recontracting, where the auction today affects the auction that will occur at the end of the license period.

Collusion between procurement officers and bidders is easier in a sealed bid auction than in an ascending auction. Such collusion is the target of many authorities' actions, not via auction design changes but through punishment and deterrence. For example, a Japanese law is aimed at procurement officials orchestrating bid-rigging. But the law, effective 2003, has been applied in only three cases to date. In Indonesia, the competition and anti-corruption authorities work together in cases involving collusion among bidders and procurement officials. In Korea, centralised public procurement is conducted electronically, reducing the contact between bidders and procurement officials in order to make collusion more difficult. In Turkey, firms found guilty of collusion in the provision of milk to schools defended themselves by pointing to orchestration of the allocation of tenders by the relevant ministry.

COMPETITION POLICY AND PROCUREMENT MARKETS [1]

-- June 1998 --

Executive Summary by the Secretariat

In the light of the background paper, the country submissions and the oral discussion the following points emerge:

(1) *Procurement - the purchase of goods and services by public and private enterprises - constitutes a substantial fraction of economic activity. Efficient procurement involves choosing the supplier who can supply the desired goods or services at the lowest price (or, more generally, the best "value for money"). Practices such as collusion, bid-rigging, fraud and corruption prevent efficient procurement. The stronger the incentive on the overall enterprise for efficiency, the stronger the incentive to control all inefficient procurement practices including corruption. The most common forms of procurement involve some form of tender or auction, although other practices are used, especially where the number of potential tendering firms is small.*

The EC estimates that procurement by public authorities alone accounts for 11 percent of the EU's GDP.

Both public and private procurement processes may be subject to the problems of bid-rigging and corruption. Procuring enterprises affect the efficiency of the procurement through their design of the procurement process and related activities. The incentive on the agency to adopt efficient procurement depends upon the internal governance arrangements within the firm and the overall incentives for efficiency.

[1] OECD (1998), *Competition Policy and Procurement Markets*, Series Roundtables on Competition Policy, No. 20, OECD, Paris. The full set of material from this roundtable discussion is also available at http://www.oecd.org/dataoecd/35/3/1920223.pdf

These incentives may be weak in government agencies. Reforms which improve the productivity and efficiency incentives on government departments therefore can improve procurement outcomes.

Where there are enough firms in the procurement market to sustain reasonable competition, efficient procurement outcomes can usually be achieved through a simple auction or tender process (either sealed or open bid). When there are not enough firms to sustain competition, more sophisticated arrangements are necessary, often involving risk or cost-sharing contracts.

(2) *Public procurement processes are often constrained by various regulatory requirements. For example, public procurement processes are often subject to transparency requirements. Public procurement may also be used as a tool to address other public policy objectives, such as environmental, affirmative action or industrial policy objectives.*

Although both public and private procurers must take action to prevent corruption (allocating procurement contracts inefficiently in response to monetary incentives), public procurers face the additional challenge of preventing political favouritism - the practice of allocating procurement contracts inefficiently according to political favours. Many countries seek to control political favouritism through disclosure requirements which make transparent the identity and the size of the winning bids. Transparency may also be mandated as a means for ensuring other aims, such as compliance with international trade rules which seek to ensure equal opportunities for foreign companies. Such transparency may facilitate collusion, leading to a conflict between the desire to promote competition and the desire to prevent corruption and favouritism. Rules which limit the pool of potential suppliers (for, say, industrial policy objectives) may have an important effect on the level of competition and on the efficiency of the procurement. Where procurement is used as a tool for the pursuit of such other public policy objectives, the benefits should be carefully weighed against the effects on competition.

(3) *Some public procurement markets exhibit features which favour collusion among the bidders: there are relatively few potential sellers who encounter each other regularly in different procurement markets in different places and over time, with relatively high barriers to entry and a high degree of transparency. Simple collusive arrangements involve*

appointing designated winners in different geographic markets or in the same markets over time. More sophisticated systems involve transfers between the bidding parties.

In certain procurement markets, such as markets for public works or defence procurement, there are relatively few incumbent firms, and relatively high barriers to entry. These firms must typically compete with each other repeatedly in a number of different tenders. These market properties facilitate collusion. The simplest approaches involve designating a winning bidder with the other firms either withdrawing, bidding a larger amount or lower quality. Over time a collusive arrangement will be more stable if it allows the tender to be won by the firm with the lowest costs (because this is the firm that has the most to gain from cheating on the cartel arrangement). This could be achieved by transfers between the cartel members, perhaps via common payments to an industry organisation or via a system of subcontracting out some of the work to other members of the cartel.

(4) *Broadly speaking, collusion in cartel markets can be restricted through policies which seek to lower barriers to entry; policies which reduce the ability of bidding cartels to detect and punish defection; and policies which enhance enforcement. Lowering barriers to entry has the double advantage of both improving the efficiency of the bidding process and reducing the likelihood of successful collusion. Barriers to foreign participation in procurement should be eliminated. The tender specifications should be carefully drafted so as not to exclude potential suppliers whether domestic or foreign.*

The boundaries of a procurement market are essentially defined by the tender specifications itself. Therefore careful attention is necessary to the tender specifications to ensure that the market is defined as widely as possible, and barriers to entry are as low as possible. In particular, foreign firms should not be excluded from participating in procurement processes. The WTO plurilateral Agreement on Government Procurement ("GPA") binds those countries which have signed up to the agreement to use open, transparent and non-discriminatory procurement procedures for all government procurement above a certain size.

(5) *It may be possible to reduce the ability of bidding cartels to detect and punish detection through policies which limit the amount of information*

available about bidding outcomes. There may be a trade-off between controlling collusion and controlling corruption and political favouritism. It may be possible to control corruption and favouritism without full transparency by limiting disclosure to designated procurement-oversight agencies.

Transparency of outcome enhances the ability of cartels to detect and punish cheating. Sealed bid auctions are, for this reason, preferred to open bid auctions. Similarly, private negotiations with potential suppliers are less likely to lead to collusion than public tender processes. Attempts to control corruption and political favouritism through enhanced transparency may facilitate collusion. In some countries it may be possible to resolve this conflict of objectives by limiting disclosure to an agency charged with maintaining oversight of public procurement.

(6) Several OECD countries have explicitly focused enforcement efforts on policies to prevent bid-rigging. Bid-rigging is almost universally condemned and in some countries is prosecuted as a crime. Specific actions include compliance and/or self-certification programs. Several countries also have laws protecting whistle-blowers. Many countries permit "follow on" proceedings through which victims of collusion can recover losses, or multiples thereof, resulting from collusion.

Many countries noted that collusion in procurement markets was prosecuted vigorously and accorded little or no tolerance. Several countries have specific anti-bid-rigging legislation. In some countries bid-rigging can be prosecuted as a crime. Some countries enhance deterrence by allowing victims of collusion to recover losses in separate "follow on" actions. A few countries explicitly require firms to certify that they have not engaged in collusion as a condition for participating in a public tender. Several countries use publicity of the offending cartel as a form of deterrence. In some cases, bid-rigging may be able to be detected through careful analysis of bidding patterns over time (such as unexplained deviation of the pattern of prices from the pattern of underlying costs).

In any case, as a general principle, the expected penalty for colluding parties should exceed the expected benefits. Where it is considered that bid-rigging is difficult to detect and prosecute, the associated penalties should be large, possibly even several times larger than the harm to the victims (the treble-damage actions available in the US are an example).

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OECD COUNCIL RECOMMENDATION ON ENHANCING INTEGRITY IN PUBLIC PROCUREMENT [C(2008)105]

-- October 2008 --

THE COUNCIL,

Having regard to articles 1, 2a), 3 and 5b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997, the Revised Recommendation of the Council on Combating Bribery in International Business Transactions adopted on 23 May 1997 and the related Recommendation on Anti-corruption Proposals for Bilateral Aid Procurement endorsed by the Development Assistance Committee on 7 May 1996;

Noting that legislation in a number of Member countries also reflects other international legal instruments on public procurement and anti-corruption developed within the framework of the United Nations, the World Trade Organisation or the European Union;

Recognising that public procurement is a key economic activity of governments that is particularly vulnerable to mismanagement, fraud and corruption;

Recognising that efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of tax payer's money;

Noting that international efforts to support public procurement reforms have in the past mainly focused on the promotion of competitive tendering with a view to ensuring a level playing field in the selection of suppliers;

Recognising that Member countries share a common interest in preventing risks to integrity throughout the entire public procurement cycle, starting from needs assessment until contract management and payment;

On the proposal of the Public Governance Committee:

I. RECOMMENDS:

(1) That Member countries take appropriate steps to develop and implement an adequate policy framework for enhancing integrity throughout the entire public procurement cycle, from needs assessment to contract management and payment;

(2) That, in developing policies for enhancing integrity in public procurement, Member countries take into account the Principles which are contained in the Annex to this Recommendation of which it forms an integral part;

(3) That Member countries also disseminate the Principles to the private sector, which plays a key role in the delivery of goods and services for the public service.

II. INVITES the Secretary General to disseminate the Principles to non-Member economies and to encourage them to take the Principles into account in the promotion of public governance, aid effectiveness, the fight against international bribery and competition.

III. INSTRUCTS the Public Governance Committee to report to the Council on progress made in implementing this Recommendation within three years of its adoption and regularly thereafter, in consultation with other relevant Committees.

ANNEX

PRINCIPLES FOR ENHANCING INTEGRITY IN PUBLIC PROCUREMENT

I. Objective and scope

1. The Recommendation provides policy makers with Principles for enhancing integrity throughout the entire public procurement cycle, taking into account international laws, as well as national laws and organisational structures of Member countries.

2. The Recommendation is primarily directed at policy makers in governments at the national level but also offers general guidance for sub-national government and state-owned enterprises.

II. Definitions

Public Procurement Cycle

3. In the context of the present Recommendation, the public procurement cycle is defined as a sequence of related activities, from needs assessment, to the award stage, up until the contract management and final payment.

Integrity

4. The Recommendation aims to address a variety of risks to integrity in the public procurement cycle. Integrity can be defined as the use of funds, resources, assets, and authority, according to the intended official purposes and in line with public interest. A 'negative' approach to define integrity is also useful to determine an effective strategy for preventing 'integrity violations' in the field of public procurement. Integrity violations include:

- corruption including bribery, 'kickbacks', nepotism, cronyism and clientelism;
- fraud and theft of resources, for example through product substitution in the delivery which results in lower quality materials;
- conflict of interest in the public service and in post-public employment;
- collusion;
- abuse and manipulation of information;
- discriminatory treatment in the public procurement process; and
- the waste and abuse of organisational resources.

III. Principles

5. The following ten Principles are based on applying good governance elements to enhance integrity in public procurement. These include elements of transparency, good management, prevention of misconduct, as well as accountability and control. An important aspect of integrity in public procurement is an overarching obligation to treat potential suppliers and contractors on an equitable basis.

A. Transparency

1. Member countries should provide an adequate degree of transparency in the entire public procurement cycle in order to promote fair and equitable treatment for potential suppliers.

6. Governments should provide potential suppliers and contractors with clear and consistent information so that the public procurement process is well understood and applied as equitably as possible. Governments should promote transparency for potential suppliers and other relevant stakeholders, such as oversight institutions, not only regarding the formation of contracts but in the entire public procurement cycle. Governments should adapt the degree of transparency according to the recipient of information and the stage of the cycle. In particular, governments should protect confidential information to ensure a level playing field for potential suppliers and avoid collusion. They

should also ensure that public procurement rules require a degree of transparency that enhances corruption control while not creating 'red tape' to ensure the effectiveness of the system.

2. Member countries should maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

7. To ensure sound competitive processes, governments should provide clear rules, and possibly guidance, on the choice of the procurement method and on exceptions to competitive tendering. Although the procurement method could be adapted to the type of procurement concerned, governments should, in all cases, maximise transparency in competitive tendering. Governments should consider setting up procedures to mitigate possible risks to integrity through enhanced transparency, guidance and control, in particular for exceptions to competitive tendering such as extreme urgency or national security.

B. Good management

3. Member countries should ensure that public funds are used in public procurement according to the purposes intended.

8. Procurement planning and related expenditures are key to reflecting a long-term and strategic view of government needs. Governments should link public procurement with public financial management systems to foster transparency and accountability as well as to improve value for money. Oversight institutions such as internal control and internal audit bodies, supreme audit institutions or parliamentary committees should monitor the management of public funds to verify that needs are adequately estimated and public funds are used according to the purposes intended.

4. Member countries should ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

9. Recognising officials who work in the area of public procurement as a profession is critical to enhancing resistance to mismanagement, waste and corruption. Governments should invest in public procurement accordingly and provide adequate incentives to attract highly qualified officials. They should also update officials' knowledge and skills on a regular basis to reflect regulatory, management and technological evolutions. Public officials should be

aware of integrity standards and be able to identify potential conflict between their private interests and public duties that could influence public decision making.

C. Prevention of misconduct, compliance and monitoring

5. Member countries should put mechanisms in place to prevent risks to integrity in public procurement.

10. Governments should provide institutional or procedural frameworks that help protect officials in public procurement against undue influence from politicians or higher level officials. Governments should ensure that the selection and appointment of officials involved in public procurement are based on values and principles, in particular integrity and merit. In addition, they should identify risks to integrity for job positions, activities, or projects that are potentially vulnerable. Governments should prevent these risks through preventative mechanisms that foster a culture of integrity in the public service such as integrity training, asset declarations, as well as the disclosure and management of conflict of interest.

6. Member countries should encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

11. Governments should set clear integrity standards and ensure compliance in the entire procurement cycle, particularly in contract management. Governments should record feedback on experience with individual suppliers to help public officials in making decisions in the future. Potential suppliers should also be encouraged to take voluntary steps to reinforce integrity in their relationship with the government. Governments should maintain a dialogue with suppliers' organisations to keep up-to-date with market evolutions, reduce information asymmetry and improve value for money, in particular for high-value procurements.

7. ***Member countries should provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.***

12. Governments should set up mechanisms to track decisions and enable the identification of irregularities and potential corruption in public procurement. Officials in charge of control should be aware of the techniques

and actors involved in corruption to facilitate the detection of misconduct in public procurement. In order to facilitate this, governments should also consider establishing procedures for reporting misconduct and for protecting officials from reprisal. Governments should not only define sanctions by law but also provide the means for them to be applied in case of breach in an effective, proportional and timely manner.

D. Accountability and control

8. Member countries should establish a clear chain of responsibility together with effective control mechanisms.

13. Governments should establish a clear chain of responsibility by defining the authority for approval, based on an appropriate segregation of duties, as well as the obligations for internal reporting. In addition, the regularity and thoroughness of controls should be proportionate to the risks involved. Internal and external controls should complement each other and be carefully co-ordinated to avoid gaps or loopholes and ensure that the information produced by controls is as complete and useful as possible.

9. Member countries should handle complaints from potential suppliers in a fair and timely manner.

14. Governments should ensure that potential suppliers have effective and timely access to review systems of procurement decisions and that these complaints are promptly resolved. To ensure an impartial review, a body with enforcement capacity that is independent of the respective procuring entities should rule on procurement decisions and provide adequate remedies. Governments should also consider establishing alternative dispute settlement mechanisms to reduce the time for solving complaints. Governments should analyse the use of review systems to identify patterns where individual firms could be using reviews to unduly interrupt or influence tenders. This analysis of review systems should also help identify opportunities for management improvement in key areas of public procurement.

10. Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement.

15. Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption.

OECD GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT [1]

-- March 2009 --

1. Introduction

Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Public and private organizations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement.[2] Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.

Bid rigging is an illegal practice in all OECD member countries and can be investigated and sanctioned under the competition law and rules. In a number of OECD countries, bid rigging is also a criminal offence.

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1 OECD (2009), *OECD Guidelines for Fighting Bid Rigging in Public Procurement*, OECD, Paris. More information on the guidelines, related documentation as well as a set of translations in several languages can be found at www.oecd.org/competition/bidrigging

2 In OECD countries, public procurement accounts for approximately 15% of GDP. In many non-OECD countries that figure is even higher. See OECD, Bribery in Procurement, Methods, Actors and Counter-Measures, 2007.

2. Common forms of bid rigging

Bid-rigging conspiracies can take many forms, all of which impede the efforts of purchasers - frequently national and local governments - to obtain goods and services at the lowest possible price. Often, competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process. A common objective of a bid-rigging conspiracy is to increase the amount of the winning bid and thus the amount that the winning bidders will gain.

Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them. However, long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also associated with firms submitting "cover" (higher) bids.[3]

Although individuals and firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one or more of several common strategies. These techniques are not mutually exclusive. For instance, cover bidding may be used in conjunction with a bid-rotation scheme. These strategies in turn may result in patterns that procurement officials can detect and which can then help uncover bid-rigging schemes.

- *Cover bidding*. Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated

[3] In most instances the compensation payment will be facilitated by the use of a fraudulent invoice for subcontracting works. In fact, no such work takes place and the invoice is false. The use of fraudulent consulting contracts can also be used for this purpose.

winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.

- *Bid suppression*. Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration.
- *Bid rotation*. In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (*i.e.,* lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.
- *Market allocation*. Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement.

3. Industry, product and service characteristics that help support collusion

In order for firms to implement a successful collusive agreement, they must agree on a common course of action for implementing the agreement, monitor whether other firms are abiding by the agreement, and establish a way to punish firms that cheat on the agreement. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Indicators of bid rigging, which are discussed further below, may be more meaningful when certain supporting factors are also present. In such instances, procurement agents should be especially vigilant. Although various industry or product

characteristics have been found to help collusion, they need not all be present in order for companies to successfully rig bids.

- *Small number of companies*. Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids.
- *Little or no entry*. When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.
- *Market conditions*. Significant changes in demand or supply conditions tend to destabilize ongoing bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion. At the same time, during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.
- *Industry associations*. Industry associations[4] can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted to illegal, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid rigging agreement.
- *Repetitive bidding*. Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.

4 Industry or trade associations consist of individuals and firms with common commercial interests, joining together to further their commercial or professional goals.

- *Identical or simple products or services*. When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure.
- *Few if any substitutes*. When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.
- *Little or no technological change*. Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.

A. CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS TO REDUCE RISKS OF BID RIGGING

There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should consider adopting the following measures:

1. Be informed before designing the tender process

Collecting information on the range of products and/or services available in the market that would suit the requirements of the purchaser as well as information on the potential suppliers of these products is the best way for procurement officials to design the procurement process to achieve the best "value for money". Develop in-house expertise as early as possible.

- Be aware of the characteristics of the market from which you will purchase and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which you will purchase has characteristics that make collusion more likely[1].
- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B[2] procurement.
- Collect information about recent price changes. Inform yourself about prices in neighbouring geographic areas and about prices of possible alternative products.
- Collect information about past tenders for the same or similar products.

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1 See "Industry, product and service characteristics that help support collusion" above.

2 Business-to-Business (B2B) is a term commonly used to describe electronic commerce transactions between businesses.

- Coordinate with other public sector procurers and clients who have recently purchased similar products or services to improve your understanding of the market and its participants.
- If you use external consultants to help you estimate prices or costs ensure that they have signed confidentiality agreements.

2. Design the tender process to maximise the potential participation of genuinely competing bidders

Effective competition can be enhanced if a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. For example, participation in the tender can be facilitated if procurement officials reduce the costs of bidding, establish participation requirements that do not unreasonably limit competition, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract.

- Avoid unnecessary restrictions that may reduce the number of qualified bidders. Specify minimum requirements that are proportional to the size and content of the procurement contract. Do not specify minimum requirements that create an obstacle to participation, such as controls on the size, composition, or nature of firms that may submit a bid.
- Note that requiring large monetary guarantees from bidders as a condition for bidding may prevent otherwise qualified small bidders from entering the tender process. If possible, ensure amounts are set only so high as to achieve the desired goal of requiring a guarantee.
- Reduce constraints on foreign participation in procurement whenever possible.
- To the extent possible, qualify bidders during the procurement process in order to avoid collusive practices among a pre-qualified group and to increase the amount of uncertainty among firms as to the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.

- Reduce the preparation costs of the bid. This can be accomplished in a number of ways:
  - By streamlining tendering procedures across time and products (e.g. use the same application forms, ask for the same type of information, etc.).[3]
  - By packaging tenders (i.e. different procurement projects) to spread the fixed costs of preparing a bid.
  - By keeping official lists of approved contractors or certification by official certification bodies.
  - By allowing adequate time for firms to prepare and submit a bid. For example, consider publishing details of pipeline projects well in advance using trade and professional journals, websites or magazines.
  - By using an electronic bidding system, if available.
- Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only.[4] For example, in larger contracts look for areas in the tender that would be attractive and appropriate for small and medium sized enterprises.
- Do not disqualify bidders from future competitions or immediately remove them from a bidding list if they fail to submit a bid on a recent tender.
- Be flexible in regard to the number of firms from whom you require a bid. For example, if you start with a requirement for 5 bidders but receive bids from only 3 firms, consider whether it is possible to obtain a competitive outcome from the 3 firms, rather than insisting on a re-tendering exercise, which is likely to make it all the more clear that competition is scarce.

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3 Streamlining the preparation of the bid nevertheless should not prevent procurement officials from seeking continuous improvements of the procurement process (procedure chosen, quantities bought, timing, etc.).

4 Procurement officials should also be aware that, if wrongly implemented (e.g. in an easily predictable manner), the 'splitting contracts' technique could provide an opportunity to conspirators to better allocate contracts.

3. Define your requirements clearly and avoid predictability

Drafting the specifications and the terms of reference (TOR) is a stage of the public procurement cycle which is vulnerable to bias, fraud and corruption. Specifications/TOR should be designed in a way to avoid bias and should be clear and comprehensive but not discriminatory. They should, as a general rule, focus on functional performance, namely on what is to be achieved rather than how it is to be done. This will encourage innovative solutions and value for money. How tender requirements are written affects the number and type of suppliers that are attracted to the tender and, therefore, affects the success of the selection process. The clearer the requirements, the easier it will be for potential suppliers to understand them, and the more confidence they will have when preparing and submitting bids. Clarity should not be confused with predictability. More predictable procurement schedules and unchanging quantities sold or bought can facilitate collusion. On the other hand, higher value and less frequent procurement opportunities increase the bidders' incentives to compete.

- Define your requirements as clearly as possible in the tender offer. Specifications should be independently checked before final issue to ensure they can be clearly understood. Try not to leave room for suppliers to define key terms after the tender is awarded.
- Use performance specifications and state what is actually required, rather than providing a product description.
- Avoid going to tender while a contract is still in the early stages of specification: a comprehensive definition of the need is a key to good procurement. In rare circumstances where this is unavoidable, require bidders to quote per unit. This rate can then be applied once quantities are known.
- Define your specifications allowing for substitute products or in terms of functional performance and requirements whenever possible. Alternative or innovative sources of supply make collusive practices more difficult.
- Avoid predictability in your contract requirements: consider aggregating or disaggregating contracts so as to vary the size and timing of tenders.

- Work together with other public sector procurers and run joint procurement.
- Avoid presenting contracts with identical values that can be easily shared among competitors.

4. Design the tender process to effectively reduce communication among bidders

When designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process will depend upon the bidding model adopted but also on how the tender is designed and carried out. Transparency requirements are indispensable for a sound procurement procedure to aid in the fight against corruption. They should be complied with in a balanced manner, in order not to facilitate collusion by disseminating information beyond legal requirements. Unfortunately, there is no single rule about the design of an auction or procurement tender. Tenders need to be designed to fit the situation. Where possible, consider the following:

- Invite interested suppliers to dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity. However, avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings.
- Limit as much as possible communications between bidders during the tender process.[5] Open tenders enable communication and signalling between bidders. A requirement that bids must be submitted in person provides an opportunity for last minute communication and deal-making among firms. This could be prevented, for example, by using electronic bidding.
- Carefully consider what information is disclosed to bidders at the time of the public bid opening.
- When publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes, going forward.

[5] For example, if the bidders need to do a site inspection, avoid gathering the bidders in the same facility at the same time.

- Where there are concerns about collusion due to the characteristics of the market or product, if possible, use a first-price sealed bid auction rather than a reverse auction.
- Consider if procurement methods other than single stage tenders based primarily on price can yield a more efficient outcome. Other types of procurement may include negotiated tenders[6] and framework agreements.[7]
- Use a maximum reserve price only if it is based on thorough market research and officials are convinced it is very competitive. Do not publish the reserve price, but keep it confidential in the file or deposit it with another public authority.
- Beware of using industry consultants to conduct the tendering process, as they may have established working relationships with individual bidders. Instead, use the consultant's expertise to clearly describe the criteria/specification, and conduct the procurement process in-house.
- Whenever possible, request that bids be filed anonymously (e.g. consider identifying bidders with numbers or symbols) and allow bids to be submitted by telephone or mail.
- Do not disclose or unnecessarily limit the number of bidders in the bidding process.
- Require bidders to disclose all communications with competitors. Consider requiring bidders to sign a Certificate of Independent Bid Determination.[8]

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6 In negotiated tenders the procurer sets out a broad plan and the tenderer(s) then work out the details with the procurer, thereby arriving at a price.

7 In framework agreements, the procurer asks a large number of firms, say 20, to submit details of their ability in terms of qualitative factors such as experience, safety qualifications, etc., and then chooses a small number, say 5 tenderers, to be in a framework - subsequent jobs are then allocated primarily according to ability or may be the subject of further 'mini' tenders with each of the tenderers submitting a price for the job.

8 A Certificate of Independent Bid Determination requires bidders to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender. In order to discourage non-genuine, fraudulent or collusive bids, and thereby eliminate the inefficiency and extra cost to procurement, procurement officials may wish to require a

- Require bidders to disclose upfront if they intend to use subcontractors, which can be a way to split the profits among bid riggers.
- Because joint bids can be a way to split profits among bid riggers, be particularly vigilant about joint bids by firms that have been convicted or fined by the competition authorities for collusion. Be cautious even if collusion occurred in other markets and even if the firms involved do not have the capacity to present separate bids.
- Include in the tender offer a warning regarding the sanctions in your country for bid rigging, e.g. suspension from participating in public tenders for a certain period, any sanctions if the conspirators signed a Certificate of Independent Bid Determination, the possibility for the procuring agency to seek damages, and any sanctions under the competition law.
- Indicate to bidders that any claims of increased input costs that cause the budget to be exceeded will be thoroughly investigated.[9]
- If, during the procurement process, you are assisted by external consultants, ensure that they are properly trained, that they sign confidentiality agreements, and that they are subject to a reporting requirement if they become aware of improper competitor behaviour or any potential conflict of interest.

5. Carefully choose your criteria for evaluating and awarding the tender

All selection criteria affect the intensity and effectiveness of competition in the tender process. The decision on what selection criteria to use is not only important for the current project, but also in maintaining a pool of potential credible bidders with a continuing interest in bidding on future projects. It is therefore important to ensure that qualitative selection and awarding criteria are

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statement or attestation by each bidder that the bid it has submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded. Consideration may be given to requiring the signature of an individual with the authority to represent the firm and adding separate penalties for statements that are fraudulently or inaccurately made.

9 Cost increases during the execution phase of a contract should be carefully monitored as they may be a front for corruption and bribery.

chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily.

- When designing the tender offer, think of the impact that your choice of criteria will have on future competition.
- Whenever evaluating bidders on criteria other than price (e.g., product quality, post-sale services, etc.) such criteria need to be described and weighted adequately in advance in order to avoid post-award challenges. When properly used, such criteria can reward innovation and cost-cutting measures, along with promoting competitive pricing. The extent to which the weighting criteria are disclosed in advance of the tender closing can affect the ability of the bidders to coordinate their bid.
- Avoid any kind of preferential treatment for a certain class, or type, of suppliers.
- Do not favour incumbents.[10] Tools that ensure as much anonymity as possible throughout the procurement process may counteract incumbent advantages.
- Do not over-emphasise the importance of performance records. Whenever possible, consider other relevant experience.
- Avoid splitting contracts between suppliers with identical bids. Investigate the reasons for the identical bids and, if necessary, consider re-issuing the invitation to tender or award the contract to one supplier only.
- Make inquiries if prices or bids do not make sense, but never discuss these issues with the bidders collectively.
- Whenever possible under the legal requirements governing the award notices, keep the terms and conditions of each firm's bid confidential. Educate those who are involved in the contract process (e.g., preparation, estimates, etc.) about strict confidentiality.
- Reserve the right not to award the contract if it is suspected that the bidding outcome is not competitive.

10 The incumbent is the company currently supplying the goods or services to the public administration and whose contract is coming to an end.

6. Raise awareness among your staff about the risks of bid rigging in procurement

Professional training is important to strengthen procurement officials' awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data. This helps procurement agencies (and competition authorities) to identify problematic situations. It should be noted that bid rigging may not be evident from the results of a single tender. Often a collusive scheme is only revealed when one examines the results from a number of tenders over a period of time.

- Implement a regular training program on bid rigging and cartel detection for your staff, with the help of the competition agency or external legal consultants.
- Store information about the characteristics of past tenders (e.g., store information such as the product purchased, each participant's bid, and the identity of the winner).
- Periodically review the history of tenders for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion.[11]
- Adopt a policy to review selected tenders periodically.
- Undertake comparison checks between lists of companies that have submitted an expression of interest and companies that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.
- Conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors.
- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.

11 See "Industry, product and service characteristics that help support collusion" above.

- Make use of mechanisms, such as a whistleblower system, to collect information on bid rigging from companies and their employees. Consider launching requests in the media to invite companies to provide the authorities with information on potential collusion.
- Inform yourself about your country's leniency policy,[12] if applicable, and review your policy on suspension from qualification to bid, where there has been a finding of collusive activity, to determine whether it is harmonious with your country's leniency policy.
- Establish internal procedures that encourage or require officials to report suspicious statements or behaviour to the competition authorities in addition to the procurement agency's internal audit group and comptroller, and consider setting up incentives to encourage officials to do so.
- Establish cooperative relationships with the competition authority (e.g. set up a mechanism for communication, listing information to be provided when procurement officials contact competition agencies, etc.).

12 Such policies generally provide for immunity from antitrust legal proceedings to the first party to apply under the policy who admits its involvement in particular cartel activities, including bid rigging schemes, and agrees to cooperate with the competition authority's investigation.

B. CHECKLIST FOR DETECTING BID RIGGING IN PUBLIC PROCUREMENT

Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as unusual bidding or pricing patterns, or something that the vendor says or does. Be on guard throughout the entire procurement process, as well as during your preliminary market research.

1. Look for warning signs and patterns when businesses are submitting bids

Certain bidding patterns and practices seem at odds with a competitive market and suggest the possibility of bid rigging. Search for odd patterns in the ways that firms bid and the frequency with which they win or lose tender offers. Subcontracting and undisclosed joint venture practices can also raise suspicions.

- The same supplier is often the lowest bidder.
- There is a geographic allocation of winning tenders. Some firms submit tenders that win in only certain geographic areas.
- Regular suppliers fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders.
- Some suppliers unexpectedly withdraw from bidding.
- Certain companies always submit bids but never win.
- Each company seems to take a turn being the winning bidder.
- Two or more businesses submit a joint bid even though at least one of them could have bid on its own.
- The winning bidder repeatedly subcontracts work to unsuccessful bidders.

- The winning bidder does not accept the contract and is later found to be a subcontractor.
- Competitors regularly socialise or hold meetings shortly before the tender deadline.

2. Look for warning signs in all documents submitted

Telltale signs of a bid-rigging conspiracy can be found in the various documents that companies submit. Although companies that are part of the bid-rigging agreement will try to keep it secret, carelessness, or boastfulness or guilt on the part of the conspirators, may result in clues that ultimately lead to its discovery. Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.

- Identical mistakes in the bid documents or letters submitted by different companies, such as spelling errors.
- Bids from different companies contain similar handwriting or typeface or use identical forms or stationery.
- Bid documents from one company make express reference to competitors' bids or use another bidder's letterhead or fax number.
- Bids from different companies contain identical miscalculations.
- Bids from different companies contain a significant number of identical estimates of the cost of certain items.
- The packaging from different companies has similar postmarks or post metering machine marks.
- Bid documents from different companies indicate numerous last minute adjustments, such as the use of erasures or other physical alterations.
- Bid documents submitted by different companies contain less detail than would be necessary or expected, or give other indications of not being genuine.
- Competitors submit identical tenders or the prices submitted by bidders increase in regular increments.

3. Look for warning signs and patterns related to pricing

Bid prices can be used to help uncover collusion. Look for patterns that suggest that companies may be coordinating their efforts such as price increases that cannot be explained by cost increases. When losing bids are much higher than the winner's bid, conspirators may be using a cover bidding scheme. A common practice in cover pricing schemes is for the provider of the cover price to add 10% or more to the lowest bid. Bid prices that are higher than the engineering cost estimates or higher than prior bids for similar tenders may also indicate collusion. The following may be suspicious:

- Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases.
- Anticipated discounts or rebates disappear unexpectedly.
- Identical pricing can raise concerns especially when one of the following is true:
  - Suppliers' prices were the same for a long period of time,
  - Suppliers' prices were previously different from one another,
  - Suppliers increased price and it is not justified by increased costs, or
  - Suppliers eliminated discounts, especially in a market where discounts were historically given.
- A large difference between the price of a winning bid and other bids.
- A certain supplier's bid is much higher for a particular contract than that supplier's bid for another similar contract.
- There are significant reductions from past price levels after a bid from a new or infrequent supplier, e.g. the new supplier may have disrupted an existing bidding cartel.
- Local suppliers are bidding higher prices for local delivery than for delivery to destinations farther away.
- Similar transportation costs are specified by local and non-local companies.
- Only one bidder contacts wholesalers for pricing information prior to a bid submission.

- Unexpected features of public bids in an auction, electronic or otherwise -- such as offers including unusual numbers where one would expect a rounded number of hundreds or thousands -- may indicate that bidders are using the bids themselves as a vehicle to collude by communicating information or signalling preferences.

4. Look for suspicious statements at all times

When working with vendors watch carefully for suspicious statements that suggest that companies may have reached an agreement or coordinated their prices or selling practices.

- Spoken or written references to an agreement among bidders.
- Statements that bidders justify their prices by looking at "industry suggested prices", "standard market prices" or "industry price schedules".
- Statements indicating that certain firms do not sell in a particular area or to particular customers.
- Statements indicating that an area or customer "belongs to" another supplier.
- Statements indicating advance non-public knowledge of competitors' pricing or bid details or foreknowledge of a firm's success or failure in a competition for which the results have yet to be published.
- Statements indicating that a supplier submitted a courtesy, complementary, token, symbolic or cover bid.
- Use of the same terminology by various suppliers when explaining price increases.
- Questions or concerns expressed about Certificates of Independent Bid Determination, or indications that, although signed (or even submitted unsigned), they are not taken seriously.
- Cover letters from bidders refusing to observe certain tender conditions or referring to discussions, perhaps within a trade association.

5. Look for suspicious behaviour at all times

Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behaviour could include the following:

- Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.
- Suppliers regularly socialize together or appear to hold regular meetings.
- A company requests a bid package for itself and a competitor.
- A company submits both its own and a competitor's bid and bidding documents.
- A bid is submitted by a company that is incapable of successfully completing the contract.
- A company brings multiple bids to a bid opening and chooses which bid to submit after determining (or trying to determine) who else is bidding.
- Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.

6. A caution about indicators of bid rigging

The indicators of possible bid rigging described above identify numerous suspicious bid and pricing patterns as well as suspicious statements and behaviours. They should not however be taken as proof that firms are engaging in bid rigging. For example, a firm may have not bid on a particular tender offer because it was too busy to handle the work. High bids may simply reflect a different assessment of the cost of a project. Nevertheless, when suspicious patterns in bids and pricing are detected or when procurement agents hear odd statements or observe peculiar behaviour, further investigation of bid rigging is required. A regular pattern of suspicious behaviour over a period of time is often a better indicator of possible bid rigging than evidence from a single bid. Carefully record all information so that a pattern of behaviour can be established over time.

7. Steps procurement officials should take if bid rigging is suspected

If you suspect that bid rigging is occurring, there are a number of steps you should take in order to help uncover it and stop it.

- Have a working understanding of the law on bid rigging in your jurisdiction.
- Do not discuss your concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, etc.
- Keep a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and what precisely occurred or was said. Notes should be made during the event or while they are fresh in the official's memory so as to provide an accurate description of what transpired.
- Contact the relevant competition authority in your jurisdiction.
- After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.

HARD CORE CARTELS

THIRD REPORT
ON THE IMPLEMENTATION
OF THE 1998 RECOMMENDATION

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- 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;

- to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original Member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became Members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

FOREWORD

In 1998 the OECD initiated an anti-cartel programme with the adoption of the Council Recommendation Concerning Effective Action against Hard Core Cartels. This publication is the third comprehensive report by the OECD Competition Committee about the ongoing fight against cartels. Earlier reports were published in 2000 and 2003.

The report focuses on four topics, including progress in member countries and observer countries in fighting cartels; public awareness of the harm caused by cartels; effective sanctions against cartel conduct, in particular sanctions against individuals; and international cooperation in cartel cases.

The report finds that efforts to detect, investigate, and prosecute domestic and international cartels have continued in OECD member and observer jurisdictions at very high levels. More competition authorities have focused efforts and resources on the prosecution of cartels. Severe sanctions are being imposed against cartels. Cooperation among competition authorities in investigations of cartels has reached unprecedented levels and exchanges of cartel enforcement know-how have intensified. While this represents significant progress, much remains to be done. The Report concludes that more countries should expand their awareness programmes, and work more extensively with procurement officials in an effort to fight bid rigging more effectively. Countries should seek opportunities to further increase corporate fines, and should consider introducing and imposing sanctions against individuals, including criminal sanctions. The report also identifies opportunities to enhance international cooperation in cartel investigations, highlighting in particular the Committee's Best Practices for formal information exchange in cartel investigations. The report concludes with an outline of the Competition Committee's future work related to the fight against cartels.

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Introduction

On 25 March 1998 the Council adopted its Recommendation concerning Effective Action Against Hard Core Cartels.[1] The Recommendation condemns hard core cartels as the most egregious violations of competition law. It calls upon member countries to ensure that their laws adequately prohibit such cartels and that they provide for effective sanctions, enforcement procedures, and investigative tools with which to combat them. Further, the Recommendation urges member countries to cooperate with one another in prosecuting hard core cartel conduct.

Since the adoption of the Council Recommendation, the Competition Committee has considered the anti-cartel effort as one of its top priorities, as documented in the Committee's reports to the Council on the implementation of the Recommendation. In 2000, the Competition Committee submitted the first report to the Council on the implementation of the Council Recommendation (the "First Report").[2] The First Report noted that in the two years since the Recommendation there had been progress in raising the public consciousness about the harmfulness of cartels and in prosecuting them. The First Report explored in depth the topics of international co-operation in cartel investigations and the obstacles to more effective co-operation.

In 2002, the Competition Committee submitted the second report on the implementation of the Council Recommendation (the "Second Report"), which focused on the harm caused by cartels, investigative tools, sanctions, and international cooperation. The Second Report included a review of the estimated harm caused by cartels, and concluded that "the total harm from cartels is significant indeed, surely amounting to many billions of dollars each year."[3] The Second Report also compared estimates of unlawful gains from cartels in a number of cases with the financial sanctions imposed in the same cases, and found that in virtually all of the examined cases the fines imposed were below the level of fines that would be considered an optimal deterrent, and in most cases were substantially below that level. The Second Report concluded a summary of anti-cartel enforcement actions as follows:

> In sum, cartels are unambiguously bad. They cause harm amounting to many billions of dollars each year. They interfere with competitive markets and with international trade. They affect both developed and developing countries, and their effect in the latter may be especially pernicious. Their participants operate in secret, knowing that their conduct is unlawful. Their detection and prosecution should be a top priority of governments everywhere.[4]

The Second Report received a great deal of public attention and played an important role in member countries' reviews of their anti-cartel regimes.[5] For example, a Government-established Commission in *Australia* that examined reforms of Australian competition laws recommended the introduction of criminal sanctions for hard-core cartels, referring, among other sources, to the findings of the Second Report concerning the harm caused by cartels and its comparison between harm and financial sanctions.[6] *Japan* is another country that used the findings of the Second Report in its review of cartel enforcement.

This is the third report by the Competition Committee on the implementation of the Council Recommendation and the progress of member countries in the fight against hard core cartels, and the last in the series of reports since the adoption of the Recommendation. It summarises recent Committee activities, which focused on efforts to raise public awareness of the harm caused by cartels, sanctions against individuals, and international cooperation. The Report also provides an overview of major developments in member countries' anti-cartel efforts. It concludes with an overview of topics that the Competition Committee intends to address in the future in its ongoing anti-cartel work.

By way of overall conclusions, this report demonstrates that efforts to detect, investigate, and prosecute domestic and international cartels have continued in OECD member countries at very high levels. More countries are catching up and improving their enforcement regimes in line with developments in the most advanced jurisdictions. As a result, more competition authorities have focused efforts and resources on the prosecution of cartels, frequently aided by new laws and regulations that provide for greater enforcement powers. Severe sanctions are being imposed against cartels. Cooperation among authorities in investigations of cartels has reached unprecedented levels. However, as competition authorities intensify their anti-cartel efforts and compare their experiences, it also becomes evident that more should be done to strengthen laws and prosecute cartels, in order to combat more aggressively what has recently been called the "*supreme evil of antitrust*."[7]

1. Trends in Anti-Cartel Enforcement

The previous two reports covered a period of record fines and individual sanctions for several competition authorities. A survey for this Report showed that some member countries, especially those that had prosecuted the vitamins and lysine cartels during previous reporting periods, have seen a moderate decline in the number of decisions and in total fines. However, the survey demonstrated aggressive enforcement efforts at very high levels in many

countries, and competition authorities in more countries than ever bring important cases that resulted in significant sanctions. For example:

- In *Germany*, the Cartel Office imposed total fines of more than € 700 million on a cartel in the cement industry;

- In 2002, the *European Commission* imposed a fine of € 249.6 million on Lafarge for participation in a plasterboard cartel, the highest fine ever imposed on a company with regard to a single cartel infringement;

- The *United States* reported the second highest fine total in FY 2004 ($359.8 million); the 10,501 total jail days imposed in FY 2002 were the highest number of jail days imposed in Division history;

- *Hungary* imposed total fines of HUF 8,375 million on cartels in 2004, more than ten times the amount of total fines imposed in the previous year.

The following section highlights some of the major developments in several OECD member countries and non-Member observers to the Competition Committee, focusing on legislative and regulatory changes, as well as changes in enforcement policy.[8] Clearly, there has been significant progress in terms of focusing public opinion on the fight against hard core cartels and winning the support of lawmakers to strengthen enforcement tools and statutory fines. This overview is followed by examples of successful enforcement action against some major cartels discovered in recent years.

1.1 Developments in Member Countries and Observers

Australia: Proposed new legislation that would substantially strengthen anti-cartel enforcement; proposed reforms include: criminalisation of cartels, increased corporate fines, the possibility of barring individuals from office as directors or managers in public corporations, and a prohibition against indemnifying individuals for sanctions imposed on them;

Austria: Proposed new legislation that would introduce a modern antitrust regime as well as a leniency programme.

Brazil: Creation of an intelligence centre for cartel investigation by one of the antitrust agencies, which started to work closely with the federal police and prosecutors and to use new investigatory techniques in cartel

investigations, including dawn raids and wiretapping, and received first leniency applications;

Canada: Review of legislation was initiated to consider introducing a per-se prohibition of hard core cartels; immunity programme is being reviewed to improve and clarify the program;

France: Implemented legislation that created a leniency programme and a new procedure that provides for the imposition of lesser sanctions on companies that do not contest the accuracy of the charges brought against them; introduced a new system of fines, with maximum fines of up to 10 percent of annual revenues.

Germany: Proposed amendments to the Cartel Act that would allow for improved cooperation with competition authorities in and outside Europe, provide for new decision making powers, change the method of calculating the maximum fine to a turnover-based approach, expand powers to skim off unlawful gains, and improve possibilities of private enforcement; imposed record fines in 2003 totalling € 717 million, and more than € 3 million against individuals;

Hungary: Created a cartel unit within the competition authority which has been very successful in investigating cartels; adopted a notice on fines which contributed to greater transparency and the imposition of substantially increased fines; adopted a leniency programme which has already triggered leniency applications;

Israel: Introduced a leniency program; obtained criminal convictions of individuals in numerous cases, including the first case in which executives had to serve jail time for their participation in a cartel;

Korea: Imposed record fines in cartel cases. 2004 amendments to the competition act increased maximum fines, introduced a new leniency programme to increase predictability and incentives for applicants, and a reward system for cartel informants; initiated a programme to better detect suspected cases of bid rigging;

Japan: Adopted new legislation in 2002 that increased the maximum amount of fines from ¥ 100 million to ¥ 500 million. New legislation has been adopted in 2005 that increases surcharge rates and introduces a leniency program;

Mexico: Proposed amendments to the competition law that would strengthen the competition authority's investigatory powers, substantially increase maximum fines, and introduce a leniency program;

The Netherlands: Introduced a leniency programme which has triggered numerous leniency applications; substantially increased fines for failure to cooperate with competition authority in investigations; proposed legislation that would introduce financial sanctions against individuals;

Portugal: Introduced a new competition law that provides for maximum fines of 10 percent of annual revenues, and the possibility of sanctions against individuals;

Turkey: A 2003 amendment to the Competition Act strengthened the competition authority's investigative powers and facilitated to collection of fines; further amendments are planned that would increase fines, and introduce a leniency programme as well as a commitment mechanism;

United Kingdom: Introduced criminal sanctions for individuals participating in cartels with a maximum jail sentence of five years. Expanded investigatory powers for the OFT;

United States: In 2004, the Antitrust Criminal Penalty Enforcement and Reform Act increased maximum corporate fines from $10 million to $100 million; the maximum individual fine from $350,000 to $1 million, and the maximum jail time from 3 to ten years. The Act also strengthened the Antitrust Division's Amnesty Program by limiting a corporate amnesty applicant's private damages exposure to the damages actually inflicted by the applicant's conduct, provided the applicant cooperates with private plaintiffs in their damage actions against remaining cartel members.

European Union: Since May 1, 2004, the enforcement of EC antitrust rules is governed by Regulation 1/2003, which allows both the Commission and the national competition authorities to better focus their resources on the fight against hard core cartels by means of more effective sharing of enforcement tasks and increased cooperation. For this purpose, the Commission and national competition authorities have established the European Competition Network (ECN). The system created for case allocation, mutual information exchanges and consultations, as well as the extension of assistance in investigations to include cooperation between the national competition authorities, facilitates the investigation of cartels.

Regulation 1/2003 also strengthened the investigation powers of the European Commission by introducing the rights to seal any business premises and books or records, inspect other than business premises (for instance private homes), interview any person who may be in possession of useful information and record the answers, as well as by extending the right to ask oral questions during an inspection to a right to question any member of staff. The Commission adopted in February 2002 a new leniency policy, and has adopted a practice of taking oral statements in leniency applications. Options to strengthen private enforcement are also being considered, which could further increase deterrence against cartels.

1.2 Illustrative Examples of Recent Cartel Investigations

Combating international cartels remains a high priority for OECD members and observers. International cartels are especially difficult to detect as they use the most sophisticated measures to conceal their activities, the amount of commerce affected by these cartels is disproportionately large, and they are widely considered the most harmful type of cartel because of the magnitude of the harm that they inflict on businesses and consumers. There have been large international cartels that were discovered during the reporting period. Two of these investigations are described below.

Recent Examples of international cartels

Rubber Chemicals

In Canada, the Competition Bureau discovered that several producers of rubber chemicals had conspired to fix prices and share customers. Their cartel involved regular meetings, communications with other producers, agreements to coordinate the timing and amounts of price increases for certain rubber chemicals and to share customers and sales volumes, and the exchange of sales data and customer information on a periodic basis in order to monitor and enforce adherence to the agreement. Crompton Corporation admitted that it participated with other rubber chemical suppliers in an international conspiracy to increase the price of certain rubber chemicals and was sentenced to a fine of $9 million for its part in the international price fixing conspiracy.

In the United States, the Antitrust Division has obtained over $100 million in fines after investigating the same cartel. Crompton pled guilty and was sentenced to pay a $50 million criminal fine. Bayer AG, a German manufacturer of rubber chemicals, pled guilty and was sentenced in December 2004 to pay a $66 million fine for its participation in the cartel. Two Crompton executives were charged with participating in the cartel. In November 2004, a Bayer executive was also charged with participating in the rubber chemicals cartel. All three have agreed to plead guilty and cooperate with the continuing investigation. The Bayer executive has since then agreed to serve a four month prison term, and pay a US $50,000 fine. The Crompton

executives' sentencings have been postponed pending completion of their cooperation.

The European Commission's investigation of the cartel continues.

DRAM Cartel

In September 2004, the Antitrust Division charged Infineon Technologies AG (Infineon), a German manufacturer of dynamic random access memory (DRAM), with participating in an international cartel to fix the price of DRAM sold to computer manufacturers. DRAM is the most commonly used semiconductor memory product, providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunication, and consumer electronic products. Infineon pled guilty and was sentenced to pay a $160 million fine, at that time the third largest fine in the history of the Antitrust Division. In December 2004, four executives of Infineon and its subsidiary, Infineon Technologies North America Corporation, were charged with participating in the international conspiracy to fix prices in the DRAM market. The executives, three German citizens and a US citizen, pled guilty and were each sentenced to pay a $250,000 criminal fine and serve prison terms in the US ranging from four to six months for their participation in the DRAM conspiracy. Since then, the Korean company Hynix has been sentenced to pay a fine of US $185 million, which currently ranks as the third largest fine in the history of the Antitrust Division. Several Hynix executives face the possibility of criminal charges.

While competition authorities from the most experienced competition regimes typically have been leading investigations of international cartels, other countries are getting involved as well. For example, *Mexico* opened an investigation into the citric acid cartel, following a guilty plea by Archer Daniels Midland and other companies before the US Department of Justice for participating in a price fixing agreement in the citric acid market. The Mexican competition authority imposed fines on Archer Daniels Midland as well as on Haarmann & Reimer Corp. and F. Hoffmann-La Roche, Ltd.

Korea also contributed to the prosecution of international cartels. In what was the first case of extra-territorial application of Korean competition law to an international cartel, the Korean Fair Trade Commission in 2002 imposed surcharges of about 11.2 billion won (approximately US $8.5 million), along with a corrective order, on 6 graphite electrodes manufacturers, including four Japanese companies (Showa Denko, Nippon Carbon, Tokai Carbon, SEC), one German company (SGL Carbon) and one US company (UCAR International). *Korea* estimated that Korean purchasers of graphite electrodes, who purchased 90 percent of their total demand from cartel participants, had suffered damages of approximately 183.7 billion won (approximately US $139 million) as a result of the global cartel.

The involvement of a greater number of countries in the prosecution of international cartels is of great significance. A larger number of prosecuting jurisdictions can increase the exposure of cartel participants to fines and thus contribute to greater deterrence of international cartels. This will require, of course, that in a greater number of jurisdictions fines reach levels at which they can be considered an effective deterrent.

Much of the attention concerning anti-cartel enforcement is directed at large, international cartels, given the significant harm they cause. There is no doubt, however, that the harm caused by domestic cartels also is very great, in light of the large number of these agreements. In addition, even a purely domestic cartel can cause substantial harm. Moreover, while international cartels frequently are found to devise the most sophisticated regimes to operate their cartels, there are also examples of domestic conspiracies that set up highly effective schemes to support cartels of significant duration. The German cement cartel, the Israeli floor tile cartel, and the Dutch construction industry cartel illustrate these concerns.

German Cement Cartel

Shortly after the adoption of a leniency programme and the creation of the Special Unit for Combating Cartels, the German Cartel Office received information from the construction industry about suspected cartel activity among cement producers. Evidence seized during a nation-wide search of 30 cement companies in July 2002, and during further searches of several small and medium-sized cement manufacturers in 2003, confirmed that the investigated cement producers had operated anti-competitive market allocation and quota agreements, some of them since the 1970s, and continued to do so until 2002, in four regional cement markets in eastern Germany, Westphalia, northern Germany and southern Germany.

The Cartel Office first imposed fines totalling approx. € 660 million in cartel proceedings against the six largest German manufacturers, including Alsen AG, Dyckerhoff AG, HeidelbergCement AG, Lafarge Cement GmbH, Readymix AG, and Schwenk Zement KG. Further fines of € 41 million were imposed on six medium-sized cement manufacturers and dealers in 2003, bringing the total fines imposed in the cement cartel to more than € 700 million.[9]

Israeli Floor Tile Cartel

In 2002, the Israeli competition authority successfully concluded the prosecution of a nation-wide floor tiles cartel and obtained criminal convictions of several tile manufacturers and their executives, including for the first time the imposition of unconditional jail sentences on several individuals. The investigation had revealed that all the major manufacturers of floor tiles in Israel had participated in a cartel for 14 years, which allocated markets, set quotas and fixed prices. A special economic

advisor was responsible for enforcing the cartel. He kept all the records of the cartel agreements, ensured that the cartel participants did not "cheat" by violating the terms of the cartel, arbitrated disputes among floor tiles companies that complained about breaches of the cartel, sanctioned companies that violated the cartel arrangements, and even sent private investigators to ensure that no manufacturer exceeded its quota.

The Dutch Construction Industry Cartel

Starting in 2002, the Netherlands competition authority investigated companies in the construction industry and uncovered evidence of large-scale collusive activities. In early 2004, as the investigation progressed, the Director-General of the competition authority as well as the Dutch Minister of Economic Affairs called upon construction companies to come forward and notify the competition authority of their practices. Almost 500 construction companies, including all major construction companies in the Netherlands, notified the authority of their cartel activities. The notifications and ongoing investigations documented an industry-wide culture of collusive behaviour. For many years, many companies had been involved in regular consultations prior to tenders to allocate "entitlements" to upcoming construction projects, and had used a system of "entitlements" and obligations to allocate future construction contracts. Many of these practices had continued despite a prohibition decision of the European Commission in the early 1990s.

The scale of the cartel prompted the competition authority to offer companies involved in the cartel an accelerated sanctions procedure: Companies which agreed to be collectively represented by a single person before the authority, rather than individually defending their cases, were offered some reduction in fines; companies that did not participate in the accelerated procedures remain subject to individual procedures. Under the accelerated procedure, the competition authority already imposed total fines exceeding € 100 million on participants in cartels in the infrastructure and civil engineering sector, with individual fines of up to € 18.8 million. Investigations into other sectors of the construction industry continue.

A significant portion of domestic cartels that member countries described in the survey for this Report concerned bid rigging in procurement procedures. This observation, although not based on a comprehensive survey, supports the conclusion that bid rigging cartels are a pervasive phenomenon that deserves greater attention. The Committee recently had a roundtable discussion on bid rigging cartels and competition authorities' efforts to reach out to procurement officials. The results of this discussion are summarised further below.[10]

During the reporting period, competition authorities discovered ample evidence of the well-known fact that cartel participants are not honest business people who inadvertently became involved in unlawful conduct, but that cartel participants are fully aware of the unlawful and harmful nature of their conduct, devise sophisticated regimes to operate their cartels, and sometimes go to great

lengths to hide the existence of their agreements. This point was already illustrated by the above description of the floor tile cartel in *Israel*, and below are additional illustrative examples:

The Peroxide Cartel

In 2003, the European Commission imposed cartel fines totalling nearly € 70 million on Atofina, Peroxid Chemie, Laporte (now known as Degussa UK Holdings), Perorsa, and AC Treuhand AG for operating a European-wide cartel in organic peroxide chemicals.[11] The cartel was remarkable in several respects: First, the cartel was active for almost thirty years. Cartel activities had begun in 1971 and lasted until the end of 1999 which makes it the longest-lasting cartel ever uncovered by the Commission. Second, the cartel had a particularly sophisticated and orderly setup: Back in 1971, the producers agreed to a written contract, spelling out in considerable detail the functioning of the cartel. The producers asked a Swiss consultancy called AC Treuhand to help organise the cartel. Its role was to organise the cartel, to mediate between the parties, and also to collect and audit statistics. AC Treuhand and the other parties to the agreement met regularly, often in Zurich. The incriminating documents were printed on pink paper and stored in Zurich. The producers were allowed only to consult these documents in the premises of AC Treuhand, but not to take the original documents home. The pink colour of the paper ensured that sensitive documents were not intentionally or inadvertently taken. Other documents were faxed to the private homes of some collaborators. Travel reimbursements were made directly from Switzerland to the participants attending the cartel meetings, so no trace could have been found in the offices.[12]

Copper Plumbing Tubes Cartel

In 2004, the Commission imposed a total of € 222.3 million in fines on participants in a cartel concerning copper plumbing tubes. The Commission discovered that the companies operated a well-structured, classic cartel with codenames, meetings in anonymous airport lounges, with the clear objective of avoiding competition through the allocation of production volumes and market shares, the setting of price targets and increases as well as other commercial terms for plain copper plumbing tubes. During the first European-wide meeting in Zurich, one of the participants noted *"The objective is to keep the prices in the high price level countries high – if possible to increase even more."*

Carbon Brushes Cartel

An investigation by the United States Department of Justice uncovered not only price fixing in the carbon brush industry, but also egregious acts of obstruction of justice. The Antitrust Division uncovered an elaborate plot to obstruct not only its price-fixing investigation, but also a potential investigation by the European Commission. The Morgan Crucible Company plc, headquartered in the UK, gave the Division false information in an attempt to convince it that their price-fixing meetings with competitors were legitimate business meetings. They provided their co-conspirator

company with a written "script" containing this false information, requested that it follow the script when questioned by the Division, and warned its co-conspirator that if the US investigation proceeded, the price-fixing investigation would spread to the EU. Officials associated with Morgan Crucible also destroyed documents relevant to the price-fixing investigation, even going so far as to create a document destruction task force. The Antitrust Division charged Morgan Crucible with obstruction of justice arising from witness tampering and document destruction. Morgan Crucible pled guilty to the obstruction charges and its US subsidiary, Morganite, Inc., pled guilty to price fixing. The companies were fined a total of $11 million. Also, three Morgan personnel have pled guilty to obstruction offences, served prison sentences in a US prison and each paid a $20,000 fine. The former Chairman of the Carbon Division and CEO of Morgan Crucible was indicted in 2004 for price fixing of carbon brushes, carbon current collectors, and mechanical carbon products, conspiracy to obstruct justice, witness tampering, and corruptly persuading others to destroy documents. The Division is seeking his extradition from the UK on all counts of his indictment.

In 2004, Morgan Crucible also pled guilty to obstruction of justice charges in Canada for wilfully providing false and incomplete evidence to Competition Bureau Investigators.

1.3 Work of International Bodies Related to Cartels

The topic of anti-cartel enforcement continues to be a key topic at competition policy events sponsored by governments and educational and private sector organisations. International organisations such as the *United Nations Conference on Trade and Development* continue to discuss the effects of cartels on trade and the appropriate response to this threat.

The *International Competition Network* ("ICN") also started to address cartel enforcement issues. In 2004, the ICN created a Cartel Working Group which addresses legal and conceptual challenges of anti-cartel enforcement, as well as enforcement techniques. Annual meetings of enforcement officials to discuss in particular the latest developments in enforcement techniques against cartels, which began in 1999, continue under the umbrella of the ICN. The latest of these conferences were held, respectively, in Brussels, *Belgium* and Sydney, *Australia.* These conferences and the ICN's work product on cartels give in particular non-OECD member countries a valuable opportunity to benefit from the expertise and knowhow in anti-cartel enforcement of the most experienced jurisdictions, thus strengthening worldwide efforts to combat cartels.[13]

2. Raising Public Awareness of the Harm Caused by Cartels

Making the public aware of the harm caused by cartels is an important part of a country's overall effort to combat cartels. Where the general public and in particular lawmakers are educated about the harm cartels cause to economies and the benefits of robust anti-cartel enforcement, they are more likely to support competition authorities and provide them with the necessary enforcement tools, including the ability to impose significant sanctions that can effectively deter cartels. Moreover, the more the business community and their counsel are aware of anti-cartel efforts, sanctions that can be imposed, and leniency programmes, the more likely it is that businesses will comply with the law or, where cartels have been formed, inform the competition authority about them. Recognising the importance of raising awareness of the harm caused by cartels, the Committee recently organised a roundtable discussion on this topic, the results of which are summarised below.

There are various methods countries can use to educate the public about cartels, including outreach to stakeholders, speeches, publications, websites, and pro-active media relations, and most importantly aggressive anti-cartel enforcement that receives good press coverage and public attention. Member countries with greater resources and experience in anti-cartel enforcement tend to have more comprehensive outreach programmes. The programmes developed in *Canada* and the *United States* are good examples of what competition authorities can do to educate the public about cartels.

The *United States* has developed one of the most comprehensive programmes to reach out to various constituents. The Antitrust Division found it useful to adapt presentations about its criminal enforcement programme according to target groups it intends to reach, distinguishing among presentations to other agencies involved in the investigation of cartels; purchasing officials; business executives; members of the antitrust bar; the general public; and lawmakers. Presentations to investigative agents tend to be fairly basic, focusing on crime, harm, investigative techniques, and prosecution statistics. Presentations to purchasing officials focus on harm and on signs of bid rigging, and are designed to give purchasing agents some tools to detect suspicious conduct. Programmes for business executives focus on the status of the Antitrust Division's enforcement program, on compliance programmes, and on methods to detect cartel activity within companies. Presentations to members of bar associations tend to be more detailed and technical, in particular with respect to leniency programmes, plea bargaining, and prosecution issues. A periodically updated status report on developments in the criminal enforcement programme is provided to business executives and bar members in connection with speeches given by Division officials. Additional materials to

increase awareness of cartels are available on the Antitrust Division's website,[14] where speeches announcing and explaining the Antitrust Division's policy with respect to the prosecution of cartels also can be found.[15]

A strong media relations programme can be an important part of a country's efforts to educate the public about cartels. *Canada* is a member country that has a particularly well-developed and active media programme aimed to inform the public about the Competition Bureau's work and to deter businesses from engaging in cartel activity. As part of its media strategy, the Competition Bureau's new releases emphasise the harm caused by cartels for consumers as well as the penalties involved. News releases and media interviews also are used to highlight the Bureau's immunity programme. Bureau spokespersons are encouraged to explain bid rigging to reporters who call looking for information. A recent media analysis showed the positive result of this active strategy as the number of media reports dealing annually with criminal enforcement activities is substantial and increasing. In addition, the Competition Bureau's media relations programme also targets lawmakers and governments to highlight the Bureau's work, and to demonstrate that the Bureau is using its resources effectively.

While presentations to core constituents as well as active media relations programmes are important components of programmes to raise public awareness of cartels, active cartel enforcement, in particular successful cases against cartels that have a direct impact on consumers' pockets, is the most important and effective tool. Several members reported that cases in which significant fines were imposed on cartel participants received great attention by the media and the general public. One example is a case brought by *Israel* against an insurance cartel which was considered a major breakthrough in anti-cartel enforcement because the prosecution of distinguished and reputable executives in the business community substantially contributed to greater public awareness of cartels and the severity of the offence.

The nature or size of fines, and the volume of affected commerce, however, are not necessary ingredients of a good case. There are examples of cases that significantly contributed to greater public awareness where the affected commerce was limited and the total harm was relatively small, compared to some global cartels, but where consumers were directly affected and experienced the benefits of anti-cartel enforcement. Two of these cases are described below.

Examples of cases that were particularly effective in raising public awareness

The UK Football Replica Kit Cartel

An OFT investigation unearthed evidence of several agreements or concerted practices to set a minimum price for certain football replica kits, including top-selling England and Manchester United shirts. The agreements, which were intended to cover key selling periods such as the Euro 2000 tournament, were policed through informal meetings and monitoring retail customers, some of whom were threatened with stock cancellations if they failed to stick to agreed prices. Ten suppliers were fined a total of £18.6 million in August 2003 for engaging in unlawful price-fixing, including JJB Sports (£8.373m), Umbro (£6.641m), Manchester United (£1.652m), and Allsports (£1.35m).

At the time the OFT detected the cartel, the kits were sold at approximately £45 per kit. Following enforcement action, prices fell by 30 percent or more, and remained at those lower levels. The football replica kit cartel was a good case because, even though the product involved was not important for the economy as a whole, individuals and families could directly experience the harm caused by cartels and the benefits of anti-cartel enforcement.

Korean Apartment Price Cartel

In 2003, following increases in apartment prices that were mainly attributed to increases of the price at which construction companies sold apartments to individuals before actual construction, and after observing that construction companies had set their prices almost uniformly in two areas in Korea, the Korean Fair Trade Commission carried out on-spot investigations and uncovered two cartels involving 16 construction companies which had uniformly set prices for apartments. The KFTC estimated that the two cartels had raised prices by a total of almost 500 billion won (approximately US $380 million), harming the final purchasers of these apartments by the same amount. In addition, given the fact that the higher apartment prices in the two areas under investigation had had an impact on prices in other areas, the actual damage caused by the cartels was presumed to be much greater. The KFTC imposed surcharges of more than 25 billion won (approximately US $20 million) on cartel participants. The case attracted great public attention and national press coverage because ownership of houses and apartments has become an increasingly important goal for Koreans.

2.1 Bid Rigging - Raising Procurement Officials' Awareness of Cartels

Member countries also discussed efforts to raise cartel awareness among procurement officials and procurement authorities. Bid rigging continues to be a great concern in virtually every jurisdiction. Every year, annual reports of enforcement activities in member countries and observers to the Committee

reveal cases of bid rigging.[16] Frequently, the best placed authority to detect signs of unlawful bidding arrangements is the procurement authority as it has good knowledge of the relevant industry sector, and can observe patterns in bidding processes that could indicate unlawful collusive activity. Moreover, procurement authorities can to some extent influence how bidding procedures are organised to make the formation of cartels more difficult. Yet, the roundtable discussion demonstrated that programmes to systematically educate procurement officials exist only in a few member countries, while some other countries have more recently started to develop their own, more limited programmes. This suggests that in many countries procurement authorities and officials are not yet sufficiently aware of the danger of cartels among companies participating in bidding procedures and of the important role they can play in preventing and detecting cartels.

C*anada* and the *United* States belong to the jurisdictions with the most comprehensive programmes for procurement officials. The competition authorities in both countries organise seminars, speeches, and other educational programmes to reach out to the procurement community. The *United States* has published a checklist of suspicious behaviour and suspicious statements that should help procurement officials to detect signs of possible collusion, in addition to brochures that inform procurement officials of the danger of cartels.[17] In *Canada*, the Competition Bureau has developed a multimedia presentation about how to identify signs of bid rigging, provide information to the Bureau, and prevent bid rigging from occurring. The programme is available on CD ROM and on the Competition Bureau's website.[18] The Canadian efforts also specifically emphasise possible reforms to the procurement process, and educate procurement officials about ways to adjust the process to safeguard against bid rigging.

In certain circumstances, a competition authority may decide that advising procurement officials alone is not sufficient, at least not in certain sectors. In *Korea*, for example, the competition authority directly monitors the procurement process of government authorities in several sectors, including electricity, defence, and highway construction, recognising that these areas could be particularly vulnerable to bid rigging.

In several countries, efforts to involve procurement authorities in discovering and preventing cartels are more recent. Some of these more recent initiatives, however, already show positive results. Once procurement officials get the message about bid rigging cartels, especially if that message is reinforced through successful enforcement action that results in lower prices, there is great interest in the work of the competition authority and willingness to support the fight against cartels. A case in point is *Sweden.* There, the

increased interest in bid rigging was triggered by a case brought against a cartel among asphalt producers that had targeted road building projects by the Swedish Road Building Association as well as by local governments. The case is described in greater detail below. Media reports highlighted the losses for taxpayers caused by the cartel, as well as the beneficial effects of the enforcement action as prices dropped by approximately 20 percent after the competition authority uncovered the cartel. Since then, the competition authority has launched a new programme against bid rigging cartels. The programme has been presented to and adopted by, for example, the association of local governments which are responsible for procurement contracts.

The Swedish example is important in two aspects: First, it confirms that good cases, especially if they receive good media coverage, can significantly contribute to greater awareness about cartels. In this respect, working with procurement officials is no different from educating the general public. Second, in its effort to strengthen the awareness of cartels among procurement officials, the Swedish competition authority provided them with a checklist for the detection of signs of bid rigging, which closely follows the above mentioned checklist developed by the *United States*. In at least one case a Swedish local authority relied on the checklist to provide information about suspicious activity during a bidding process, and prompted the competition authority to open a case. This was only a small step in the more effective fight against bid rigging, but it demonstrates that competition authorities can benefit from the experiences of others and programmes that already exist in order to more effectively reach out to public procurement officials.

The role of procurement officials in the combat against bid rigging cartels should not be limited to the detection of cartels once they have occurred. Competition authorities can advise procurement authorities of several measures to make bid rigging less likely. This includes adjustments to procurement procedures that make the formation of cartels more difficult and/or more costly.[19] For example, as a small number of competitors and greater similarities among competitors increase the likelihood of collusion, procurement authorities should seek a larger number and a better mix of competitors. Second, the frequency of interaction among participants in procurement procedures increases the potential of collusion. Varying the scope of tenders can help, as it might ensure that the same parties were not always participating in tender procedures. Third, stability of demand, such as contracts of a similar size that come up for bids at regular intervals, facilitates bid rigging cartels. Again, procurement authorities can adjust procedures to reduce the risk of collusion.

There are other ways in which procurement rules can be strengthened to prevent bid-rigging from occurring. For example, the *United States* considers

the threat of debarment from future government contracts of companies convicted of bid rigging offences an effective tool to deter cartels and achieve greater compliance with the law. Many companies regularly participating in public procurement consider possible debarment from future government contracts as a serious risk. Quite often procurement officials are willing to suspend debarment pending the implementation of a rigorous compliance program, combined with the right to conduct surprise inspections of books and bidding processes, thus ensuring greater compliance rates in the future. More countries could adopt this sanction. EU public procurement rules, for example, authorise national authorities of EU member states to exclude bidders that have been found guilty of bid rigging, provided the authorities are authorised to do so under their respective national procurement laws. However, it appears that few, if any, EU member states provide for debarring as a possible sanction in bid rigging cases.

In some countries, every participant in a procurement procedure is required to sign a written statement of compliance or a statement of independent bid determination. Such statements are considered another effective measure that procurement officials can adopt to reduce instances of bid rigging cartels. They can deter bid rigging by requiring disclosure of all material facts about any communications and arrangements they have entered into with competitors regarding the tender call, or by requiring bidders to certify that there were no consultations, communications or agreements with competitors relating to pricing or intent to submit an offer.

Examples of Bid Rigging Cartels

Hungarian Motorway Construction Cartel

In 2003, the Hungarian competition authority ("GVH") launched an investigation into suspected bid rigging in connection with a tender for a motorway construction project, and later extended the investigation to another tender procedure. Evidence discovered by the GVH established that several major construction firms, including subsidiaries of foreign companies, had agreed among them about the identity of the winning bidders for the construction works contracts. They also agreed that the winning bidder would subcontract parts of the construction works to the other cartel participants. The total fines amounted to HUF 7,04 billion (approximately € 28 million), by far the largest fine ever imposed in the history of Hungarian anti-cartel enforcement.

Portuguese Cartel for Blood Glucose Monitoring Reagents

The Portuguese Competition Authority opened an investigation into a suspected bid rigging cartel for blood glucose monitoring reagent strips, following a complaint from a hospital in Coimbra. The hospital had launched a public invitation to tender for Blood Glucose Monitoring Reagent packages. Bids were submitted by five companies, but the hospital decided not to award the contract when all five bidders submitted bids with a uniform price (€ 20), which constituted a sharp increase from the prices charged for the same product a year earlier (between € 11.37 and € 14.96). Following an investigation of the suspicious bids, the competition authority determined that the alignment of the prices could not have occurred without a cartel agreement. The authority imposed a fine of approximately € 660,000 on each of the five defendant companies (Abbot Laboratórios, Bayer Diagnósticos Europe, Johnson & Johnson, Menarini Diagnósticos, and Roche Farmacêutica Química) for a total fine of almost € 3.2 million.

Swedish Asphalt Cartel

The Swedish competition authority investigated the asphalt industry which was suspected of rigging bids for many road construction projects. The main target of the suspected cartel was the Swedish National Road Administration, but many local municipalities were also affected. A subsidiary of the National Road Administration is suspected of participating in the cartel as well, which, if proven, would make the National Road Administration at the same time a perpetrator and a target of unlawful cartel activity. The Competition authority is seeking a court judgment imposing fines of SEK 1.6 billion (approximately US $225 million) on the cartel participants.

While the case is still pending before a Swedish court, the competition authority's enforcement action already has had significant benefits: The case received extensive media coverage, with several reports highlighting the losses for taxpayers caused by the cartel. The beneficial effects of the enforcement action have been very apparent as procurement officials observed that prices dropped by approximately 20 percent. As a result of the greater awareness among procurement officials of the harm cartels can cause, the competition authority launched a new programme against bid rigging cartels in 2004, following an initiative of the association of local governments. The programme gives the competition authority the opportunity to inform procurement officials about how to detect signs of bid rigging, and encourage them to report suspicious activity.

3. Harm and Sanctions

3.1 Estimates of Harm Caused by Cartels

A major contribution of the Second Report was its survey of cartel cases where the harm caused by cartels could be estimated and compared with sanctions that were imposed in the same cases. With respect to those cases, the Second Report demonstrated that financial sanctions imposed on cartels remained significantly below the level at which they could be considered an optimal deterrent.[20]

The Competition Committee did not engage in a similar exercise in preparation of this Report. However, the anecdotal evidence that some member countries were able to provide re-affirms the findings of the Second Report. As regards overcharges, for example, *Japan* has estimated that recent cartels raised prices on average by 16.5 percent. In *Sweden* and *Finland*, competition authorities observed price declines of 20 percent-25 percent following enforcement action against asphalt cartels, suggesting unlawful mark-ups of a similar magnitude. Along the same lines, in the above mentioned football replica kits case in the *United Kingdom*, long-term price reductions in the order of 30 percent were observed following the OFT's enforcement action. In *Israel*, the competition authority observed that prices declined by approximately 40 percent-60 percent after it uncovered a bid rigging cartel among envelope producers. And estimates in the *United States* suggest that some hard core cartels can result in prices increases of up to 60 percent or 70 percent.

Recent research on overcharges in cartel cases, based on a review of a large number of cartels, estimated that the average overcharge is somewhere in the 20 percent - 30 percent range, with higher overcharges for international cartels than for domestic cartels.[21]

As regards the level of financial sanctions, anecdotal evidence gathered for this Report confirms the conclusions reached in the Second Report. For example, data from several cartels in *Japan* suggested that fines remained substantially below the harm that the cartels were estimated to have caused. At these levels, financial sanctions cannot be considered an optimal deterrent, especially considering that not all cartels are discovered and financial sanctions therefore should substantially exceed the harm caused by a cartel. The Second Report suggested, for example, that based on conservative estimates a fine would have to be three times the actual gain realised by the cartel to be an effective deterrent.[22]

3.2 Sanctions, in Particular Sanctions Against Individuals

After examining the level of financial sanctions imposed in cartel cases, the Second Report observed with respect to sanctions against individuals:

> Whether or not it is legally possible to impose an optimal organisational fine and practically possible to calculate it in a given case, actually imposing it might present problems. The optimal fine could simply be too large for the entity to bear, causing bankruptcy and possible exit from the market, which itself could diminish competition. *Thus, there is a place for sanctions against natural persons, placing them at risk individually for their conduct*. Such sanctions can complement organisational fines and provide an enhancement to deterrence. The laws of several OECD countries, but less than half, permit the imposition of administrative fines on natural persons for cartel conduct. In a distinct minority of countries cartel conduct is a crime, punishable by imprisonment, as well as by fines. The prospect of spending time in jail can be a powerful deterrent for businesspeople considering entering into a cartel agreement. Not all countries consider that criminalising cartel conduct is appropriate, however. Such a step may conflict with existing social or legal norms in a jurisdiction. It also has the effect of imposing a higher burden of proof on the prosecutor and it may make it more difficult to acquire evidence in certain circumstances, as additional procedural safeguards apply in criminal investigations.[23]

Following the adoption of the Second Report, the Committee examined more closely the role of sanctions against individuals, including criminal sanctions, in anti-cartel enforcement, but also the challenges that the introduction of such sanctions can create. The results of this discussion are summarised below.[24]

The Case for Sanctions Against Individuals

An analysis of financial sanctions imposed on cartels strongly supports the case for sanctions against individuals: It is widely believed that corporate sanctions in the form of fines are almost never sufficiently high to be an optimal deterrent, and that the threat of individual sanctions can be an important complement to corporate, financial sanctions. Individual sanctions can strengthen the incentive of directors and employees to resist corporate pressure to engage in unlawful activity, and thus enhance the level of deterrence. In addition, sanctions against individuals also can increase the effectiveness of leniency programmes as they are a powerful incentive for individuals to reveal information about existing cartels and to cooperate in investigations. They can

thus create a greater likelihood that someone will defect from a cartel arrangement and offer information and co-operation and make leniency programmes more effective. In addition, even after a cartel has been disclosed, the threat of sanctions against individuals, and the possibility to avoid them through co-operation, will strengthen a competition authority's position during its investigation.

In addition, there is anecdotal evidence that criminal sanctions against individuals can have deterrent effects. For example, there have been instances of cartel members locating cartel meetings outside the *United States* in the (mistaken) belief that they could escape the threat of criminal sanctions under US antitrust law. There are also more recent examples of cartels carving out the United States from their operations to avoid the risk of criminal sanctions. That the threat of criminal sanctions weighs much heavier than financial sanctions is further evidenced by the experience of the United States where individuals repeatedly offered to pay high financial fines if they could avoid jail time, but nobody has ever offered to go to jail in order to avoid paying a fine.[25]

However, there is no systematic empirical evidence available to prove the deterrent effects of criminal sanctions or, more importantly, to assess whether the marginal benefit of introducing sanctions against individuals in the form of less harm from cartel activity exceeds the additional costs that a system of criminal sanctions entails, including the costs of prosecution as well as of administrating a prison system. Given the nature of cartel activity, there also appears to be agreement that it would be virtually impossible to generate the relevant data. Countries that use sanctions against individuals in cartel cases do so because they believe that corporate sanctions alone cannot ensure adequate deterrence, and that individual sanctions, including imprisonment, can be useful instruments in the fight against cartels.

Ultimately, each country must determine its own, "right" mix of sanctions that has the most effective deterrent effects against cartels.[26] A strong case can be made that cartel enforcement will be more effective if sanctions against individuals are part of that mix. In each jurisdiction, however, this decision depends on a number of factors, including a jurisdiction's cultural and legal environment, its enforcement history in cartel cases, the relationship between a competition authority and courts and prosecutors, as well as the resources of a competition authority. Countries might, for example, consider other mechanisms to provide greater incentives for individuals to defect from cartels, which could be adopted as an alternative or as a complement to individual sanctions. *Korea*, for example, introduced a reward system for individuals who inform the KFTC about a cartel, thus creating incentives for individuals to defect from cartels that do not rely on the threat of sanctions.[27] Other countries

and jurisdictions might seek to encourage private enforcement of competition laws to more effectively deter cartels.

A Trend Towards Criminalisation

While the number of OECD members and observers that have actually imposed sanctions against individuals is relatively small, there is a trend toward accepting that sanctions against individuals can contribute to more effective anti-cartel enforcement. The *United Kingdom* has introduced criminal sanctions and initiated its first cases under the new legal regime. In *Australia*, there has been broad support for a criminal sanctions system, and its adoption can be expected soon. And discussions about the benefits of a criminal sanctions system have resumed elsewhere. One such example is *Sweden*, where a Commission proposed in 2004 to criminalise cartel conduct. The Swedish Competition Authority, however, while not objecting to criminalisation as such, raised concerns that the proposal in the way it was designed would actually hamper effective cartel enforcement.[28]

Factors to Enhance the Effectiveness of a Criminal Sanctions Regime

If a jurisdiction decides to introduce criminal sanctions, several factors should be taken into account to ensure that criminal sanctions contribute as effectively as possible to anti-cartel enforcement while trying to minimise the costs associated with a criminal enforcement regime. Especially where the authority to criminally prosecute cartels has been allocated to public prosecutors and not the competition authority, proper coordination between prosecutors and the competition authority can be of the greatest importance. First, competition authorities may have to work closely with prosecutors to persuade them to bring cases against cartels. In several member countries and observers, including, for example, *Israel* and *Norway*, competition authorities have experienced difficulties in persuading prosecutors to take up cartel cases. In addition, close cooperation will be important to ensure the effectiveness of leniency programmes. Individuals as well as corporations might be more reluctant to voluntarily provide information about cartels under a competition authority's leniency programme if they fear the possibility of criminal prosecutions of individuals. Clear and transparent rules must assure individuals and corporations who come forward and seek leniency that individuals will also have protection against criminal prosecution. In the *United Kingdom*, for example, the competition authority and the public prosecutor's office have made public statements to that effect, assuring leniency applicants that leniency would extend also to criminal prosecutions.

The proper definition of the criminal offence can be another factor that can affect the effectiveness of a criminal sanctions system. Members that recently introduced criminal sanctions, or are considering introducing them, have closely examined this question and concluded that the definition of a criminal cartel offence should be different from the general prohibition of restrictive agreements in the competition act. In addition to protecting rights of defence more effectively by providing greater legal certainty, there were also concerns that criminal sanctions might have excessive deterrent effects if the conduct to which they apply is not clearly defined. These countries, including the *United Kingdom* and *Australia*, therefore opted for, or are considering, a provision that would specify various acts that constitute a criminal cartel offence in a way similar to the definition of hard core cartels in the 1998 Hard Core Cartel Recommendation.

However, using a specific definition of a criminal cartel offence is not a necessary condition for a successful criminal enforcement regime. Countries that obtain criminal convictions based on the general language of their competition statutes, such as the *United States* and *Israel*, rely on consistent case law, prosecutorial discretion, and, sometimes, approval or exemption systems to ensure that there is no uncertainty about the scope of the criminal offence and to avoid the potential risk of over-deterrence.

Relying on the general competition law definition of anticompetitive conduct can hinder criminal enforcement, however, if there is no recognition of a per-se cartel offence. Otherwise, elements of a competition law violation such as market definition, entry barriers, and effects on competition may have to be proven under criminal standards, providing for insufficient deterrence and making it exceedingly difficult to obtain criminal convictions in courts. This has been the experience in *Canada*. As a result, alternative models are currently under consideration that could include a more effective, specific criminal provision for hard core cartels while encouraging pro-competitive alliances.

4. International Cooperation, Including Exchange of Information in Cartel Investigations

Supporting efforts of member countries to strengthen international cooperation in cartel investigations remains a priority area for the Committee. More effective international cooperation can enhance the ability of authorities to detect and investigate international cartels, and reduce the risk of inconsistencies between enforcement regimes.

The Second Cartel Report studied developments in international cooperation in cartel investigations in great detail.[29] It observed that the

enforcement community had increasingly become aware of international and global cartels and the substantial harm they cause, and that cooperation among competition authorities to discover and investigate such cartels had substantially increased. The Second Report noted that cooperation was the strongest within a relatively small group of jurisdictions, although other countries were engaged in international cooperation in some cases as well. In most cases cooperation was limited to "informal cooperation" where agencies informally discuss such matters as investigative strategies, market information and witness evaluations, but do not exchange evidence that has been generated by an investigation and is protected by domestic confidentiality laws. The Second Report, however, also recognised that, even though informal cooperation can be quite useful and sometimes help to advance investigations considerably, in many cases investigations of international cartels were significantly constrained by the inability of competition authorities to formally exchange information.[30]

Many of these trends have continued. OECD members and observers have found that international cooperation in discovering, investigating, and prosecuting international cartels has reached unprecedented levels. New investigative strategies have been used successfully, such as coordinated, simultaneous surprise inspections in several jurisdictions. Confidentiality waivers in cases of simultaneous leniency applications have created more opportunities for multi-jurisdictional cooperation. In several cases, countries were able to assist others in providing access to evidence and witnesses located in their jurisdictions. More countries than ever cooperate by exchanging knowhow and expertise in cartel enforcement, in particular in the field of investigative techniques. The number of bilateral cooperation agreements has substantially increased.[31] One enforcement official recently concluded: "Cooperation among competition law enforcement authorities has undergone a sea change in the past five years," and "[o]ur cooperation with foreign antitrust authorities has never been more effective."[32]

Despite appreciable progress, however, substantial room for improvement remains in the area of international cooperation. Most importantly, often cooperation among competition authorities does not include the formal exchange of confidential information. If a greater number of competition authorities were authorised to exchange confidential information in cartel investigations, efforts to detect, investigate and prosecute international cartels would be more effective.

4.1 Enforcement Cooperation

In many cases of successful cooperation in investigations of international cartels, OECD members have continued to rely on informal cooperation,

including the discussion of investigative strategies, market information, and witness evaluations. Despite its limitations, informal cooperation can be very effective and contribute to more effective enforcement. A recently developed form of successful informal cooperation is the coordination of surprise inspections in several jurisdictions which enable the participating authorities to maintain the surprise element of their investigations and to avoid the possible destruction of evidence.

Cooperation through Coordinated Inspections[33]

In February 2003, for the first time an international cartel investigation went overt simultaneously in four jurisdictions: In investigations of suspected cartel activities related to heat stabilisers and impact modifiers, the Canadian Competition Bureau, the European Commission, the Japanese Fair Trade Commission, and the Antitrust Division of the US Department of Justice coordinated simultaneous searches, the servicing of subpoenas and drop-in interviews. In Europe, officials from the European Commission and Member States searched 14 companies located in six Member States as a part of these parallel efforts. Overall, more than 250 investigators and agents were involved in the simultaneous launching of these investigations on three continents.

Cooperation through exchanges of information that is not considered confidential also proved helpful in many cases. Frequently, the 1995 OECD Cooperation Recommendation[34] continues to provide the framework for this type of cooperation, especially between OECD members that have not entered into a bilateral cooperation agreement. *Korea*, for example, reported that it notified several other competition authorities in accordance with the 1995 Recommendation when it initiated cartel investigations, and received support from several of the notified authorities which provided non-confidential information from their own investigations. It considered the information it received of substantial help in its own investigation.

Successful cooperation among competition authorities is also supported by a regular exchange of knowhow and expertise related to enforcement activities, including tools and techniques for the detection of cartels, investigative techniques and evidence gathering, such as electronic searches, and case management. Annual meetings of cartel enforcers focusing on the practical aspects of cartel enforcement, which began in 1999, have come under the umbrella of the ICN since 2004. In the most recent meeting in Sydney, *Australia*, the two-day meeting was combined with a two day workshop focusing on leniency programmes. These meetings not only enable participants to exchange ideas and learn about "best practices" in cartel enforcement. They also provide important opportunities to develop close working relationships,

which in turn can facilitate better enforcement cooperation among an increasing number of jurisdictions.

Despite the achievements in international cooperation through various forms of informal cooperation, in many cases members realised that informal cooperation has its limits and that the inability to exchange confidential information can seriously hamper cartel investigations. *Turkey*, for example, found that the absence of a formal cooperation mechanism authorising the exchange of confidential information with the *European Commission* limited its ability to investigate cartels. In one case, Turkey investigated suspected cartel activity in the gas insulated switchgear industry, which appeared to operate outside Turkey, but affected the Turkish market as well. The same suspected cartel was simultaneously investigated by the European Commission. Despite Turkey's request for cooperation, however, the Commission was unable to exchange any confidential information in the absence of an instrument authorising the exchange of confidential information. The inability to obtain information from abroad significantly impeded Turkey's ability to investigate this cartel.

Where international agreements authorise formal cooperation, competition authorities have used them in an increasing number of cases to more effectively investigate cartels. Cooperation under these instruments can include search operations at the request of another country. *Germany*, for example, undertook extensive search operations at the request of the *United States*. In one case it is reported that more than 100 police officers and Cartel office staff simultaneously searched business premises in several German states following a request for assistance in a cartel investigation by the United States.

Cooperation in cartel investigations in the European Union has undergone substantial reforms under the new legal framework introduced by Regulation 1/2003, which entered into force on May 1, 2004. The Regulation introduced far-reaching cooperation mechanisms within the European Competition Network, which comprises the competition authorities in EU member states and the European Commission. In addition to authorising the exchange of confidential information among competition authorities, the Regulation also authorises competition authorities to request assistance of other competition authorities in investigations of suspected infringements of arts. 81 and 82, including investigations of suspected cartels.[35] The first such requests for assistance have been issued in cartel cases, resulting in inspections on behalf of the requesting EU member state.

4.2 Best Practices for the Formal Exchange of Information

Competition authorities have consistently found that the ability to exchange confidential information can substantially contribute to more effective cooperation and enforcement in international cartel cases. The Committee therefore has for many years sought ways to promote the sharing of confidential information in cartel investigations, consistent with the mandates of the 1995 Cooperation Recommendation[36] and the 1998 Hard Core Cartel Recommendation.[37] Much of the Committee's work has been documented in the Second Report. The Second Report also described the Committee's discussions with the business community, represented by the OECD's Business and Industry Advisory Committee (BIAC), including issues on which the two sides tended to disagree.[38] In addition, the Committee studied practices and rules related to information exchanges in other law enforcement areas where international cooperation is common. In these areas, such as securities regulation and tax, authorities appear to operate under significantly less restrictive regimes concerning confidentiality protection, and therefore exchange information much more frequently in international investigations.

More recently, better coordination of leniency programmes has led to increased opportunities to share confidential information and better cooperate. The number of leniency applications submitted simultaneously to more than one competition authority has increased, and simultaneous leniency applications can include waivers of confidentiality rights. Such waivers create more opportunities for multi-jurisdiction cooperation by enabling the competition authorities involved to share information they have received in the leniency applications. However, even in cases where leniency applicants are willing to give waivers, a broader authority to exchange confidential information would be desirable because confidentiality waivers cover only information submitted by the leniency applicants, and competition authorities usually cannot share incriminating information that they obtain as a result of these applications. For example, where a competition authority obtains documents during a dawn raid that was triggered by information provided by a leniency applicant, any such documents usually are still subject to confidentiality protections and cannot be shared with authorities in other jurisdictions.

Based on its ongoing work related to information exchanges, the Committee embarked on the development of Best Practices for the formal exchange of information in cartel investigations in 2004, and adopted the final version of the Best Practices in October 2005. The laws of many member countries prevent competition authorities from exchanging confidential information in cartel investigations, or severely restrict their ability to do so. The Best Practices aim to identify safeguards that member countries should

consider applying when they authorise competition authorities to exchange confidential information in cartel investigations. It is hoped that by identifying appropriate safeguards for information exchanges, the Best Practices would assist member countries to remove obstacles to effective cooperation by authorising the exchange of confidential information in cartel investigations. During the drafting process, the Committee continued extensive discussions with the business community and bar associations to better understand their concerns.

The Best Practices are based on the following principles:[39]

- International treaties or domestic laws authorising a competition authority to exchange confidential information in certain circumstances should provide for safeguards to protect the confidentiality of exchanged information. On the other hand, such safeguards should not apply where competition authorities exchange information that is not subject to domestic law confidentiality restrictions.

- Member countries should generally support information exchanges in cartel investigations. It should, however, always be at the discretion of the requested jurisdiction to provide the requested information in a specific case, or to provide it only subject to conditions, and there should be no obligation to act upon such a request. A country may decline a request for information, for example, because honouring the request would violate domestic law or would be contrary to public policy in the requested jurisdiction. In addition, information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty/leniency programmes.

- When initiating an exchange of information, jurisdictions should act with the necessary flexibility in light of the circumstances of each case. They should consider engaging in initial consultations, for example to assess the ability of the jurisdiction receiving the request for information to maintain the confidentiality of information in the request as well as the confidentiality of exchanged information.

- Appropriate safeguards should apply in the requesting jurisdiction when it is using the exchanged information. In this context, the Best Practices address in particular the use of exchanged information for other public law enforcement purposes, disclosure to third parties, and efforts to avoid unauthorised disclosure.

- Information exchanges should provide safeguards for the rights of parties under the laws of member countries. The Best Practices specifically mention the legal profession privilege and the privilege against self incrimination. In this context, member countries may have to take into account differences in the nature of sanctions for violations of competition laws concerning hard core cartels in different jurisdictions.

- In light of concerns that prior notice to the source of information can severely disrupt and delay investigations of cartels, the Best Practices advise against giving prior notice, unless required by domestic law or international agreement. Competition authorities may, on the other hand, consider ex-post notice if such notice would not violate a court order, domestic law, or an international agreement, or jeopardise the integrity of an investigation.

Thus, the Best Practices envisage a robust and credible framework of safeguards to protect confidential business information against unauthorised disclosure, without undermining the ability of competition authorities to effectively cooperate in cartel investigations.

4.3 The Interface Between Public and Private Enforcement in International Cartel Cases

A number of issues recently have emerged at the interface between public enforcement and private enforcement in international cartel cases. They have highlighted that the interaction between public enforcement and private enforcement can sometimes lead to inconsistencies, and that increased private litigation with broader rights in one jurisdiction could undermine public enforcement efforts against cartels elsewhere, with uncertain net effects on global deterrence of cartels.

Discovery procedures in private litigation before US courts emerged as one area that has received particular attention. The concern has been that the use of discovery procedures in private antitrust litigation before US courts to obtain access to documents that the defendants had submitted in non- US investigations of the same cartel could impede anti-cartel efforts outside the United States. In particular, the *European Commission* has intervened before US courts based on the concern that allowing discovery of leniency applications could substantially undermine its leniency programme. *Canada* intervened on similar grounds and opposed or tried to limit discovery of documents related to cartel investigations and prosecutions in its jurisdiction.[40] The outcomes of these cases have been mixed, and not all courts have accepted the views of

foreign governments and enforcement authorities seeking to protect the integrity of their enforcement programmes.[41] One response to rulings in favour of broad discovery rights has been an adjustment in the European Commission's leniency policy which now permits oral statements in leniency applications.[42] Ultimately, however, the potential that civil procedure discovery rules in one country might interfere with public anti-cartel enforcement in another jurisdiction cannot be completely eliminated.

A second important development at the interface between private litigation and public law enforcement against cartels concerned the reach of US antitrust laws in private litigation. In private litigation that followed the prosecution of the well-known *Vitamins* and *Art Auctions* cartels, as well as a cartel for heavy-lift barge services, all of which adversely affected US customers, foreign plaintiffs sought to use US courts to obtain damages from foreign cartel participants where the plaintiffs had been harmed by cartel conduct outside the United States.

The important policy questions raised in these cases with regard to international anti-cartel enforcement prompted several governments to intervene before the Supreme Court in *Empagran*,[43] urging the Court to limit the reach of US antitrust law. Their principal point was that even if most countries agreed that price fixing should be condemned, an unreasonable extension of US antitrust law and its private enforcement regime with treble damages would unduly interfere with the policy decisions of foreign jurisdictions on how to remedy anti-competitive conduct that occurred in their territories and how to provide relief to private plaintiffs. They also argued that permitting independently injured foreign plaintiffs to pursue private remedies under US antitrust laws could undermine anti-cartel enforcement as it could reduce the incentives for cartel participants to cooperate under leniency programmes in the United States and elsewhere. On the other hand, interveners on behalf of the foreign plaintiffs had argued that increased availability of private enforcement in the United States would result in greater deterrence of global cartels, thus ultimately benefiting foreign countries as well. The Court refrained from deciding between the two opposing empirical assertions concerning greater global deterrence. Instead, it relied on comity considerations and the need to avoid unreasonable interference with foreign sovereign interests to hold in favour of a more restrictive construction of the relevant US statute,[44] at least in the narrow factual circumstances where the worldwide cartel had adversely affected US and foreign customers, but the foreign effects had been "independent" of any adverse domestic effects.[45]

These cases have raised issues which require further study. Competition authorities, in general, look favourably at private litigation in cartel cases in

which customers seek damages for losses they incurred as a result of cartel conduct. The risk of significant damage awards in private litigation can provide a further deterrent against cartels. For this reason, the Second Cartel Report encouraged member countries to explore "means for permitting cartel victims to recover monetary damages from cartel operators, consistent with a country's legal norms and in a way that would avoid unnecessary and vexatious litigation."[46] The European Commission and EU member states also started to examine ways to encourage more private enforcement of European competition law.

Civil litigation, however, has the potential to interfere with public law enforcement, in the same jurisdiction as well as in foreign jurisdictions. The role of competition authorities in resolving tensions between private and public enforcement in international cartel enforcement frequently will be limited, as they have little influence over procedural rules, including rules concerning the gathering of evidence. They might in certain cases be able to adjust their own enforcement procedures to protect the integrity of their anti-cartel programmes, and sometimes may intervene in court proceedings to argue in favour of rules that limit inconsistencies between enforcement regimes.

The Committee has begun discussions of private litigation in competition cases and intends to further study this area, with a view toward supporting member countries in efforts to provide more opportunity for private enforcement, and to increase the understanding of rules applicable in private litigation in other member countries in order to adjust to such rules.

4.4 International Agreements

The survey for this Report disclosed that the number of international co-operation agreements continues to grow significantly. Several have been signed since the adoption of the Second Report, and a growing network of bilateral agreements covers not only cooperation between OECD members, but also cooperative relationships between OECD members and non-members. Such international agreements can include state-to-state cooperation agreements, inter-agency cooperation agreements, mutual legal assistance agreements ("MLAT"), as well as competition-related provisions in bilateral free trade agreements.[47]

While MLATs are not competition specific, they can play an important role in international cartel cases as they provide the authority for formal cooperation, including the exchange of confidential information, if the conduct under investigation amounts to a criminal offence. MLATs have been used in several more recent investigations of international cartels to obtain evidence

located in the territory of another jurisdiction. The MLAT between *Canada* and the *United States* is probably one of the most frequently used MLATs in cartel cases. In an important case, Canadian courts recently upheld the Canadian Competition Bureau's ability to use the MLAT for Canada-US cartel cooperation after parties under investigation for suspected cartel activity in the United States had challenged the MLAT's use to exchange information in cartel cases.[48]

Canadian courts upholding the use of the Canada/US MLAT in antitrust cases

The *Falconbridge* case had its origin in an MLAT request by the US Department of Justice in connection with its investigation into possible antitrust offences by Falconbridge and Noranda in relation to sulphuric acid. After the request for assistance was approved, documents were seized and gathered pursuant to search warrants and an order for production of records. When the Commissioner of Competition sought authorisation to send the records to the United States, Falconbridge and Noranda brought cross applications to have the search warrants and evidence gathering orders set aside, and for a declaration that the MLAT and implementing domestic legislation were not available in aid of the investigation of a Sherman Act violation.

The court rejected Falconbridge's and Noranda's argument that the alleged offence under section 1 of the Sherman Act did not fall within the definition of "offence" under the MLAT. The court also rejected the argument that the MLAT requires "reciprocity" or "dual criminality" such that any alleged offence in the requesting country must also be an offence within the requested country. In this case, the alleged conduct did not amount to an offence under Canadian laws. The court confirmed that the MLAT does not have "a reciprocal offence" or "dual criminality" requirement in terms of the "offence." Rather, the MLAT sets out an obligation to give effect to requests regarding certain "offences" as defined in the MLAT and to give certain kinds of assistance also as set out in the MLAT and subject to various stipulated limitations. The Court of Appeal recognised that this interpretation of the MLAT "places Canada in the position of providing assistance in situations for which it would never have occasion to make a demand." The Court was of the view, however, that this is "precisely what the Treaty envisages."

5. Conclusions

This Report, the final report on the implementation of the Council Recommendation and the progress of member countries in the fight against hard core cartels, has documented that efforts to fight domestic and international cartels have advanced in many respects. Legislative changes in several member countries have conferred greater investigative powers on competition

authorities, authorised stiffer sanctions, and increased the opportunities to effectively cooperate with foreign competition authorities. More competition authorities have created specialised cartel units and/or prioritised the fight against cartels among their activities. High fines are imposed on a regular basis. Cooperation has become much more common, and exchanges of cartel enforcement knowhow have intensified. But much remains to be done.

5.1 Raising Public Awareness

There has been a significant increase in the awareness of the harm caused by hard core cartels in many countries. Vigorous campaigns to inform the public about the nature of cartels and the danger they pose, and to enhance public support for the anti-cartel efforts have been developed in some member countries. More countries, however, should consider opportunities to create and expand their own awareness programmes that reach out to key constituents, following the examples of successful programmes that already exist elsewhere. High profile cases, especially those that directly affect consumers, are often the most effective vehicles to increase public awareness of cartels.

In many countries, there is also room to work more extensively with procurement officials in an effort to fight bid rigging more effectively. Bid rigging cartels are pervasive, so virtually every country can benefit from a more aggressive approach against them. Several countries have developed comprehensive programmes to reach out to procurement authorities, in particular to inform procurement officials about the harm caused by bid rigging cartels, to discuss with them how procurement procedures can be adjusted to make the formation of cartels less likely, and to inform them about ways to monitor markets for possible signs of bid rigging. Countries that have not yet undertaken similar efforts should consider developing their own programmes, taking into account programmes that already exist elsewhere, to make procurement officials effective allies in anti-cartel enforcement efforts.

5.2 Sanctions

A policy of imposing strong sanctions for cartel conduct is an indispensable part of a successful anti-cartel programme. High financial sanctions have become more common in many countries. But this is not the case in all countries, and it appears that sanctions are not yet at optimal levels. Countries therefore should seek opportunities to further increase corporate fines for participating in cartels.

To enhance both deterrence and the effectiveness of leniency programmes, countries also should consider introducing and imposing sanctions against

individuals, including criminal sanctions where it would be consistent with social and legal norms. If a country accepts that corporate sanctions alone cannot ensure adequate deterrence, and that criminal sanctions can be a useful instrument in the fight against cartels, it should consider measures that maximise the benefits of criminal sanctions and limit their costs. These measures include: securing broad public support for a criminal sanctions regime, persuading prosecutors and judges that cartels should be criminally prosecuted and that criminal sanctions should be imposed, and close cooperation between competition authorities and public prosecutors.

5.3 International Cooperation

Cooperation among competition authorities in cartel investigations has become more common. Cooperative relationships between countries, including the exchange of enforcement knowhow and expanded work relationships at the level of enforcement officials, have increased. These developments are critical for more successful efforts to discover and prosecute international cartels. Further means of enhancing international cooperation in cartel investigations should be considered. In particular, countries should consider authorising their competition authorities to exchange confidential information with foreign competition authorities, provided appropriate safeguards against unauthorised disclosure are in place such as those developed in the Committee's Best Practices for formal information exchange in cartel investigations. Countries that prosecute cartel conduct as a crime should consider exploring ways of making more effective use of MLATs. Ways should be examined of coordinating leniency programmes, especially by encouraging leniency applicants to simultaneously apply in as many countries as possible.

5.4 Next Steps

The Competition Committee will continue to consider the anti-cartel effort as one of its top priorities. It intends to focus on the following areas:

- *Enforcement Procedures:* Examine the potential use, in particular in civil law jurisdictions, of plea bargaining-type procedures in cartel prosecution to use resources more effectively;

- *Role of Prosecutors:* Discuss ways to ensure more effective cooperation and coordination with public prosecutors in criminal enforcement regimes;

- *Harm:* Gather more information about harm caused by cartels, and methods to measure harm;

- *Leniency Programmes*: Continue discussions of effective leniency programmes, including ways to better coordinate leniency programmes;

- *Cooperation & Information Exchange:* Continue promoting enhanced opportunities for competition authorities to exchange information in cartel investigations; and

- *Private Enforcement*: Examine ways to permit cartel victims to recover monetary damages from cartel operators in a greater number of cases, taking into account issues arising at the interface between private and public enforcement against cartels.

NOTES

1. Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels.

2. Implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels: First Report by the Competition Committee.

3. Implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels: Second Report by the Competition Committee, at 9.

4. Second Report, *supra* note 3, at 13.

5. The Second Report was also recognised in the academic literature on cartels. *See, e.g.,* John M. Conner, *Price Fixing Overcharges: Legal and Economic Evidence* (2005); on file with OECD.

6. Review of the Trade Practices Act 1974 (Dawson Report), Chapter 10, Penalties and other remedies 150-63 (2003). The Dawson Report cautioned that the introduction of criminal sanctions should be conditioned on the ability to reach satisfactory conclusions on a number of important preliminary questions, such as the definition of a criminal offence. As reported further below, new legislation has been proposed in the meantime which would introduce many of the reforms discussed in the Dawson Report.

7. Verizon Communications v. Trinko, 540 US 398, 408 (2004).

8. Much of this information is available in greater detail in the annual reports on competition enforcement activities which member countries and observers to the Committee file with the Competition Committee and which are available on the OECD Competition web site, at www.oecd.org/competition.

9. At the time of this Report, the Cartel Office's orders imposing fines are not yet final since most of the companies concerned filed appeals.

10. *See* the discussion of raising the awareness of procurement officials of the harm caused by cartels, *infra,* at 20.

11. AKZO received full immunity from fines for having revealed the cartel.

12. Until May 2004, private homes could not be searched by the Commission.

13. Information about the ICN's activities related to cartel enforcement is available at http://www.internationalcompetitionnetwork.org/cartels.html.

14. *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*; *Antitrust Enforcement and the Consumer*; available at http://www.usdoj.gov/atr/contact/newcase.htm.

15. http://www.usdoj.gov/atr.

16. Annual Reports of competition policy developments are available at http://www.oecd.org/competition.

17. Available at http://www.usdoj.gov/atr/public/guidelines/primer-ncu.htm.

18. http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02296e.html

19. WTO law as well as EU law impose requirements on national procurement laws that might limit the extent to which such laws can be adjusted to make the formation of cartels more difficult. However, even within the framework set forth by WTO and EU procurement rules, adjustments can be made to reduce the likelihood of cartels.

20. Second Report, *supra* note 3, at 22.

21. Conner, *supra* note 5, at 67. The author used estimates from more than 500 cartel episodes. *See also* Gregory J. Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook*, Economic Analysis Group Discussion Paper 30 (2003) (estimating average price increase of more than 20 percent).

22. Second Report, *supra* note 3, at 22. The Second Report also acknowledged, though, that some believe that as few as one in six or seven cartels is detected and prosecuted, implying a multiple of at least six.

23. Second Report, *supra* note 3, at 23 (emphasis added).

24. Cartels: Sanctions Against Individuals (2005). A complete version of the roundtable discussion is available at:

    http://www.oecd.org/dataoecd/61/46/34306028.pdf. Strengthening private enforcement of competition laws against cartel participants can also increase deterrence. However, since this topic was not addressed during the roundtable on sanctions against individuals, it is not discussed in the following text.

25. *Id*., at 105. The United States emphasised that it would not accept an offer to pay a fine in lieu of a prison sentence.

26. In determining the "right" mix of sanctions, a country may also decide that concerns about a risk of bankruptcy should not be taken into account when imposing fines on corporations, thus eliminating a factor that could result in lower financial, corporate fines.

27. Several commentators have suggested that a reward scheme could be an effective tool to uncover cartels and could also make the formation of cartels

more costly and therefore less likely. *See* Cécile Aubert, Patrick Rey, & William E. Kovacic, *The Impact of Leniency and Whistleblowing Programs on Cartels*, 23 Int'l J. Indust. Org. (forthcoming).

28. Sweden, Annual Report on Competition Policy for 2004 (2005), available at: http://www.oecd.org/competition. Claes Norgren, Intervention at the Conference on Antitrust Reform in Europe, Brussels, 2005, available at http://www.kkv.se/press/Pdf/tal_cn_050309.pdf.

29. Second Report, *supra* note 3, at 24.

30. Second Report, *supra* note 3, at 26-30.

31. *See also infra*, at 37.

32. Scott D. Hammond, *An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program*, presentation before the American Bar Association Midwinter Leadership Meeting, January 10, 2005, available at http://www.usdoj.gov/atr/public/speeches/207226.pdf.

33. Commission Press Release IP 03/33 (February 14, 2003). The same strategy has successfully been used in other cases as well. *See, e.g.*, Commission Press Release IP 03/107, May 14, 2003 (coordinated inspections in the copper concentrate sector).

34. Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, C(95)130/FINAL, available at: http://www.oecd.org/competition.

35. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L1/1 (2004), arts. 12 (exchange of information) and 22 (assistance). *See also* Commission Notice on Cooperation within the Network of Competition Authorities, O.J. C101/43 (2004).

36. *Supra*, note 34.

37. *Supra*, note 1.

38. Second Report, *supra* note 3, at 33. For a detailed discussion of some of these issues *see also* Scott D. Hammond, *Beating Cartels at Their Own Game – Sharing Information in the Fight Against Cartels*, presentation before the Competition Policy Research Center, Fair Trade Commission of Japan, November 20, 2003, available at:

http://www.usdoj.gov/atr/public/speeches/201614.pdf.

39. The text of the Best Practices is available at:

http://www.oecd.org/competition. *See also* Annex 2.

40. In re Vitamins Antitrust Legislation, Misc. No. 99-197 (TFH) MDL No. 1285 (D.D.C. Dec. 18, 2002), 2002 US Dist LEXIS 25815.

41. *Compare* In re Methionine, Case No. C-99-3491 CRB (N.D. Cal. July 29, 2002) (motion to compel discovery of leniency statements denied) *with* In re Vitamins Antitrust Legislation, Misc. No. 99-197 (TFH) MDL No. 1285 (D.D.C. Dec. 18, 2002) (leniency submission held to be discoverable).

42. For a description of the European Commission's concerns raised by these cases *see, e.g.,* Oliver Guersent, *The Fight Against Secret Horizontal Agreement in the EC Competition Policy*, in 2003 Fordham Corp. Law Inst. 43, 51-53 (B. Hawk ed. 2004).

43. Hoffmann-La Roche v. Empagran, 124 S. Ct. 2359 (2004).

44. Foreign Trade Antitrust Improvement Act of 1982, 15 USC. § 6a (2000) ("FTAIA").

45. The Supreme Court remanded the case to the appeals court for further consideration of the plaintiffs' argument that the foreign conduct and domestic conduct were linked (and not "independent"), and therefore the foreign conduct fell under the jurisdiction of US antitrust laws. On remand, the appeals court affirmed the dismissal of the plaintiffs' antitrust claims for lack of subject matter jurisdiction under the FTAIA on the ground that the domestic (US) effects of the defendants' conduct did not proximately cause the foreign plaintiffs' injuries. Empagran v. Hoffmann-LaRoche, 2005 US App. LEXIS 12743 (D.C. Cir. June 28, 2005). *But see* In re Monosodium Glutamate Antitrust Litigation, 2005 US Dist. LEXIS 8424, 2005-1 Trade Cas. (CCH) ¶74781 (D. Minn. May 2, 2005) (court upholding subject matter jurisdiction under the FTAIA on the ground that domestic effects of an international cartel and foreign plaintiffs' injuries were sufficiently linked).

46. Second Report, *supra* note 3, at 36.

47. Examples of cooperation agreements in competition matters between OECD members include agreements and MOUs of the Korean Fair Trade Commission with the Mexican competition authority and the Australian ACCC; an agreement among the ACCC, the New Zealand Commerce Commission, and the UK's Office of Fair Trading and Department of Industry and Commerce; an agreement between the governments of Canada and Mexico; and an agreement between Japan and the European Community. Examples of cooperation agreements with non-OECD members include a fair trade agreement between Korea and Chile; the Korean Fair Trade Commission's MOUs with CIS countries; an MOU between the Canadian and Chilean competition authorities; and Australia's free trade agreements with Thailand and Singapore. Overall, the member countries and observers participating in the survey for this Report reported some 30 new bilateral cooperation agreements, if MLATs are included.

48. Canada (Commissioner of Competition) v. Falconbridge Ltd. [2003] O.J. No. 1563 (Ont. C.A.), *leave to appeal denied*, Canada (Commissioner of Competition) v. Falconbridge Ltd. [2003] S.C.C.A. No. 302, File No. 29845.

ANNEX 1

RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS

(Adopted by the Council at its 921st session on 25 March 1998)

THE COUNCIL,

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

Having regard to previous Council Recommendations' recognition that "effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports"; and that "anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries";

Having regard to the Council Recommendation that exemptions from competition laws should be no broader than necessary and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways";

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

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

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

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

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

I. RECOMMENDS as follows to Governments of Member countries:

A. CONVERGENCE AND EFFECTIVENESS OF LAWS PROHIBITING HARD CORE CARTELS

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

a) effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and

b) enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

a) a “hard core cartel” is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or

share or divide markets by allocating customers, suppliers, territories, or lines of commerce;

b) the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

B. INTERNATIONAL CO-OPERATION AND COMITY IN ENFORCING LAWS PROHIBITING HARD CORE CARTELS

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

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

a) the common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country's laws, regulations, and important interests;

b) to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition

authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;

c) a Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;

d) Member countries should agree to engage in consultations over issues relating to co-operation.

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

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

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

II. INSTRUCTS the Competition Law and Policy Committee:

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

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

3. to review Member countries' experience in implementing this Recommendation and report to the Council within two years on any further

action needed to improve co-operation in the enforcement of competition law prohibitions of hard core cartels.

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

ANNEX 2

BEST PRACTICES FOR THE FORMAL EXCHANGE OF INFORMATION BETWEEN COMPETITION AUTHORITIES IN HARD CORE CARTEL INVESTIGATIONS

These Best Practices for the formal exchange of information[1] between competition authorities in hard core cartel investigations[2] ("Best Practices") have been developed under the sole responsibility of the OECD's Competition Committee.

The OECD gives high priority to effective competition law enforcement, particularly against hard core cartels.[3] This has been recognised in recent acts by the OECD Council, which also encouraged member countries to cooperate in their law enforcement activities:

- The Council's Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade recommended that, when permitted by their laws and consistent with their interests, Member countries should co-ordinate competition investigations of mutual concern and should comply with each other's requests to share information.

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1 Throughout this document "exchanging information" and "providing information" are meant to refer to situations in which one competition authority shares information with, or otherwise makes information available to, another competition authority, including reciprocal exchanges of information between two competition authorities and the provision of information which one competition authority has obtained at the request of another competition authority.

2 Throughout this document "investigation of a hard core cartel" is meant to include all steps related to the enforcement of competition laws against hard core cartels.

3 Throughout this document "hard core cartel" is meant to refer to hard core cartels as defined in the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels.

- Furthermore the Council's Recommendation Concerning Effective Action Against Hard Core Cartels recognised that member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process, to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information.

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

The Best Practices are based on these two Council Recommendations and draw from the Committee's previous work on the fight against hard core cartels, and in particular the subject of information exchanges in hard core cartel investigations.[4]

Consistent with these Council Recommendations and in light of the Competition Committee's work on the topic of information exchanges in cartel investigations, the Committee believes that member countries should generally support information exchanges and should, in accordance with their laws, seek to simplify and expedite the process for exchanging information in order to avoid imposing unnecessary burdens on competition authorities and to allow an effective and timely information exchange.

The Competition Committee also recognises that:

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[4] The Committee's previous work on the subject of information exchanges in hard core cartel investigations has been documented in reports by the Committee to the Council on the implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels. The Committee also held roundtable discussions on various issues related to cooperation and information exchanges in hard core cartel investigations. Representatives of the business community contributed to the Committee's discussions, and their views have been taken into account in developing these Best Practices.

- a member country may decline to comply with a request for information, or limit or condition its co-operation;

- the exchanging of confidential information presupposes effective safeguards (i) to protect against improper disclosure or use of exchanged information; and (ii) for privileged information, in particular information subject to the legal profession privilege, as well as for other rights under the laws of member countries involved in the exchange of information, which may have to take into account differences in the nature of sanctions for violations of competition laws concerning hard core cartels in different jurisdictions;

- information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty programs, and that, to that end, most member countries have adopted policies pursuant to which they do not exchange information obtained from an amnesty applicant without the applicant's prior permission;

- member country authorities should seek to ensure that information exchanges do not have negative consequences for informants, for example by deciding not to disclose their identities in certain cases;

- regional organisations and regional agreements may imply a very close cooperation which requires less safeguards than set out in these Best Practices.

Based on the above, the Competition Committee believes that member countries should take note of the following Best Practices when they enter into international agreements, or adopt domestic legislation, authorising the exchange of confidential information in investigations of hard core cartels under their competition laws, and in their policies and practices applicable to such exchanges:

I. Information Exchanges Covered by These Best Practices

A. These Best Practices apply to situations where (i) for the purposes of the investigation of hard core cartels under the competition laws of the requesting jurisdiction a competition authority in one jurisdiction provides information obtained from private sources to a competition authority in another jurisdiction; (ii) the competition authority would normally, under domestic law, be prohibited from disclosing such information to other competition authorities; and (iii) the disclosure of such information can occur only because it is authorised in certain circumstances by an international agreement or domestic

law. International agreements and domestic laws authorising such disclosure, as well as policies and practices of competition authorities applicable to such exchanges, should provide for the safeguards identified in these Best Practices.

B. The Best Practices should apply to exchanges of information that has been obtained on behalf of a foreign competition authority following a request for assistance as well as information already in the possession of the requested jurisdiction.

C. These Best Practices do not apply to:

(i) Exchanges of information not subject to domestic law restrictions and which competition authorities therefore are free to exchange without authorisation by international agreement or domestic law;

(ii) Information exchanges among members of a regional organisation or parties to a regional agreement that have adopted specific rules governing information exchanges among competition authorities, unless such exchanges involve information originating from a jurisdiction that is outside the regional organisation or not party to the regional agreement; and

(iii) Information exchanges in the context of private litigation.

II. Safeguards for Formal Exchanges of Information

A. Authority to Exchange Information

1. Before making a formal request for information, a requesting jurisdiction should seek to consult with the requested jurisdiction to understand the circumstances under which the requested jurisdiction can act upon the request, in particular, whether it may have any disclosure requirements with respect to the information in the request and/or whether it would have to give notice to the source of the information. The requested jurisdiction should confirm that it will to the fullest extent possible consistent with its laws maintain the confidentiality of the information in the request.

2. The requesting jurisdiction should provide sufficient information as is necessary for the requested jurisdiction to act upon the request. The requesting jurisdiction should explain to the

requested jurisdiction in detail how the request for information located in the territory of the requested jurisdiction concerns the requesting jurisdiction's investigation of a violation of the requesting jurisdiction's competition laws concerning hard core cartels.

3. The requested jurisdiction should have discretion to provide or not to provide the requested information. Reasons for declining to provide the requested information might include, but are not limited to: (i) the requesting jurisdiction's investigation relates to conduct that would not be deemed hard core cartel conduct by the requested jurisdiction; (ii) honouring the request would be unduly burdensome for the requested jurisdiction or might undermine an ongoing investigation; (iii) the requested jurisdiction believes that confidential information may not be sufficiently safeguarded in the requesting jurisdiction; (iv) the execution of the request would not be authorised by the domestic law of the requested jurisdiction; or (v) honouring the request would be contrary to the public interest of the requested jurisdiction.

4. The requested jurisdiction may offer to provide the requested information only subject to conditions and/or limitations on use or disclosure. It should at least consider doing so if otherwise it would have to decline the request for information.

B. Provisions Concerning Confidentiality, Use, and Disclosure in the Requesting Jurisdiction

1. The requesting jurisdiction should identify its domestic confidentiality laws and related practices so that the requested jurisdiction can consider the requesting jurisdiction's ability to maintain the confidentiality of the exchanged information.

2. The exchanged information should be used or disclosed by the requesting jurisdiction solely for purposes of the investigation of a hard core cartel under the requesting jurisdiction's competition laws in connection with the matter specified in the request and solely by the enforcement authorities in the requesting jurisdiction, unless the laws of the requested jurisdiction provide the power to approve the use or disclosure of the exchanged information in other matters related to public law enforcement, and the requested jurisdiction has granted

such approval in accordance with its domestic law requirements prior to the use of the information in such other matter in the requesting jurisdiction.

3. The requesting jurisdiction should confirm that it will to the fullest extent possible consistent with its laws: (i) maintain the confidentiality of the exchanged information; and (ii) oppose the disclosure of information to third parties for the use of such information in private civil litigation, unless it has informed the requested jurisdiction about such third party request for disclosure of the information, and the requested jurisdiction has confirmed that it does not object to the disclosure.

4. The requesting jurisdiction should ensure that its privilege against self incrimination is respected when using the exchanged information in criminal proceedings against individuals.

5. The requesting jurisdiction should take all necessary measures to ensure that an unauthorised disclosure of exchanged information does not occur. In addition, it should make information available about the consequences under its domestic law in the event of such unauthorised disclosure. If, under exceptional circumstances, an unauthorised disclosure of exchanged information occurs, the requesting jurisdiction should take steps to minimise any harm resulting from the unauthorised disclosure, including promptly notifying the requested jurisdiction, and to ensure that such unauthorised disclosure does not recur. The requested jurisdiction should consider whether it is appropriate to notify the source of the information about the unauthorised disclosure.

C. Protection of Legal Profession Privilege

1. The requested jurisdiction should apply its own rules governing information subject to and protected by the legal profession privilege when obtaining the requested information.

2. The requesting jurisdiction should, to the fullest extent possible, (i) formulate its request in terms that do not call for information that would be protected by the legal profession privilege under its law; and (ii) ensure that no use will be made of any information provided by the requested jurisdiction that is

subject to legal profession privilege protections of the requesting jurisdiction.

D. Notice to Source of the Exchanged Information

1. If an information exchange is made consistent with these Best Practices, the requested jurisdiction should not give prior notice of the exchange to the source of the information, unless such notice is required under its domestic laws or an international agreement.

2. If the requested jurisdiction provides notice to the source of the information of the fact that information has been exchanged, it should do so only if such notice does not violate a court order, domestic law, or an obligation under a treaty or other international agreement, or jeopardise the integrity of an investigation in either the requesting or requested jurisdiction.

3. Prior to giving notice to the source of the information in accordance with Sections D.1 or D.2, the requested jurisdiction should, where practicable, consult with the requesting jurisdiction.

III. Transparency

To the extent possible without compromising legitimate enforcement objectives, jurisdictions should ensure that their relevant laws and regulations concerning information exchanges covered by these Best Practices are publicly available.