

## **COMMUNICATION FROM KOREA**

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### **HARD CORE CARTELS AND VOLUNTARY COOPERATION**

#### **I. INTRODUCTION**

1. By submitting this paper, Korea seeks to raise some conceptual issues that may help to identify and clarify specific elements to be incorporated in a multilateral framework on competition policy, without prejudice to any further developments in Korea's position.
2. In doing so, this paper discusses hardcore cartels under four headings: definition and scope, obligations of the Members, flexibility, and modalities for voluntary cooperation.
3. In particular, this paper focuses on the means of voluntary cooperation for regulating international hardcore cartels. Special characteristics of international hardcore cartels demand cooperation among Members, but at the same time make cooperation extremely difficult. The topic, therefore, is worth a closer examination.

#### **II. HARD CORE CARTELS: SOME CONCEPTUAL ISSUES AND POSSIBLE ELEMENTS FOR A MULTILATERAL AGREEMENT ON COMPETITION POLICY**

##### **A. DEFINITION AND SCOPE**

4. It has been argued in the past that regulations on cartels should be included in the multilateral framework on competition policy, for their negative impacts are clear and also significantly affect international trade.<sup>1</sup>
5. According to the OECD's Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (the Recommendation),<sup>2</sup> the hardcore cartel is defined as:

" ... an anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output

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<sup>1</sup> Contribution of the European Community and its member States "A Multilateral Framework Agreement on Competition Policy" (WT/WGTCP/W/152); Contribution of Japan "Observations on the Possible WTO Framework on Competition" (WT/WGTCP/W/119); Contribution of Korea "A Multilateral Framework on Competition Policy: Issues and Suggestions" (WT/WGTCP/W/133).

<sup>2</sup> OECD Council. 1998. Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (C(98)35/FINAL).

restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce; the hard core cartel category does not include agreements, concerted practices or arrangements that (i) are reasonably related to the lawful realization 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 authorized in accordance with those laws. However, all exclusions and authorizations 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 ..."

6. According to this definition, the term hardcore cartel refers to the worst form of cartel, the anti-competitive effect of which cannot be denied in any circumstances. Collaborative activities that lower costs or improve efficiencies are thus excluded. An example could be a consortium or a joint venture for basic research at pre-commercial level. The cartels that are legal under a Member's domestic laws, or cartels that have been legally authorized are also excluded. The example would be the authorized trade association or export cartel composed of small-size firms, which collaborate to reduce transaction costs while having little significant anti-competitive effects.

7. In the meantime, the UN's Set of Principles and Rules on Competition (Set) also provides unbinding recommendation on cartels.<sup>3</sup> The Set itself does not use the word "hard core cartel", but still defines cartels under Section B (i) as "... formal, informal, written or unwritten agreements or arrangements among enterprises ..." that "limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries and on the economic development of these countries." As such examples, Section D, Article 3 suggests the following:

- (a) Agreements fixing prices, including as to exports and imports;
- (b) collusive tendering;
- (c) market or customer allocation arrangements;
- (d) allocation by quota as to sales and production;
- (e) collective action to enforce arrangements; e.g., by concerted refusals to deal;
- (f) concerted refusal of supplies to potential importers;
- (g) collective denial of access to an arrangement, or association, which is crucial to competition.

8. Even though the two existing definitions on cartels do not largely differ in substance, the Set's definition of cartels may cover broader scope than that offered by the OECD's Recommendation. For example, it does not explicitly provide for exemptions for those agreements and arrangements that may lower costs or improve efficiencies, or those that are legally authorized. Furthermore, it explicitly refers more to anti-competitive arrangements such as collective refusals to a deal or collective denial of access to associations. In addition, the Set explicitly refers to exports and imports. Of course, it should not be construed that the Set precludes other forms of cartels that is not included in the list, nor that the Recommendation necessarily precludes certain forms or types of cartels, including export or import cartels.

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<sup>3</sup> The UN Set of Principles and Rules on Competition (TD/RBP/CONF/10/Rev.2).

9. In comparison, the definition in the Recommendation is more effect-oriented. It calls for regulation of cartels that have the same effects as blatant price fixing, while allowing exemptions for those arrangements that have pro-competitive effects. These exemptions and any changes made by the governments are to be notified to the OECD in order to ensure transparency.

10. It may depend on the Members to decide which of the two definitions is more appropriate for the WTO multilateral framework. Whatever the form, the definition should be clear and applicable so as to provide practical guidance to the regulations and obligations of the multilateral agreement. In this sense, the OECD Recommendation, developed later in time, seems to have certain merits in being more focused on the effect of the cartel rather than on the particular forms of cartels, and yet simple in the use of language.

11. The following is a non-exhaustive list of questions that the Working Group might address to clarify the definition and scope.

- What kind of definition and concept should be adopted for the WTO Multilateral Framework?
- How should the exemptions be allowed? And if allowed how can the transparency be ensured within the context of the WTO framework? E.g. should the exceptions be reviewed periodically so as to assess whether they are necessary and not broader than necessary to achieve the overriding policy objectives. Should they be subject to policy review?
- What criteria should be used for authorizing a cartel? Should we work on setting principles or leave it to each Member's discretion under the national laws?

#### B. OBLIGATION OF MEMBERS TO REGULATE HARD CORE CARTELS

12. Provided we have developed a definition and scope of hardcore cartels, their effective regulations would require each Member to legislate at the minimum certain regulations prohibiting the act and to have procedures or provisions for sanctions and remedies. However, the multilateral rule should not dictate the particular form of such provisions. Each Member should be allowed to take into consideration their own legal traditions, history, and other socio-economic environment, as long as the basic principles and criteria are applied.

13. The Recommendation, for example, calls for the Member economies to "ensure that their competition laws effectively halt and deter hard core cartels." In particular, the following should be provided 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.

14. While the Recommendation is addressed only to governments, the Set covers both enterprises and states. It calls for the enterprises to refrain from such practices that hinder competition, and at the same time, calls for States to adopt "appropriate legislations and implement judicial and administrative procedures for the control of restrictive business practices."

"States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behaviour of enterprises" that restrict competition,

including cartels. In addition, "States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to the attention of States ..."

15. Therefore, both the Recommendation and the Set contain similar rules against anti-competitive cartel activities of the enterprises, obliging the States to eliminate such activities and to provide appropriate remedies. The difference may be that the Set adds the obligation of the enterprises, whereas the Recommendation only addresses government measures.

16. In this context, further questions could be raised for our discussions:

- Should we include the obligations of the enterprises? The WTO rules in general address government measures, and not the private activities of enterprises.
- How much flexibility should we allow in introducing domestic regulations?
- How can we periodically review the legislation and enforcement mechanism (including exemptions provided) in the WTO?

17. In particular, the last point, that is the periodic review of the domestic legislations, enforcement, and measures, is very important, if we are to make the multilateral disciplines effective and transparent.

18. At the least, a peer review procedure is necessary in order to improve the regulations against hard core cartels, to learn from each other's experiences, and contribute towards a common understanding and interpretation of competition laws among Members. The concrete forms and level of the review need further discussions, but it goes without saying that securing transparency through periodic notification of domestic rules and measures (including exceptions) is a prerequisite for effective review.

### C. FLEXIBILITY

19. Flexibility is another important element in the multilateral regime on competition policy, especially for those Members that have not yet fully adopted competition rules and have relatively less experience in their enforcement.

20. There may be various ways for providing such flexibilities with regard to the regulations of hard core cartels, such as:

- (1) Transitional period for developing countries that have not yet established competition laws to adopt such disciplines. During the transitional period, technical assistance and capacity building for the adoption of such legislative process, as well as for the enforcement process at a later stage should be provided.
- (2) Allowance for regional arrangements where national competition laws would not have sufficient economies of scale or effectiveness.
- (3) Exceptions allowed for special economies, for example, mono-crop economies, or economies dependent on a very few commodities or goods.
- (4) A possible exemptions for a certain number of R&D cartels or cartels made up of small business, which do not have significantly negative impact on competition
- (5) Exemption for certain export or import cartels, if necessary.

#### D. INTERNATIONAL CARTELS AND THE MODALITIES FOR VOLUNTARY COOPERATION

21. Other than the basic obligation of each Member to adopt the basic framework of competition policy as provided, there is one more important obligation that may be introduced in the multilateral framework: voluntary cooperation.

22. The basic modality of voluntary cooperation in the Recommendation is based on positive comity, but also requires Members to engage in consultations over issues relating to cooperation. It provides for information-sharing, subject to protection of commercially-sensitive and confidential information, and within the limitations set by national laws.

23. The Set has similar provisions for consultation mechanism and information sharing. The Set provides that if the Members involved so agree, they may prepare a joint report on the consultations and submit it to the Secretariat. Adoption of this procedure would help towards accumulating experience in voluntary consultations.

24. The particularly difficult nature of cartel investigation stems from the fact that the investigation must proceed in a secretive manner so as not to lead to the destruction of evidences. When it comes to international cartels, the jurisdictional issues further complicate the situation.

25. The secret nature of investigation makes it difficult to obtain voluntary cooperation from another jurisdiction. While cartel investigation relies greatly on voluntary cooperation of informants from the inside, nationals of another jurisdiction may be under different rules with respect to imparting confidential information.

26. Another problem stems from the different level and degree of enforcement and damage recovery. If the Member with a lower degree of enforcement has the jurisdiction, what actions can a company or consumers of another country harmed by the cartel do?

27. Given such difficulties in international cooperation, several issues should be further discussed, such as:

- Considering these factors, what kind of cooperation may be required to yield substantive results?
- Is positive comity sufficient for effective regulation of international cartels?
- How can the jurisdictional issues be addressed under the WTO rules? Can certain principles be introduced?
- How can the WTO be of use to coordinate cooperation?

28. The foremost important issue with regard to enhancing international cooperation would be how to set up criteria or principles on the jurisdictional issues. Given the fact that countries that try to enforce their laws face such jurisdictional disputes, it would be important to review which jurisdictional principle could be established as a means to enhance such international cooperation.

### III. CONCLUSION

29. Provisions on hardcore cartels are the first and the key element for a multilateral framework that we should examine in this Working Group, and the existing definition of cartels, including OECD's definition of hard core cartel and the UN Set provide useful resources for our discussions.

28. The paper has raised more questions than answers, but the questions may be the starting point for our in-depth discussions for shaping the possible form of the multilateral disciplines on competition policy.

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