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SUMMARY OF DISCUSSION OF THE HEARING ON ENHANCED ENFORCEMENT CO-OPERATION

17 June 2014

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Item III of the 119th meeting of Working Party No. 3 on 17 June 2014.

More documents related to this discussion can be found at: www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm

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HEARING ON ENHANCED ENFORCEMENT CO-OPERATION

Summary of Discussion

1. Mr. **William Baer**, Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice and **Chair** of Working Party N. 3 (WP3) opened the Hearing on Enhanced Enforcement Co-operation. He first presented the purpose of the Hearing discussion, which was to consider possible new and different forms of co-operation among competition authorities. He then explained the format of the Hearing, and introduced the four external expert speakers who have been invited to participate to the Hearing to share their insights on possible new forms of co-operation. The external expert will also participate to the discussion that will follow with the WP3 delegates. The **Chair** then briefly introduced the four expert panellists: Prof. Michal S. Gal (Faculty of Law, University of Haifa), Chief Judge Diana P. Wood (the US Court of Appeals for the Seventh Circuit), Dr. John Temple Lang (Partner, Cleary Gottlieb Steen & Hamilton LLP), and Prof. Oliver Budzinski (Institute of Economics, Ilmenau University of Technology).

1. The role of the courts in international enforcement co-operation

2. To open the Hearing discussion, the **Chair** gave the floor to **Chief Judge Wood** who presented on the role of courts in international co-operation. In particular, she discussed the legally approved ways in which courts in different jurisdictions can assist one another in international competition cases, and how those ways might contribute to improve the overall international co-operation effort.

3. At national level, there are legal systems which enable different courts to cooperate with each other. For example, the US Constitution includes the "*full faith and credit*" clause, which entitles State courts to enforce judgements from other State courts even if the two States do not have the exact same competition law provisions. The US has also Federal enforcement powers, which are underpinned by the "*federal supremacy*" principle. This is something comparable to the relationship existing between the European Court of Justice and the national courts of each EU Member State.

4. However, there are no binding and enforceable rules regarding courts co-operation at the international level, since there is no consensus on what those rules should be. In addition, there are different views on the effect of international law on domestic legal systems. While some countries prescribe in their constitutions that international law binds domestic courts, others take a softer approach whereby national courts have an obligation to interpret national law in a way which is consistent with international law wherever possible.

5. Because of this lack of consensus, most co-operation between courts in different jurisdictions is informal. National courts have developed a variety of doctrines to minimise possible frictions between domestic and foreign courts, and between domestic and foreign norms. The US Supreme Court, for example, has established the notion that national law ought never to be construed to violate international law if any other possible interpretation remains. This is the so called "*Charming Betsy presumption*". There are also territorial presumptions, which limit the scope of domestic law to national borders unless a contrary intent can be shown clearly. Personal jurisdiction is another concept which is often used to harmonise domestic law with the international law. This requires that the defendant has sufficient

"minimum contacts" with the forum so that the suit "does not offend traditional notions of fair play and justice".

6. When parallel litigations over the same dispute exist in multiple jurisdictions, courts have adopted informal ways to direct the litigation towards the most appropriate venue. One of them is the concept of "*forum non conveniens*", which is a common law doctrine that allows a court to decline jurisdiction over a case if a court in another jurisdiction would be substantially better placed to review the case. It is not clear, however, if this doctrine can apply to competition cases. In addition, the "*lis pendens*" doctrine allows courts to stay proceedings when a similar dispute on the same or a related matter is already pending in foreign court. This principle was incorporated in Article 27 of the EU Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention).

7. According to Chief Judge Wood, it is fair to say that courts never had the efficient communication mechanisms which competition authorities have been developed for many years. In terms of formal method of international judicial co-operation, the letter rogatory, i.e. a formal request by a court to a foreign court for assistance in performing judicial acts, is effective and well-established but highly cumbersome as it is transmitted via the Foreign Ministries of the jurisdictions concerned. In this regard, the Hague Convention on Service of Process in Civil and Commercial Matters (the Hague Service Convention) has established a system where national courts can request and receive judicial documents from a foreign court in a simpler way than letter rogatory. This procedure, however, applies only to civil and commercial matters and it is questionable whether competition law cases can always be included in this category.

8. International judicial co-operation also extends to the enforcement of foreign judgments and foreign arbitral awards. In this area, although there are regional conventions which permit the enforcement of foreign judgments on competition matters, there is no general multilateral treaty. The other problem often encountered is competition law-specific: cooperating in the enforcement of a behavioural injunction, which is often used in competition cases to stop an anti-competitive conduct, is much more difficult than the enforcement of a monetary judgement.

2. Reliance on foreign cartel decision

9. The **Chair** thanked Chief Judge Wood for her presentation and invited Prof. Gal to present her suggestions for strengthening the deterrence of international cartel through jurisdictional reliance.

10. **Prof. Gal** started her presentation by explaining that the increase in recent years of international trade has created incentives for engaging in international cartels. More international trade generates large economic benefits and welfare effects but at the same time leads to an increasing number of international cartels, affecting an increasing number of countries and producing significant harmful global effects. The concern is that domestic sanctions do not have a sufficient deterrent effect on these cartels because of the overall low detection and enforcement rate. Such anti-competitive practices are prohibited in all countries but are investigated and prosecuted only in a small number of jurisdictions compared to the overall number of jurisdictions where the effects of the cartel have taken place. Not all jurisdictions can enforce their laws against such global cartels, and thus a large part of the profit from the cartel is left in the hands of cartelists, creating strong incentives for companies to cartelise markets around the world.

11. Prof. Gal presented the results of her study which reveals that most small and developing countries have never (or very rarely) prosecuted international cartels. One of the reasons for this under-deterrence is the scares human and financial resources at the disposal of smaller agencies. De facto this prevents them from prosecuting more than a couple of cartels at the time. Moreover; dealing with

international cartels might be expensive and difficult especially if it exposes the agency to strong external pressures by the company or by business lobbies. Another reason for this under-deterrence is the fact that many of international cartels have been already eliminated or stopped by the larger agencies when the smaller jurisdictions find out about them. This often leads the agency to decide that there is no reason for it to take additional enforcement actions.

12. According to Prof. Gal, under-deterrence of global cartels can be problematic both at national and international levels, At national level, all these jurisdictions will not get any compensation for the harm to their consumers or markets; at the same time, incentives of companies to engage in harmful cartel conduct in these jurisdictions will increase. For the problems that under-deterrence raises at international level, Prof. Gal cited an OECD report which says that "*unless a multinational cartel participant is prosecuted and fined in most or all of the countries in which the cartel has effects, the cartel still might have been profitable after paying fines in only some of the countries affected*."

13. Based on these findings, Prof. Gal suggested that a possible solution could be what she called "recognition of judgments mechanism". This mechanism can be described as a form of international collateral estoppel. To be more precise, the suggested system would allow domestic courts and antitrust authorities to recognise and use the factual findings in a foreign decision on an international cartel as basis for their own domestic decisions. In this case, they would only need to prove the local elements of the cartel. This system has the potential to increase the enforcement capabilities of different jurisdictions, addressing one of the main problems for international cartel enforcement, particularly in developing countries. It also limits the duplication of investigative resources of competition authorities. It increases deterrence against international cartels and ensures wider compensation for the harm caused in many jurisdictions.

14. One of the most important elements of the system proposed by Prof. Gal is that the foreign decision must meet substantive and procedural fairness criteria established under international legal principles: (i) the decision should be made in accordance with the foreign law; (ii) the decision should be a final one, i.e. all possible appeals must have been exhausted; (iii) the decision must clearly and specifically be based on a factual finding of an international cartel; (iv) the resolution of the issue is essential to the decision; (iv) the foreign court should meet judicial competence requirements; (v) the defendant should have a full and fair opportunity to litigate the issue before the foreign decision maker. Moreover, there should not be clashing foreign decisions which meet these preconditions. One final and important condition is that the foreign decision should not be used as basis for a criminal prosecution in the adopting jurisdictions.

15. Concerns with this system are related to the risks of over- and under-enforcement. According to Prof. Gal, however, these do not seemed to pose serious risks. Concerning the risk of over-enforcement, the overall amount of the fines sanctions would not expose firms to double counting as long as fines are calculated on the basis of the harm to each jurisdiction's economy or on the company's local turnover. As for under-enforcement, it is unlikely that large jurisdictions will decrease the current level of cartel enforcement and prefer to wait for other jurisdictions to bring suit with the aim of limiting their enforcement costs. One of the most important concerns with this mechanism is that it might affect incentives of firm to apply for leniency. The fact that a decision based on evidence obtained through a leniency program could then serve as basis for sanctions in different jurisdictions where a leniency agreement was not reached might significantly reduce the incentive to apply for leniency in the first place. In order to overcome this problem, Prof. Gal suggested that a company which applied for leniency should be allowed to enjoy leniency also in the other countries which decide to rely on the original findings in the jurisdiction where leniency was granted.

16. The **Chair** thanked Prof. Gal and commented from a practical viewpoint that even though authorities could rely on the findings in foreign decisions, they would still have to prove an effect on their national market in order to establish the cartel and this might amount to bringing almost the same degree of proof that would be required without the system. He also noted that this mechanism might lead to delays in stopping the cartel infringements as agencies would wait until other jurisdictions have made a decision which meets all the conditions necessary for recognition.

17. To respond, Prof. Gal used an actual example. In the Vitamin cartel, the Brazilian authorities assumed that there was a cartel in Brazil relying on the factual findings in the US and in the EU which established the existence of the global cartel conduct. The Brazilian authorities then calculated impact to Brazilian consumers using import data in Brazil. This example shows how it is possible to reduce the resources needed in order to reach a cartel decision globally. With regard to the risk of enforcement delays, Prof. Gal reminded that the system is purely voluntary and that each jurisdiction can always bring a cartel case based on its own factual findings. Also, it is unlikely that the large jurisdictions that currently bring cases against international cartels would limit their enforcement efforts and wait for another jurisdiction to reach a final decision.

18. Chief Judge Wood made a few remarks on Prof. Gal's presentation. According to Judge Wood, the proposed mechanism would require legislative reforms, considering that most countries' laws on recognition and enforcement of foreign judgments exclude public law at the moment. Lacking an international law instruments which would endorse the proposal from Prof. Gal, each country would need to prepare legislation before it could rely on foreign antirust decisions. From a US perspective, she also noted that that the foreign decision would not need to be final but could be used even if still under appeals or if further reviews by judicial authorities were still available.

19. **Prof. Budzinski** asked whether the proposed mechanism could also apply in private damage claims that could further contribute to reduce the problem with under-deterrence , and whether this mechanism could apply also to vertical arrangements, which might affect different countries in different ways.

20. Prof. Gal agreed with Judge Wood that the mechanism requires a legislative change. She pointed out to the legislative proposal that was annexed to her contribution, which jurisdictions might use as a blue print for legislating the proposed mechanism. She also emphasised that it is important to require that the foreign decision is final in order to make sure that it went through all the appeal processes and to ensure that it was fairly decided. With respect to private enforcement, she said that this is an interesting suggestion, meaning that private companies or individuals would be allowed to rely on the foreign decisions when bringing private cases, and that indeed jurisdictions might consider adopting this option as well. Prof. Gal stressed that the system she proposes would only apply to horizontal cartels, since they are the most straight-forward and usually have similar effects on all country involved.

21. The **Chair** thanked Prof. Gal again for her intervention and for the debate that followed and gave the floor to the US. The delegation from the **United States** asked what would happen if a cartel is litigated in a qualifying jurisdiction and that jurisdiction were to decide against the existence of a cartel. Would all other jurisdictions be prevented from taking actions against the same conduct? Prof. Gal answered that each jurisdiction should be able to decide not to rely on the foreign decision and to bring a case based on its own findings.

3. Lead agency models

22. The **Chair** gave the floor to Prof. Budzinski for his presentation on the so-called "lead jurisdiction models". These models aim at solving the economic problems of multiple parallel antitrust procedures, which raise transaction and regulatory costs of companies, generate inefficiencies for enforcers and ultimately taxpayers, and expose firms to the risk of inconsistent enforcement actions.

23. Prof. Budzinski started his presentation by explaining the general idea behind lead jurisdiction models. These models aim at introducing a common procedure led by a competition authority, instead of multiple uncoordinated procedures by several competition authorities. There are three types of lead jurisdiction models: voluntary models, mandatory models and mixed models. Under a voluntary model, the lead jurisdiction plays the role of a coordinator. It compiles and distributes information regarding the case and it coordinates the different interests of the participating agencies. At the end, it provides a non-binding proposal for a decision which would respect mutual comity for all the affected jurisdictions. There are opt-in and opt-out variations on this model, so that every jurisdiction is able to decide whether to participate and follow the model or not on a case-by-case basis. With voluntary models, multiple parallel procedures are not eliminated entirely but they are streamlined and run in such a way that a large part of possible conflicts are solved. With respect to mandatory models, the lead jurisdiction handles the overall case as a "one-stop-shop". It leads the investigation with the assistance of the other affected jurisdictions, and takes a decision which binds all the affected jurisdictions. Under this mandatory scheme, the problem of multiple parallel procedures would basically disappear.

24. Lead jurisdiction models operate on two levels: an international or global level and a national or regional level. At an international level, the model requires the selection and appointment of a lead jurisdiction for a given case, the monitoring and supervision of the lead jurisdiction and a system for handling complaints against the lead jurisdiction. When investigating cases, the lead jurisdiction is entitled to apply its own competition law, but in exercising its competition powers it should take into account the anti-competitive effects in all relevant geographic markets and the interests of all the jurisdictions in a non-discriminatory way. In addition, the non-lead jurisdictions are obliged to assist with the investigation by the lead jurisdiction, and to accept the decision that follows the investigation.

25. One of the crucial elements of this system is how the lead jurisdiction is selected. It would be necessary to establish a forum or an international panel in charge of deciding who would be the potential lead jurisdiction for a given case in accordance a number of criteria: a) which jurisdiction's internal market represents the centre of gravity for the activities to be investigated, or so-called "primary effects clause"; b) which jurisdiction can enforce competition law effectively and in a non-discriminatory matter; c) which jurisdiction disposes of sufficient resources and skills to investigate the case in question; and d) which jurisdiction demonstrates (and has demonstrated) the willingness and experience to investigate, handle and decide cases with a view of protecting all affected consumers and markets, i.e. to safeguard comity to other jurisdictions' legitimate interests.

26. The main tasks of the international forum or panel would be to review and monitor national provisions and practices, and to supervise the work of the lead jurisdictions to ensure the enforcement of the non-discrimination principle. The international forum or panel would also hear complaints by non-lead jurisdictions regarding alleged lack of consideration of the effects in all the jurisdictions. The only sanction against the lead jurisdiction that has infringed its duty of non-discrimination would be disqualification as a potential lead jurisdiction for future cases.

27. With respect to the question of which cases would lend themselves to a review under the lead jurisdiction model, Prof. Budzinski emphasised that only cases potentially subject to multiple national procedures should be considered for the lead jurisdiction model. In order to define what constitutes a

"multiple procedure", an "x-plus rule" could be used as a threshold, so that if more than a certain number of countries would be opening an independent review proceeding on a given case then the case would be regarded as a multiple case potentially subject to the model. However, Prof. Budzinski added that the validity of the x-plus rule would depend also on the size of the relevant jurisdictions, making the jurisdictional rules not that simple. The important thing is that there must be rules ensuring a sufficient nexus between a case and the lead jurisdiction to avoid the risk of complaints by others, which would undermine the correct functioning of the whole system.

28. Prof. Budzinski also addressed the problems and obstacles inherent with lead jurisdiction models:

- The first limitation is linked to incentives. Unless the case causes homogenous anti-competitive effects on different countries so that all the affected jurisdictions have the same interests in investigating the case, the lead jurisdiction cannot provide a positive externality. Although investigative assistance between jurisdictions generates advantages, the situation is much more complex if interests are conflicting in the sense that one jurisdiction would like to prohibit a certain conduct or transaction whereas another jurisdictions would not. However, there are a couple of disciplining forces which may reduce the incentives problem. Peer pressure, reputational issues and the possibility of disqualification may strengthen the position of the lead jurisdiction against undue domestic influences. Another useful point made by Prof. Budzinski is that even if strategic interest is taken into account in the first round, there still remains a way to overturn decisions of lead agencies through the jurisdictional review system by domestic courts.

- The second limit concerns the problem of existing divergences in national laws, policies, legal/economic theories and practices. These differences may affect the outcome of the case depending on which jurisdiction is selected as lead jurisdiction. This problem might be reduced by closer co-operation between all the affected jurisdictions with the lead jurisdiction, or by convergence through the adoption of international best practice and recommendations. According to Prof. Budzinski one might also argue that this diversity of regimes can be regarded as an advantage because it allows more innovation to be injected to the system.

- The third possible concern with lead jurisdiction models is the so-called "lack-of-eligible-lead-jurisdiction problem". This would occur if very few jurisdictions actually meet the conditions to be qualified as a lead jurisdiction from the viewpoint of resources, experience, skills, and nexus to the case. The concrete risk is that this system would end up pointing to only a handful of agencies. In addition, some jurisdictions particularly in small, open economies which do not have significant domestic cases may strategically decide to free ride on the system and as a result scale down their own competition enforcement and policy. There may be some alleviating factors for this problem: co-operation by assisting jurisdictions including offering staff, resources and skills can be a way to empower more jurisdictions to be appointed as a lead jurisdiction. In addition, "international regionalisation" may create the scope for a diversity of lead jurisdictions because event if there is a free-riding risk, there it would still be valuable to remain connected with this system.

29. Prof. Budzinski closed his presentation noting that the economic charm of the lead agency concept would be that it has the potential to solve the deficit of multiple procedures without establishing an international competition authority deciding cases on a worldwide level. Prof. Budzinski also emphasised the importance of "out-of-box" thinking like his model, although he recognised the limitations and downsides which make this proposal intrinsically aspirational at the moment.

30. The **Chair** thanked to Prof. Budzinski and asked whether the recognition of judgments mechanism which Prof. Gal suggested could be viewed as a first step consistent with the lead agency model. Prof. Budzinski answered that this is certainly the case and added that Prof. Gal's model can be an element of a lead jurisdiction model in terms of how cartels are treated within it.

31. The **Canadian** delegation asked both Prof. Budzinski and Prof. Gal for their views on how their respective proposals would deal with the fact that there are criminal and administrative jurisdictions for cartel enforcement. Prof. Budzinski explained that from an economic perspective the existence of criminal jurisdictions would not cause serious problems under his lead jurisdiction models as it can enhance the deterrence effect on cartels even in the administrative jurisdictions. Prof. Gal agreed with the point made by Prof. Budzinski about the strong deterrence effect of criminal jurisdictions but expressed some concerns about the negative public perceptions that this could have in jurisdictions where cartelistic conduct is not a considered to be a criminal event. With regard to the effects on her proposed model, Prof. Gal said that a foreign finding - even if it serves as a basis for a criminal finding in the foreign jurisdiction – should not serve as a basis for a criminal case in the adopting jurisdiction.

32. The delegation from the **United States** took the floor and asked three questions: (i) whether the proposed system is at all realistic, weighing the potential benefits against the difficulties? (ii) who would have the power to choose, judge and disqualify a lead jurisdiction in each case? (iii) if a decision by the lead jurisdiction is appealed and reversed years after, whether the other jurisdictions would also have to modify their own decisions based on the overturned decision or not?

33. Prof. Budzinski answered that the model is worth considering as it has the potential to create important efficiencies, especially considering the fact that in most cases where various jurisdictions are involved the decisions are very similar despite the fact that each agency uses different types of procedures and legal rules. As for who would select the lead jurisdiction, a forum or an international panel should do that. This forum/panel could basically consist of the representatives of competition authorities joining the lead jurisdiction system. Lastly, with respect to appeals, according to Prof. Budzinski it should be made clear that complaints against the decision by the lead jurisdiction can only be made on the ground of discriminatory treatment.

34. The delegation of the **European Union** commented from a regional perspective and noted that the lead jurisdiction models can be evaluated positively under harmonised legal systems, but they require flexibility about the criteria for the appointment of the lead jurisdiction. This is because it is not always clear from the beginning of the case which country is well-placed to investigate a case. This is at least the experience from European Competition Network (ECN).

4. One-stop-shop models

35. The **Chair** thanked Prof. Budzinski for his interesting and thoughtful remarks and gave the floor to Dr. Temple Lang to discuss possible ways to enhance international co-operation based on the "one-stop-shop" principle. The objective is to seek ways of increasing the efficiency of the competition authorities and of lowering the regulatory cost of companies involved in cross-border cases.

36. With reference to what the other two speakers have presented, **Dr. Temple Lang** noted one important point regarding international co-operation. It should not be taken for granted that evidence valid in one jurisdiction is usable as evidence in another jurisdiction without prior careful reconsideration by the second jurisdiction. Then he pointed to an essential requirement for effective and useful co-operation, which is a common treatment among jurisdictions of immunity and/or leniency applications and the treatment of confidential information. When co-operating, agencies should not disclose applications for immunity or leniency to one another, without consent of the company. Unauthorised disclosure would

discourage leniency applications. It is for the company to decide which agencies should receive its application, and separate applications might be appropriate because circumstances in different countries might be different. As for confidential information, it is important to have criteria to identify the scope of the exchange and the type of information that can and cannot be disclosed, and to whom it can be disclosed. For this reason, before moving to enhanced co-operation models it would be desirable to have standardised rules on immunity and leniency programmes and on competition law procedures as a whole.

37. Competition authorities should coordinate in situations where more than one jurisdiction is involved in the review of the same case and there is a risk of divergent approaches. In these situations, they should agree if there is one infringement or several; they should disclose related information to one another, and they should consider consistent remedies. Dr. Temple Lang remarked that this co-operation should be voluntary and flexible rather than mandatory, which means that it should not be made legally binding either under the national law or under international agreements. Mandatory systems are unrealistic at least in the near future and would introduce undesirable rigidity in the system and create scope for obstruction of national procedures.

38. Having a lead agency or a "one-stop-shop" seems to work effectively for enhanced co-operation. However, the criteria for choosing the lead agency or the one-stop-shop must be flexible and even then one may argue that is should be unacceptable and inappropriate for a jurisdiction to impose fines for the harm to consumers in other jurisdictions. In these cases, there should be a system where the fine should be paid to the competition authority in the jurisdictions where the harm has occurred. Thus, according to Dr. Temple Lang it will be anyway hard to avoid having more than one procedure for the imposition of fines in the different jurisdictions affected by the anti-competitive conduct.

39. According to Dr. Temple Lang even without a lead jurisdiction or "one-stop-shop" systems, there is still considerable scope for enhanced co-operation in a number of respects. Coordination regarding leniency applications is one obvious possibility: a leniency or immunity application to one competition authority could be treated, if the company so chose, as an application to all the other agencies specified by the company, to which the company would send the application. He also added that it would be helpful for companies if each competition authority would accept leniency applications which are written in another language and submitted to another jurisdiction, especially because of translation difficulties.

40. Dr. Temple Lang argued that close and enhanced co-operation is particularly needed in merger cases. It is particular important that competition authorities avoid duplication of remedies and for this reason they should also coordinate the request for information sent to the merging parties and to third parties so that companies are not asked the same questions by different authorities. One of the most important aims of co-operation is to minimise the cost and inconvenience to the companies involved in competition cases. Dr. Temple Lang closed his remarks with a comment on the presentation by Prof. Gal. He noted that competition authorities should not be under any obligation to accept other jurisdictions' decisions because this may lead to procedural conflicts.

5. General discussion

41. The **Chair** thanked to Dr. Temple Lang for his remarks and the four panellists for the very stimulating presentations and opened the floor for comments and reactions by the speakers or by the delegations.

42. Chief Judge Wood took the floor to provide a few remarks on the presentations by the other panellists. With reference to the lead jurisdiction models discussed by Prof. Budzinski, she noted that today competition authorities are already under a *de facto* lead jurisdiction model in the sense that some countries already play the role of *de facto* lead jurisdictions. As for the recognition of judgments mechanism

proposed by Prof. Gal, Chief Judge Wood thought that it might be a useful step in the direction of a lead jurisdiction model. Concerning the question that was discussed earlier of who decides on which jurisdiction should play the role of lead jurisdiction, according to Chief Judge Wood the US can offer a good example in the judiciary field. In the US there is a judicial panel on multi-district litigation consisting of judges from different Federal courts. The panel decides which court should take the lead on each case. Thus, it can be said that Prof. Budzinski's idea of an international panel for selecting a lead jurisdiction is actually not that aspirational after all.

43. Prof. Budzinski made some remarks on Dr. Temple Lang's presentation. He noted that although the facts of a case may be different in different jurisdictions, the effects of the case would usually not differ very much. This means that remedies would not necessarily be very different in different jurisdictions so that all competition authorities need to do would be to co-ordinate the remedies with each other. Prof. Budzinski raised another point about mandatory co-operation systems. He noted that that every system is voluntary in nature because no jurisdiction can be forced to participate in the system. Of course, once a jurisdiction has voluntarily agreed to a system, there may be certain mandatory rules that would apply to it.

44. Prof. Gal commented very positively on Prof. Budzinski's proposal of a lead jurisdiction model particularly because the proposal does not call for additional resources. She then raised the question of how competition authorities can deal with public backlash in situations where, for example, a lead jurisdiction takes into account worldwide anti-competitive effects and then takes a decision which goes against the interest of its own country, which in turn leads to public criticism against the competition authority. With respect to Dr. Temple Lang's remarks, she agreed that a co-operation system should be flexible, but at the same time it is important to ensure that flexibility does not lead to a total disconnect between the different jurisdictions' decisions.

45. Dr. Temple Lang noted that there are ways in which mutual recognition could be introduced in a relatively simple way. He noted, for example, that in the new EU Directive regarding private damages claims, there are provisions prescribing that a decision or a judgement in one EU Member State can be used as at least *prima facie* factual evidence in other Member States judicial proceedings. If each jurisdiction would introduce this kind of provisions they would be allowed to rely on decisions of other countries by their own discretion.

46. In response to Prof. Gal's question about public backlash in case a lead jurisdiction takes a decision against its own interest but in the general interests of all jurisdictions involved, Prof. Budzinski had two answers. First, in such cases it is possible that the case allocation to the lead jurisdiction might have been wrong because it would appear that the primary negative effects take place in other jurisdictions. Second, public backlash can be a positive if it generates discussions about how to deal with the trade-offs between domestic welfare and welfare in other countries so that it could contribute to a better understanding of competition issues in the public domain.

47. The delegation from the **United States** took the floor and added a few comments related to what Dr. Temple Lang covered in his presentation. The US noted that allowing companies to see the advice and evidence exchanged among jurisdictions and to comment on the informal communication between jurisdictions might not be a good idea or even necessary. The reason why so much co-operation takes place today is because it is mostly oral and informal. Introducing more formal communications and sharing that with the parties would seriously risk spoiling productive communication. Also, it is unnecessary for companies to review every piece of advice and evidence exchanged by agencies, especially because a large part of it would not be used at all for taking a decision. Dr. Temple Lang replied that from the viewpoint of the parties' rights for defence it is important to give companies opportunities to know what kind of evidence and comments are exchanged among authorities and what sort of line of argument is being put

forward, although this idea might inhibit informal and close co-operation to some extent. He saw no difference between written communication and oral communication for this purpose.

48. The **Chair** then asked to the Working Party if any delegation had any interesting experience with enhanced forms of co-operation that they wanted to share with the others.

49. The delegation from **Canada** asked for the floor and described its experience with respect to advanced forms of co-operation with the US agencies in merger cases. In this respect, Canada reminded that in March 2014, Canada and the US agencies issues best practices on co-operation in merger review, which seek to increase transparency of their coordinated procedures. Co-operation includes regular calls in which the agencies discuss procedural and timing issues (including of notifications by merging parties), compare substantive findings (such as market definition), and discuss timing and content of communications with the companies concerned. The Canadian delegation also presented two merger cases where Canada went beyond what is generally considered normal co-operation. The first case is the *Nufarm/AH Marks* merger, where the Canada's Competition Bureau (CCB) and the U.S. FTC conducted joint, face-to-face negotiations with the parties. The second example is the *Louisiana Pacific/Ainsworth Lumber* acquisition. In this case, the two case teams attended one another's interviews with some of the key witnesses and discussed together the remedy proposals of the parties. Most importantly, the economists of the CCB and the U.S. Department of Justice cooperated throughout the investigation to validate and improve the econometric models which were used in the case and also assessed together the expert reports put forward by the parties.

50. The delegation from **Australia** presented on the special relationship between the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) in the Trans-Tasman region. They described especially the cross-appointment arrangements between the two agencies. Before moving to those, Australia explained that the two jurisdictions have already extended their competition law provisions to Trans-Tasman market proceedings and have established rules which allow them to mutually recognise and enforce a wide range of judgments, including judgements in competition cases. As for cross-appointments between the ACCC and the NZCC, this practice started at the end of 2010 and aims at enhancing co-operation and increased alignment in the administration of competition laws in the two jurisdictions. Under these arrangements, the two agencies have already dealt with 8 merger cases and have revised a number of policy guidelines. In practice, when a merger case is filed in both jurisdictions, they would routinely review it under the cross-appointments. Commissioners of each authority would be invited to the other's meetings considering the merger. As a Commissioner of the other agency, each has full access to confidential information considered by the other authority. At the same time, the two case teams continue to coordinate according to a long established history of co-operation which includes informal discussions and closer co-operation based on waivers. At the end of this coordinated process, however, each agency adopts a separate decision and these are not always identical especially if the market context differs in the two countries. Even in those cases, cross-appointments ensure a greater alignment of analysis and decisions in the two jurisdictions. The cross-appointments arrangements have been in place for just three years but feedback from stakeholders in both countries has been overwhelmingly positive.

51. The **European Commission** explained how enhanced forms of co-operation are used in the ECN to conduct inspections on competition law infringements throughout the European Union. EU competition law allows the European Commission to conduct inspections in two ways: (i) the European Commission officials can go to the premises directly and conduct inspections; or (ii) they can ask national competition authorities (NCAs) to conduct the same inspection under national laws. This latter possibility has been rarely used. In addition to the co-operation between the European Commission and NCAs, each NCA is entitled to request another EU NCA to conduct inspections. Prior to an inspection of the European Commission, NCAs which have sufficient information about the companies targeted and the possible

location of the information sought will provide support to the European Commission officials in various ways. For example, they could give advice regarding the timing of inspections, the choice of the premises, the size of the inspection team and the investigative strategy. The officials of NCAs can also accompany the staff of the European Commission during the inspection and will have the same powers as the European Commission officials. In this case, the NCAs' role becomes very important in case the company inspected refuses to be raided or obstructs the inspection, as they are entitled to ask for the assistance of the local police or seek for a court order. The main point to note according to the European Commission is that this form of enhanced co-operation can be achieved only on the basis of the mutual trust existing between ECN jurisdictions and developed thanks to the harmonised competition law framework of the EU.

52. The delegation from **the Netherlands** described the coordination among the EU Member States in dealing with cross-border cartels. Member States cases are mainly based on the EU competition law which enables them to exchange information and to request each other's assistance in conducting dawn-raids. Coordination in dawn raids can be divided into three stages: (i) the preparation of the inspection, (ii) the inspection itself and (iii) the post-dawn raids phase, or the phase pre-decision. In the preparatory phase, co-operation between jurisdictions should be carried out with full consideration for the legal and practical differences in terms of the investigative powers and the rights of defence of companies. This would, for example include, consideration as to whether a court warrant is required or not, what sort of conditions should be met in order to initiate the investigation, what is the inspection framework, and the timing of the different national procedures. During the inspection, coordinating authorities communicate with each other not only through contact persons but also through the case handlers themselves. They discuss the progress of the on-going investigation, although the extent of these activities depends on each Member States' national laws. For example, when it comes to interviews, there are cases where the assisting jurisdiction asked the companies involved whether they would object to answer the other jurisdiction's questions and with the companies' consent let the other jurisdiction proceed with the interview directly. Co-operation in the post-inspection phase is also a very important because the inspection can instigate a leniency application in the assisting jurisdiction. This will in turn generate parallel cases which will require on-going coordination.

53. The **Chair** thanked the expert speakers and all the delegates for their participation to this very interesting discussion and declared the Hearing closed.