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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS

-- Turkey --

27 October 2015

This document reproduces a written contribution from Turkey submitted for Item 3 of the 122nd meeting of the Working Party No. 3 on Co-operation and Enforcement on 27 October 2015.

*More documents related to this discussion can be found at:
www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm*

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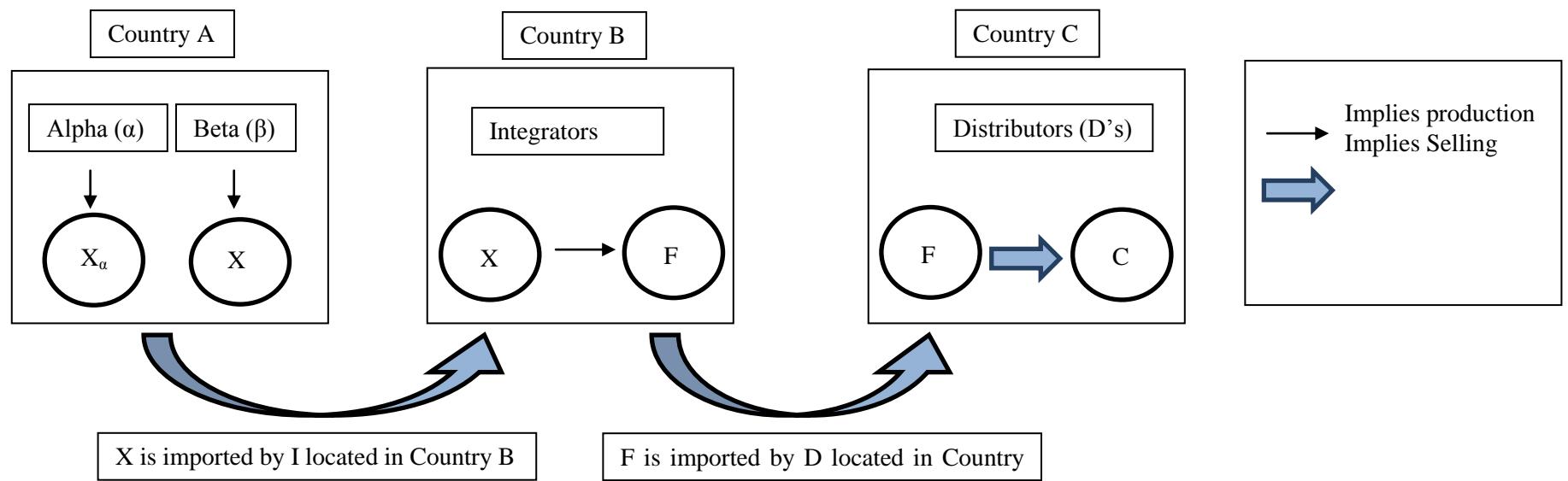
-- Turkey --

Hypothetical Scenario:

1. Alpha Corporation and Beta Corporation are organized under the laws of Country A and have factories in Country A where they manufacture Component X, a piece of high-tech hardware used in electronic products. Alpha and Beta agree to charge higher prices for Component X sold to finished product integrators. These integrators are organized under the laws of Country B and have factories in Country B where they incorporate Component X into finished electronic products sold in Country C.
2. Some or all of the anti-competitive overcharge on Component X is passed on by the integrators to purchasers of the finished product in Country C. Alpha and Beta are aware that Component X is incorporated into finished products sold in Country C and Alpha and Beta discuss market conditions and track sales of the finished products in Country C.
3. In responding to the questions below, delegates should feel free to address any modifications to the scenario that raise other issues that in their view need to be considered when dealing with cartels involving intermediate goods.

1. Turkish Competition Authority's Answers to Hypothetical Scenario and Suggested Questions

4. First of all we have to state that the topic chosen for this coming OECD meeting is welcomed by the Turkish Competition Authority (TCA). We believe that it is a current hot topic for every competition agency whether they are young or old. We believe that OECD's input to this subject will greatly improve the decision making process of the competition agency when faced with such a case involving a similar conduct.
5. We think that answers to this scenario can easily be miscommunicated or misunderstood as the scenario involves the interaction of multiple jurisdictions, products and consumers. In order to maximize the usefulness of the scenario, we have summarized the facts given in the scenario into a chart which is on the second page of this paper.
6. When we look at the different legislations and the literature about how cartelization in the intermediate goods are dealt, we see that there are two approaches to this problem. One is the *effect based approach* and the other one is *direct effect based approach*. In *effect based approach*, it is suggested that countries should punish/go after cartels as long as cartels' conduct affects a market in your jurisdiction. However, in *direct effect based approach*, it is suggested that you should punish/go after the cartels if they have a direct effect in your jurisdiction. Since there is no generally accepted principles on how to deal with cartels we have prepared a different answer for each approach.



1. Assume You Are Country A:

1.1 *What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?*

Effect Approach:

7. In order to bring an enforcement action against an agreement, the agreement has to have an effect in that country. Since the agreement between α and β has no affect in Country A we think that we cannot bring an enforcement action against α and β.

Direct Effect Approach:

8. In order to bring an enforcement action against an agreement, the agreement has to have a direct effect in that country. Since the agreement between α and β has no direct affect in Country A we think that we cannot bring an enforcement action against α and β.

1.2 *If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?*

Effect Approach:

9. If we were to bring an enforcement action to α and β it can be on the grounds that the agreement between α and β has prevented, distorted or restricted competition in Country A. The appropriate sanction may be to fine both companies based on their annual turnover in Country A.

Direct Effect Approach:

10. If we were to bring an enforcement action to α and β it can be on the grounds that the agreement between α and β has directly prevented, distorted or restricted competition in Country A. The appropriate sanction may be to fine both companies based on their annual turnover in Country A.

3. Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?

Effect Approach:

11. We do not think that the decision whether Country A should bring an enforcement action to this agreement should be affected by other jurisdiction's decisions. However, if the other jurisdictions have imposed sanctions for this conduct this could be a regarded as a green light for Country A's competition authority to open an investigation against α and β in order to see if their agreement has affected a market in Country A or not.

Direct Effect Approach:

12. We do not think that the decision whether Country A should bring an enforcement action to this agreement should be affected by other jurisdiction's decisions. However, if the other jurisdictions have imposed sanctions for this conduct this could be a regarded as a green light for Country A's competition authority to open an investigation against α and β in order to see if their agreement has affected a market in Country A or not.

2. Assume You Are Country B:

2.1 *What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action?*

Effect Approach:

13. The companies α and β are exporters of Product X and I's are located in Country B. Since the agreement between α and β affects a relevant market in Country B, the competition authority of Country B can open a formal investigation. The competition authority of Country B can initiate an investigation against α and β , either depending on a complaint or by its own initiative.

14. After showing that the agreement has the potential to affect a relevant market in Country B, the other requirement for bringing an enforcement action is to prove that there is an agreement and/or a concerted practice between α and β . This may include finding an evidence showing that α and β did in fact collude (such as the original agreement or a copy of the agreement or the e-mails exchanged between the employees of α and/or β , testimonies of the α and β 's managers that there is an agreement between α and β to raise the price of X etc.).

Direct Effect Approach:

15. The companies α and β are exporters of Product X and I's are located in Country B. Since the agreement between α and β directly affects a relevant market in Country B, the competition authority of Country B can open a formal investigation. The competition authority of Country B can initiate an investigation against α and β , either depending on a complaint or by its own initiative.

16. After showing that the agreement has the potential to directly affect a relevant market in Country B, the other requirement for bringing an enforcement action is to prove that there is an agreement and/or a concerted practice between α and β . This may include finding an evidence showing that α and β did in fact collude (such as the original agreement or a copy of the agreement or the e-mails exchanged between the employees of α and/or β , testimonies of the α and β 's managers that there is an agreement between α and β to raise the price of X etc.).

2.2 *Is your analysis any different if Alpha and Beta have attended price-fixing meetings in Country B?*

Effect Approach:

17. Attending price-fixing meetings do not affect our analysis since the criteria to bring an enforcement decision is whether the alleged agreement have affected a market in Country B or not. This information can only affect how the agreement between α and β is proved during the investigation process. For example, if they have attended price-fixing meetings in Country B, then the competition authority of Country B can conduct a dawn raid during the meeting since the meeting took place in its jurisdiction area or easily confirm whether such a meeting by α and β took place there.

Direct Effect Approach:

18. Attending price-fixing meetings do not affect our analysis since the criteria to bring an enforcement decision is whether the alleged agreement have directly affected a market in Country B or not. This information can only affect how the agreement between α and β is proved during the investigation process. For example, if they have attended price-fixing meetings in Country B, then the competition

authority of Country B can conduct a dawn raid during the meeting since the meeting took place in its jurisdiction area or easily confirm whether such a meeting by α and β took place there.

2.3 *If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?*

Effect Approach:

19. The amount of fine should be based on the sales of α and β to I's in the previous year. After calculating the fine we can use the following factors to decide on the additional amount to be added to the fine for deterrence;

- Whether α and β are dominant producers of product X or not,
- Whether I's are dominant in selling product F or not,
- Whether α and β have helped Country B's competition authority during the investigation not,
- For how long α and β have been colluding,
- Whether α or β has a past record of collusion in this market or not,
- Whether α and/or β has applied for leniency.

Direct Effect Approach:

20. The amount of fine should be based on the direct sales of α and β to I's in the previous year. After calculating the fine we can use the following factors to decide on the additional amount to be added to the fine for deterrence;

- Whether α and β are dominant producers of product X or not,
- Whether I's are dominant in selling product F or not,
- Whether α and β have helped Country B's competition authority during the investigation not,
- For how long α and β have been colluding,
- Whether α or β has a past record of collusion in this market or not,
- Whether α and/or β has applied for leniency.

2.4 *Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?*

Effect Approach:

21. It is not important whether other jurisdictions have imposed sanctions for this conduct in order to bring an enforcement action or determining an appropriate sanction. The important thing is whether the collusion has affected Country B's market(s) or not.

Direct Effect Approach:

22. It is not important whether other jurisdictions have imposed sanctions for this conduct in order to bring an enforcement action or determining an appropriate sanction. The important thing is whether the collusion has directly affected Country B's market(s) or not.

3. Assume You Are Country C:

3.1 *What are the legal and jurisdictional requirements to bringing an enforcement action against Alpha and Beta? What factors would you consider in deciding whether to bring an enforcement action against Alpha and Beta?*

Effect Approach:

23. The companies α and β are exporters of Product X to I's which are located in Country B. I's use Product X to produce Product F in Country B and then export Product F to Country C where Product F is sold to consumers living in country C. Thus, the agreement between α and β to increase the price of Product X affects a market in country C as consumers in Country C pay a higher price for the Product F as a result of the agreement between α and β .

24. Since the agreement between α and β affects a relevant market in Country C, the competition authority of Country C can open a formal investigation. The competition authority of Country C can initiate an investigation against α and β , either depending on a complaint or by its own initiative.

Direct Effect Approach:

25. The companies α and β are exporters of Product X to I's which are located in Country B. I's use Product X to produce Product F in Country B and then export Product F to Country C where Product F is sold to consumers living in country C. Since the agreement between α and β to increase the price of Product X doesn't directly affect a market in country C the competition authority of Country C cannot open a formal investigation.

3.2 *Is your analysis any different if Alpha and Beta have attended price-fixing meetings in Country C?*

Effect Approach:

26. The decision to open an investigation against α and β should be independent of where they attended the price-fixing agreements. The important issue to consider before bringing an enforcement action against α and β is whether their agreement has affected a market in country C or not.

Direct Effect Approach:

27. The decision to open an investigation against α and β should be independent of where they attended the price-fixing agreements. The important issue to consider before bringing an enforcement action against α and β is whether their agreement has directly affected a market in country C or not.

3.3 Is your analysis any different if Alpha and Beta have had contacts with finished product purchasers in Country C, including negotiations regarding Component X pricing?

Effect Approach:

28. If D's have contacted α and β about the pricing of Product X, this can either mean that they wanted the price of Product X to be decreased or increased. Therefore we need to check whether the evidence shows such a fact.

29. If the evidence shows that D's wanted to lower the price of Product X so that Product F can be priced at a competitive level in Country C, then these contacts might have a beneficial effect in Country C. Therefore, this might not constitute an infringement of competition and there might not be a need to open an investigation about the agreement in Country C.

30. If the evidence shows that D's wanted to increase the price of Product X so that Product F can be priced at a monopoly price, then this means that D's and α and β have entered into an agreement to the detriment of consumers in Country C. If the competition authority in Country C can prove this, then an investigation can be opened to the practices of α, β and D's.

Direct Effect Approach:

31. If D's have contacted α and β about the pricing of Product X, this can either mean that they wanted the price of Product X to be decreased or increased. Therefore we need to check whether the evidence which shows such a fact.

32. If the evidence shows that D's wanted to lower the price of Product X so that Product F can be priced at a competitive level in Country C, then these contacts might have a beneficial effect in Country C. Therefore, this might not constitute an infringement of a competition act and there might not be a need to open an investigation about the agreement in Country C.

33. If the evidence shows that D's wanted to increase the price of Product X so that Product F can be priced at a monopoly price, then this means that D's and α and β have entered into an agreement to the detriment of consumers in Country C and the agreement directly affects a market in Country C. If the competition authority in Country C can prove this, then an investigation can be opened to the practices of α, β and D's.

3.4 Is your analysis any different if, contrary to the facts outlined above, the finished products are sold around the world and Alpha and Beta are unaware or indifferent to whether the finished products are sold in Country C?

Effect Approach:

34. The decision to open an investigation to α and β should be independent of whether α and β is aware where Product F is sold.

Direct Effect Approach

35. The decision to open an investigation to α and β should be independent of whether α and β is aware where Product F is sold.

3.5 Is your analysis any different if the integrators are wholly-owned subsidiaries of the finished product purchasers in Country C?

Effect Approach:

36. If I's in Country B are wholly-owned subsidiaries of the D's, then D's can sue α and β in Country B as well as in Country C since the agreement have effected a market in Country B and Country C.

Direct Effect Approach

37. If I's in Country B are wholly-owned subsidiaries of the D's, then D's can sue α and β only in Country B since the agreement have only directly affected a market in Country B.

3.6 If you would bring an enforcement action under these facts, how would a sanction against Alpha or Beta be determined? What factors would you consider in determining an appropriate sanction?

Effect Approach:

38. The amount of fine should be based on the previous year's sales of α and β to I's in Country B, not on the previous year's sales of I's to Country C. The level of the fine to be imposed by Country C should be related with the percentage of X in the final product. If the price of the final product is highly affected by the price of X, then the fines should be imposed using the higher end of the range. After calculating the fine we can reduce it if α and β are also fined by Country B's competition authority for the same conduct in order to prevent the duplication of fines according to the *ne bis in idem* doctrine.

39. We can also use the following factors to decide on the additional amount to be added to the fine for deterrence;

- Whether α and β are dominant producers of product X,
- Whether α and β have helped Country C's competition authority during the investigation,
- For how long α and β have been colluding,
- Whether α or β has a past record of collusion in this market,
- Whether α and/or β has applied for leniency.

Direct Effect Approach

40. It would be wrong to bring an enforcement action against α and β under these facts as the agreement to raise the price of Product X do not directly affect a market in Country C.

3.7 Would you consider whether other jurisdictions have imposed sanctions for this conduct either in bringing an enforcement action or in determining an appropriate sanction?

Effect Approach:

41. Yes.

42. If all of the countries imposed sanctions for this conduct depending on whether or not it has affected a market in their economies, then α and β would be sanctioned by both Country B and Country C.

However, since this might result in an overlapping of fines for α and β , we think that countries should consider whether other jurisdictions have imposed sanctions for this conduct.

Direct Effect Approach:

43. No.

44. If all of the countries imposed sanctions for this conduct depending on whether it has directly affected a market in their economies or not, then there will be no overlapping of the fines. For example in our case there will be no enforcement decision in Country A and C and the only country that this conduct would result in an enforcement decision and possibly a fine is Country B.