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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

TOWARDS AN INTERNATIONAL FRAMEWORK OF COMPETITION RULES

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TOWARDS AN INTERNATIONAL FRAMEWORK OF COMPETITION RULES

This Communication is about the international aspects of competition law. It examines whether public international law, and especially the WTO, should be complemented by a specific framework to support competition law enforcement [1].

The concepts and proposals set out in this paper build on the report of the group of experts established by Commissioner van Miert in June 1994. That report, entitled "Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules", was published in July 1995.

The experts' report covered both bilateral and multilateral cooperation in the field of competition. Their parallel development was considered to be complementary and mutually supportive. Thus, although the emphasis of this Communication is on multilateral aspects, the further development of bilateral cooperation agreements is equally important and would have a favourable impact on work in a multilateral setting.

I. INTRODUCTION:

a) A global perspective on competition rules: Why international rules are needed

Two developments have characterised international economic activity in recent decades: liberalisation and globalisation. Eight negotiating Rounds since GATT was established in 1947 have brought import tariffs down to historically low levels: from around 35% to below 4%[2]. This has led to a massive growth in the volume of trade in goods and services, doubling every seven to eight years and growing from around $200 billion in the early sixties to exceed $5000 billion in 1994. Foreign direct investment has grown at an

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1 The scope of this Communication is limited to *anticompetitive practices of enterprises*. There are many governmental practices that have an effect on competition, such as subsidies, which are grouped together with private practices in the EC Treaty's chapter on competition rules. These are by and large already covered by rules under the World Trade Organisation (WTO).

2 This is the trade-weighted average of industrial tariffs that will apply in developed countries once the reduction commitments of the Uruguay Round have been fully implemented. 40% of European imports will even be duty free. Developing countries generally committed themselves in the Round to bind their duties in a horizontal way for the first time, with highest levels mostly around 20-35%. Remaining quantitative restraints on imports, in specific sectors such as agriculture or textiles, but also with regard to generic practices such as voluntary export restraints, are to be phased out by all WTO Members.

even more spectacular rate - by a factor of thirty in less than twenty five years. National economies are more open to foreign competition today than ever before.

At the microeconomic level firms have adopted global strategies. Liberalisation and technological progress have driven them to adopt new production methods: exploiting the comparative advantage of countries, improving their mobility, shifting factors of production, moving into new markets etc. Firms often need to be present on different markets at the same time to stay competitive. As a result countries have become interdependent and the markets of many goods and services have become regional or even global.

The number and size of transnational firms has increased. There are more commercial practices that have an international dimension than ever before. These can lead to an increase in cross-border anti-competitive practices: cartels with international effects, agreements whose effect is to exclude (foreign) competitors in an unfair way, international abuses of a dominant position, or international mergers with anticompetitive effects. Such practices can limit competition and undermine the benefits of liberalisation.

These developments call into question the domestic nature of competition rules and the absence of binding rules at the international level. Many countries or regions have implemented comprehensive competition policies, but lack appropriate instruments to apply domestic competition rules to anti-competitive practices with an international dimension, as well as to obtain relevant information outside their jurisdiction. A framework is then necessary to enhance the effective enforcement of competition rules.

In the Community anticompetitive practices are effectively dealt with in an even-handed and non-discriminatory way across Member States. Competition policy is a cornerstone of the Community legal order. But there are no competition rules at the global level, and in many foreign markets the means for redress against anticompetitive practices that undermine the efforts of our companies trying to compete are inadequate.

There are then four main reasons why the adoption of international rules on competition should be considered:

- as part of the Community's strategy on market access: anticompetitive practices are keeping our firms out of third country markets but they cannot, in the absence of proper enforcement measures in those third markets, be tackled effectively without international rules. European firms also face a competitive disadvantage if they have to compete on world markets with foreign producers operating from home markets that are subject to less vigorous competition policies. Multilateral rules would promote more equal conditions of competition world-wide;
- to avoid conflicts of law and jurisdiction between countries and to promote a gradual convergence of competition laws. There is a real need to minimise the jurisdictional conflicts and resulting trade conflicts that can arise, not only from extraterritorial application of certain competition laws, but also from the application of competition law to anti-competitive practices conceived abroad but implemented within one's jurisdiction. Convergence and conflict avoidance would also increase the legal security of firms operating in different jurisdictions, as well as reduce their costs of compliance with competition laws;
- to increase the effectiveness and coherence of the Community's own competition policy enforcement. As it is in many countries, competition policy is a key factor in

supporting the competitiveness of European industry, in protecting a sound functioning of our market economies and in maximising consumer welfare. It needs instruments of cooperation to take account of the effects of globalisation.

- Enhanced commitment to competition policy enforcement would strengthen the trading system along the lines of our legal systems and market economies, of which competition law is a basic feature.

These concepts are further developed below.

b) The competition perspective

Within the Community the elimination of trade barriers and the application of competition law have gone hand in hand. This approach is unique in the world. The competition policy of the Community has, in its development over thirty-five years, grown to full maturity and is rigorous and neutral in its application.[3] Consequently, the Community has become a highly integrated market, with the competition provisions of the Treaty protecting the integrity of the common market. In a larger perspective, however, the Community's competition policy and instruments have remained essentially domestic, inward-looking and limited to conduct implemented within the common market and affecting trade between our Member States.

Absence of an instrument to deal with transborder cases

Many countries or regions which have implemented comprehensive competition policies nonetheless lack the necessary instruments to apply domestic competition rules to anti-competitive practices with an international dimension. For example, information central to the investigation may be located outside their jurisdiction and thus be beyond their reach. Absent the necessary proof of anti-competitive conduct, competition authorities are unable to take remedial action.

Avoidance of conflict of law and remedies

The 1980s and 1990s have seen a significant increase in international mergers, strategic alliances, joint ventures, licensing agreements etc. These arrangements may face examination by different authorities at the same time with a potential for a conflict in the law or remedy applied to the same case. In an extreme example, divergences in the laws applicable to the same set of facts may result in conflicting conclusions as to the legality of the behaviour under review. However, even where there is a common view as to the anti-competitive nature of the conduct, the remedies imposed in each jurisdiction may be incompatible.

Greater convergence of laws and cooperation between competition authorities would reduce the likelihood of such conflicts and promote greater legal certainty for business.

Avoiding unnecessary duplication of work and costs

The review of commercial practices involves considerable work and costs, both for competition authorities and for the businesses whose conduct is subject to review. If the same commercial practice falls within several jurisdictions the costs increase accordingly.

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[3] In parallel, those member States who did not have competition authorities prior to the establishment of the Community, have enacted legislation and set up enforcement structures at national level.

Greater cooperation and the elimination of unnecessary duplication of effort, can reduce costs to competition authorities and business alike.

Export cartels

Certain practices are difficult to tackle under present rules by any agency. For example, export cartels[4] have, for trade reasons (the wish of countries to improve their terms of trade) not been subject to competition law in exporting countries. For legal and practical reasons too, competition law has not been applied. Absent an effect on the exporting country's markets, the competition authority has no jurisdiction over export cartels. For the importing country, export cartels have an effect on the market and so jurisdiction can be established, but the evidence needed to prove the existence of the cartels is located outside the importing country's jurisdiction.

In all these cases the instruments at the disposal of the Community and its Member States are inadequate.

More generally, in today's liberalised world the Community cannot be without an *external* dimension to its competition policy. The Community interest is to seek the same commitment to competition enforcement from our partners in their markets as we apply to operators, irrespective of their origin, on ours.

c) The trade perspective

Balance of access opportunities

Anticompetitive practices affect the balance of access opportunities negotiated between WTO Members. They belong to the next barriers to trade in a liberalised world. The application of competition law contributes to creating accessible markets and to assuring the overall openness and stability of the trading system. Community efforts in this area need to be matched by our partners. Competition policy is now clearly trade-related, and the application of competition law principles on export markets will help level the playing field and promote equal conditions of competition for our firms competing on international markets.

While governments today are subject to very strict international disciplines in respect of the laws they make or the measures they apply, as soon as these have an effect on trade, no rules exist at the international level to control anti-competitive commercial practices. Such practices can replace formal governmental barriers that have been reduced or eliminated. Arguably, the incentive for firms to engage in anticompetitive behaviour impeding market access, (such as cartels combined with boycotts, exclusionary abuse of a dominant position, exclusionary vertical restraints) increases with the reduction of tariffs and other barriers. Also, as industrial structures in emerging economies increase in sophistication, so will the devices used by firms to protect the market from foreign competition. Finally, governments whose freedom of action to support domestic industries through administrative measures has been curtailed by international rules, may be tempted to maintain lax standards of competition regulation or enforcement, or to grant exceptions, to protect specific industrial sectors.

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[4] Export cartels are a specific problem insofar as their negative effects are only felt in the market of the importing country, while the relevant information is situated in the exporting country. The latter of course has neither an interest, nor the jurisdiction to take action.

Although competition rules do exist on many of our export markets, anticompetitive practices are often impossible to tackle without active enforcement by the domestic competition authority. In the absence of international rules our firms have to rely exclusively on the commitment and tenacity of third country agencies to have their concerns addressed[5].

Recent developments confirm that real or perceived anticompetitive practices can generate trade friction and that the trading system has been unable to effectively resolve disputes in the absence of agreed rules of conduct [6].

Trade instruments

The inadequate application of competition principles on different markets can have other trade effects. Cartellization or similar restrictive behaviour in a foreign country can enable firms to make supracompetitive profits at home and then sell products on export markets below cost price. This may trigger the use of legitimate trade instruments such as antidumping duties by the importing country. But the use of trade instruments will not address the activity on the exporting country's market and may also have negative side effects. From an economic perspective it is therefore less efficient than tackling the conduct on the exporting firm's home market.

Even where there is no evidence of dumping, the protection afforded to companies through an inadequate application of competition rules on their home markets may place them in an advantageous position when competing on foreign markets.

d) Jurisdictional issues: avoiding unilateral measures

Some competition authorities pursue policies to address market access problems, caused by anti-competitive practices on foreign markets, by extending the territorial scope of their national competition rules. This raises concerns of jurisdiction[7] and sovereignty, and can lead to conflicts between countries. Moreover, there are limits to the effectiveness of such a policy given the legal and practical obstacles to seeking information outside one's jurisdiction.

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5 Note, however, that in the US the enforcement system is geared towards private action in civil courts : private parties are actively encouraged to bring cases by the possibility of winning treble damages. The competition provisions in the EC Treaty and national legislations can also be invoked by private parties before national courts. Domestic courts in third countries are often not, however, as easily accessible.

6 Note, however, that in May 1995 Kodak filed a petition with the US Government (USTR) under Section 301 of the US Trade Act, alleging that there are anticompetitive barriers restricting open access to the Japanese market for consumer photographic film and paper. On 13 June 1996 Acting USTR Barshefsky made a determination of "unreasonable practices" and initiated dispute settlement in the WTO, on the grounds of "nullification and impairment" of expected GATT benefits and violation of GATS commitments. Consultations will also be conducted under the 1960 GATT Decision on restrictive business practices.

7 See The 1995 US international antitrust enforcement guidelines. US attempts to impose its law beyond its jurisdiction led Canada, France, Germany, the UK, the Netherlands and Switzerland to adopt blocking legislation. Section 301 of the 1974 Trade Act also allows trade action to be taken to counter the toleration by foreign governments of anticompetitive practices.

Enhanced international cooperation would limit competition authorities' need to resort to extraterritorial action. There are compelling advantages to solving problems through cooperation, especially if such cooperation improves the likelihood that the anticompetitive behaviour can be eliminated.

e) Historical background and recent developments

There have been many initiatives to establish rules on anticompetitive conduct in the past. The Havana Charter was based on the concept of comprehensive rules covering both public and private practices and devoted a whole chapter to restrictive business practices[8]. The Charter was not ratified however and was succeeded by the more modest GATT, which examined the trade-competition interface a number of times in the 1950s and 1960s, but with no clear result [9]. In the 1970s a full Competition Code was finally negotiated in the framework of UNCTAD[10] at the request of developing countries. Its provisions are not binding.

The OECD has carried out significant work in the international competition area for many years. It has adopted a Recommendation that includes a non-binding but functioning notification instrument between Agencies, which has been revised a number of times[11].

The WTO contains limited tailor-made rules on competition in each of its three "pillar" Agreements [12]. The General Agreement on Trade in Goods (GATT) has an annexed Agreement on Trade Related Investment Measures (TRIMs) which provides for a review, to be conducted within five years of its entry into force, to consider whether the Agreement should be complemented with provisions on competition policy[13]. The

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8 See its Chapter V. The 1947 Charter foresaw the establishment of an International Trade Organisation to oversee world trade. The Organisation was mandated to act against anticompetitive practices: it would have had an investigative capacity and be entitled to issue recommendations on remedial measures. The Charter, which also included rules on investment, was not adopted and a number of its provisions were bundled together in the less ambitious GATT Treaty that was, in turn, superseded by the WTO on 1 January 1995.

9 See GATT BISD 7S/29, 9S/28,170.

10 The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was adopted by the UN General Assembly in December 1980. (UN Doc. A/35/48 (1980)).

11 Amended in 1995. This Recommendation includes a voluntary dispute settlement procedure, which has never been used. (C (95) 130/final).

12 The WTO has three "pillar" Agreements, covering trade in goods (GATT), trade in services (GATS) and the trade-related aspects of intellectual property rights (TRIPs). The Agreement establishing the WTO itself as well as the integrated Dispute Settlement Understanding overarch the three separate Agreements. The WTO also includes a number of Plurilateral Agreements, which are binding between the signatories only.

The GATT Agreement on trade in goods contains a provision to ensure commercial conduct of enterprises that have been granted special or exclusive rights (Article XVII GATT - which does not function very well). It has been argued that anticompetitive conduct could be tackled through a so-called "non-violation" complaint.

13 Multilateral rules on investment are currently being negotiated in the OECD and the WTO may start

Agreement on the trade-related aspects of intellectual property rights (TRIPs) contains provisions on the control of anti-competitive practices or conditions in contractual licenses, relating to the transfer of technology or of other proprietary information. It also recognises the right of countries to regulate such practices through their domestic laws, and it provides for consultations and exchange of information between governments where there is reason to believe that licensing practices or conditions constitute an abuse and have an adverse effect on competition in the relevant market. Likewise, the General Agreement on Trade in Services (GATS) contains provisions on consultation and exchange of information, similar to those in the TRIPs Agreement, and requires countries to ensure that monopoly services providers do not abuse their position in activities outside the scope of their monopoly privilege.

However, the scope of these provisions remains very limited for the effective control of anticompetitive practices at the international level. More importantly, the lack of more comprehensive multilateral principles and standards for the application and enforcement of competition policies, may undermine past and present international trade liberalisation efforts.

Parallel to the above developments an increasing number of countries have negotiated bilateral agreements on *cooperation* between their competition authorities. Such Agreements have been negotiated in the Union both at the Community and the national level. At Community level, for example, a cooperation agreement has been concluded with the US. Amongst others it provides for notification of enforcement activities by one party that may effect the important interests of the other; information exchange in certain circumstances; consultation and cooperation and avoidance of conflicts over enforcement activities. The so-called positive comity instrument stands out[14], because it permits a party whose important interests are affected by anticompetitive practices within the other party's territory to ask the latter to examine them and take appropriate measures. In general, the substance of these treaties has also evolved and their contents are more developed today than before.

Notwithstanding the wide consensus on the promotion of deeper bilateral cooperation among competition authorities, bilateral cooperation agreements, similar to OECD efforts, remain limited in scope and in effect. In scope, because although increasing, only the EU and a limited number of countries which are very actively involved in enforcing competition policies, have entered such agreements; and, in effect, because these agreements do not contain substantive rules or principles.

Another question is whether, next to the above, the proliferation of sector-specific trade agreements that include competition provisions which each have their own specific characteristics, can be kept coherent. This becomes more significant as the interrelationship between trade in goods, services and foreign investment increases, and as respective geographic markets overlap. At best, firms will press governments to ensure that their policies are streamlined and consistent. At worst, they will seek to exploit the provisions of such agreements for narrow corporate advantage through forum-shopping.

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work in this field soon. Competition rules may contribute to ensuring that (foreign) investments are only made under sound and competitive conditions.

14 See Article V.

A more coordinated policy grouping together a number of countries and straddling all sectors of the economy then needs to be considered.

II. WHICH FORUM ?

There are four alternative fora to house an international framework: the OECD, UNCTAD, the negotiation of a separate, stand-alone agreement, or the WTO.

The OECD has been involved in the area of international competition rules for a long time and is serviced by an independent Secretariat. It has the organisational capacity to cater for the negotiation of an agreement on international competition rules. However the OECD has three disadvantages: it does not have a track record of dealing with binding commitments and dispute settlement, it does not provide the disciplines on competition-related trade measures (which are dealt with in the WTO), and, importantly, it has a limited Membership.

UNCTAD developed a full Competition Code in the 1970s which has been regularly revised. However, many of the same objections that apply to the OECD also apply to UNCTAD, i.a. the absence of a tradition of dealing with binding commitments and the lack of an overlap with competition-related trade disciplines (which are dealt with in WTO).

It may be difficult to gather the necessary political momentum in different countries for an independent, stand-alone agreement, and its functioning would likely have higher overhead costs.

The WTO is the prime candidate for a framework of competition rules: it has a near universal membership[15]. The WTO can provide a balanced response sensitive to the varying interests and concerns of both developed and developing countries.

The WTO is the recognised institution for trade related international economic rules. Many of its present rules are closely related to competition issues (especially those on subsidies, state enterprises and intellectual property). Some of its Agreements already have a number of specific provisions to address anticompetitive practices (see under I.e above).

The institutional infrastructure of the WTO includes a system of transparency and surveillance through notification requirements and monitoring provisions. These are common to many WTO/GATT Agreements. The WTO also provides a forum for continuous negotiation and consultation, where its Members could bring their trade-related competition concerns. Furthermore, the Organisation has a reinforced and legalised dispute settlement system between governments. This can back-up agreed rules and provide means for conflict resolution.

The WTO also caters for the possibility of negotiating an Agreement with specific

[15] Over twenty five former state trading economy countries, amongst which China and Russia, are currently negotiating their accession to the WTO.

disciplines between a limited number of signatories (thereby creating a so-called Plurilateral Agreement under Annex IV of the WTO Agreement).

III. AN INTERNATIONAL FRAMEWORK OF RULES ON COMPETITION - ISSUES FOR CONSIDERATION

A premise of this Communication is that the creation of an International Competition Authority, with its own powers of investigation and enforcement, is not a feasible option for the medium term. Countries would at this stage be unwilling to accept the constraints on national sovereignty and policies that such a structure would impose. The proposals set out below and in the annex therefore reflect a more modest approach, built on commitments binding governments and providing *intergovernmental* procedures. This is also the model on which the international trading system has been built since the Second World War.

Work on a framework of international competition rules is most likely to make headway if a progressive approach is adopted. The objective would be to strengthen competition policy coordination in steps (building-blocks approach). This could be achieved through the creation of a working group in WTO, whereby initial work might be limited to those areas where consensus can be mustered at an early stage, and more ambitious objectives would be tackled later. The main steps can be identified as follows:

a) Adoption of domestic competition structures

A first step could be taken by WTO Members committing themselves individually to assuring the existence of domestic competition structures. The core elements of such a structure would be :

- having basic competition rules in domestic laws to address anti-competitive practices, covering restrictive agreements of companies, abuse of dominant position, and mergers;

- having or creating domestic enforcement structures to guarantee an effective implementation of those rules, including proper investigatory instruments and appropriate sanctions;

- ensuring access for private parties to the domestic enforcement authorities, including national courts, on equitable, transparent and non-discriminatory terms.

b) Adoption of common rules

In parallel WTO Members could seek to identify a core of common principles, and work towards their adoption at international level. This would :

- promote equal conditions of competition world-wide;

- facilitate closer cooperation between competition authorities and pave the way for

the coordination of international enforcement activity;

- promote a gradual convergence of competition laws.

Common principles or rules can be developed progressively and step by step. It may be opportune, in a first stage, to concentrate on horizontal restraints (price or output fixing or market sharing cartels, bid-rigging, group boycotts, export cartels). Work on other practices (abuse of a dominant position, certain vertical restraints such as exclusive distribution or supply agreements) could start in parallel, but may take more time.

c) Establishment of an instrument of cooperation between competition authorities

Transparency is an essential element of a framework of competition. Provisions could be developed on notification, information exchange and cooperation between competition authorities. These could include provisions regarding cooperation procedures, for example when agencies are launching parallel investigations into the same practice. Negative and positive comity instruments could also be developed further[16].

d) Dispute settlement

Apart from its natural role as a permanent forum for negotiation adapting or strengthening agreed rules and obligations, the WTO also provides a compliance mechanism to help settle disputes between governments when a country claims that agreed WTO rules have been breached. Private parties do not have access to the WTO's dispute settlement system. The WTO mechanisms could be applied if a country for example fails to set up a domestic competition structure or if it fails to react in a specific case to a request for enforcement action lodged by another WTO Member. The relevant rules could be adapted, if necessary, to the specificities of competition law and policy, and could be applied in a progressive way.

The above concepts are further developed in the annex.

IV. RELATED ISSUES

a) Who should participate?

An international agreement on competition rules would bring benefits to all nations of the trading community. All countries could participate in an agreement to incorporate competition law provisions in their domestic laws.

At the same time the application of the *cooperation and enforcement* provisions would require, of participating countries, that they have a sophisticated administration capable

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[16] These could be inspired by OECD provisions as well as those in bilateral agreements. The principle of negative comity implies that a Party will take into account the important interests of another Party before action is taken. Through the positive comity instrument (see also above page 7), a Party may request another to act on the basis of its own powers, to investigate activities which adversely affect the important interests of the first Party.

of handling sensitive information and of assessing commercial practices in a dynamic context. Many developing countries do not yet have this administrative machinery.

It is therefore realistic to expect that, if adopted, cooperation provisions of a competition agreement would, in a first stage, apply only between a limited number of signatories with mature antitrust agencies. Provisions could group together developed and advanced developing countries to start with, and gradually come to include more countries. Any country able to shoulder the obligations of the agreement could be eligible to participate.

A different intensity of cooperation, for example in the field of information exchange, could apply between different countries.

b) The interest of developing countries

Private anticompetitive practices have long been a concern for developing countries. As the turnover of many multinationals has come to surpass the GDP of middle size developing countries, developing countries have seen a growing need for a minimum of discipline on private conduct in their markets. It was in response to this that UNCTAD developed its competition Code in 1980. It would certainly be consistent with this stance for developing countries to support a further strengthening of international rules, certainly if these would come to cover practices, such as export cartels, that today escape effective control [17].

Even if developing countries might not, in a first stage, participate in the provisions on cooperation between competition authorities (see under III a. above), they would be beneficiaries of enhanced control over anticompetitive practices with an international dimension. They would also, like other WTO Members, have access to the dispute settlement provisions if agreed basic rules and enforcement structures had not been properly implemented by other countries. Moreover, they would benefit from the acceptance by developed or newly industrialised countries of MFN obligations in the competition field, even if their own obligations were lighter (eg. in respect of transitional periods). Finally, all WTO Members, including developing countries, would benefit from possible dispute settlement judgements which might create new market access opportunities.

Insofar as competition rules can ensure that investments are made under sound and fair conditions, effective competition structures can support liberal investment regimes.

The establishment of appropriate competition structures is a complex task and requires substantial resources and training. A framework on competition should include provisions on technical assistance for those countries requesting it.

c) The relation to trade defence instruments

[17] Note, however, that a competition framework cannot be a panacea for the difficulties faced by developing countries as a result of their limited *domestic* instruments and capacities of investigation. This reinforces the need for developing countries to be able to benefit from technical assistance.

The relation between the elaboration of a competition framework and the functioning of existing trade instruments is a key issue in the trade-competition debate. It is true that the incorporation of competition provisions into trade law and/or more comprehensive and effective enforcement of competition policies through increased international cooperation, would lessen the need to have recourse to instruments of commercial defence. However, competition instruments cannot be seen as substitutes for trade instruments. The latter only lose their *raison d'être* in the context of fully integrated markets. A framework of competition rules would, therefore, complement present trade law and create a *new* instrument to tackle anticompetitive behaviour in markets which are not integrated. Thus the development of new instruments would complement, not supplant, present instruments.

The above is illustrated by practice within the EC itself. Antidumping action is excluded on intra-Community trade, as this is a fully integrated market [18]. This integration has meant, for Member States: the elimination of all tariffs, the elimination of measures of equivalent effect to tariffs (which is a wider concept than GATT's national treatment obligation) and the adoption of the four freedoms (goods, services -including establishment, capital - including investment, and labour). The single market programme and relative currency stability have been added to this. Competition law has been applied effectively, amongst others with an explicit objective to integrate the markets of Member States, by an authority with autonomous powers of investigation and enforcement. All of these elements are absent in present day world trade. Finally the framework explored under II. above falls well short of EC competition structures, and would have to prove its worth.

d) The relation to the Community legal order and Member States

A basic assumption of this Communication is that a framework of competition rules, negotiated in WTO, would be compatible with EC competition law, in particular the provisions of the EC Treaty. The WTO instrument would, as is traditional in GATT/WTO, apply to governments and not be self-executing or have direct effect. It would also be much more general than the relevant provisions under EC law, and the emphasis would in the first stages be on procedural obligations. For these reasons alone it is highly unlikely that there should be any friction between a WTO panel report on the rules agreed in the WTO, and ECJ case law on Articles 85 and 86 and related legislation[19].

Moreover firms are already, including within the Community, subject to different competition regimes, and an objective of an international framework is exactly to promote equivalent and rational application of competition principles on different markets.

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[18] The EEA Agreement between the EC and EFTA countries follows the same approach: anti-dumping is excluded in those area's where the "acquis communautaire" has been taken over. In trade between the Community and the countries of central and eastern Europe, however, anti-dumping action can still be taken, as well as between the US, Canada and Mexico in the NAFTA context. The same applies between the EU and Turkey: anti-dumping action remains a possibility despite the customs union agreement.

[19] A case where a WTO instrument and a corresponding EC regulation are even closer than in the competition field is anti-dumping. In this case the latter is even an implementation of the former, yet friction between panel reports based on the WTO instrument, and ECJ judgements based on the EC regulation, has so far been avoided.

A second issue concerns the question of participation in an international framework. As competition is not an exclusive Community competence, international cases might involve either the Community (if trade between Member States were affected) or a single Member State (if it alone were affected). A framework of rules would have to take account of both cases, while preserving the unity of Community action in the trade field.

V. CONCLUSIONS

The Commission requests the Council to take note of this Communication.

Noting that by pursuing stronger multilateral efforts the benefits of greater convergence and improved competition standards and enforcement would be realized world-wide;

Considering that an international framework of competition rules can promote a level playing field and could therefore reduce the costs, distortions and conflicts in international trade arising from differing domestic competition regimes;

Recognising that, alongside continued bilateral cooperation with principal partners stronger multilateral cooperation in the field of competition is desirable and feasible at this time, and would contribute significantly to a more efficient, stable, and integrated global economy, from which both the Community and its Member States, as well as all WTO Members, would benefit;

Recognising that the possible development of an international framework of competition rules is in the interest of all trading nations, irrespective of their level of development;

Considering that the Community has a sound experience in applying uniform competition principles across different countries.

The Commission suggests the Council to conclude along the following lines:

- The Community should prepare a position for the WTO Ministerial meeting in Singapore in December 1996; this should propose to WTO Members that the Organisation establish a Working Party to conduct exploratory work, from 1997 onwards, on the development of an international framework of competition rules;

- Such a framework could include, in particular: a commitment by all countries to adopt domestic competition rules and enforcement structures and, for a limited number of countries, an instrument to allow information to be exchanged between competition authorities, an instrument to request action on foreign markets, and an intergovernmental dispute settlement mechanism;

- that the European business community should be consulted and appropriately associated as progress in this area is made;

- that the Community should take the lead on this issue and initiate efforts to build international consensus and encourage other WTO Members to support multilateral work in this field;

- to request the OECD and UNCTAD to pursue their work on trade and competition taking account of developments in WTO.

ANNEX

This annex outlines the main concepts set out under Part III of the Communication. Many of the concepts have been extracted from OECD documents and other sources, and are included on an exploratory basis:

a) Adoption of Domestic Competition Structures

The process towards an international framework of competition rules could be carried out in a progressive way. A first step could be to ensure that each country provides for competition rules in its national legislation, covering restrictive agreements, abuse of dominant position and mergers. This would include the provision of a set of equitable procedures ensuring an effective application of the rules, including investigatory instruments and appropriate penalties, as well as access to the judicial system, transparency and non-discrimination.

Although an increasing number of countries have a sophisticated competition law for the effective control of restrictive business practices, some (developing) countries have yet to introduce such rules. An added advantage of agreement by all countries to enact competition laws is that domestic courts would become an integral part of enforcement procedures, as they are in most industrialised countries already[20]. Firms could not then be obliged to respect agreements which were forbidden: these would be unenforceable before national courts.

Another important issue is sectoral comprehensiveness. A recent OECD study has revealed that even in OECD countries substantial gaps exist in the coverage of competition laws; most countries exclude sectors of the economy from their competition law application[21]. A first step in addressing this could be taken by a listing of these sectors and a commitment to stand-still and gradual reduction by all countries[22].

Competition rules should likewise apply to all economic operators. Public enterprises and companies with special or exclusive rights should be covered, except for that part of their activities where their public task overrides the interests of competition law application.

b) Agreement on Common Rules

There is general recognition of the negative effects on competition of *horizontal* restrictive practices: cartels, market sharing, boycott of foreign firms, price fixing, bid rigging, collective exclusive dealing. It should be possible to formulate international provisions at an early stage to combat these practices. Relevant provisions should also

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20 A similar approach was adopted in the Uruguay Round negotiations on the respect of intellectual property rights (TRIPs).

21 Overview on Coverage of Competition Laws and Policies by Prof. B. Hawk.

22 See OECD work in this respect.

cover export cartels. These are exempted from the applicability of competition law in exporting countries. Although such cartels are covered by the legislation of most importing countries[23], they are hard to tackle due to a lack of information in the importing country. An international agreement to outlaw export cartels would put an end to these "beggar thy neighbour" policies.

Vertical restrictions, such as exclusive distribution or supply agreements, should also be considered, but a longer period may be required to reach consensus, and countries may wish to maintain a greater degree of latitude in their assessment of the effects on competition of vertical restraints[24].

A common approach to vertical restrictions could be found by concentrating on restrictions which create barriers to market access. The working group could examine to what extent competition authorities could take into account the international dimension and weigh the effects on domestic competition of market access restrictions, when a complaint is lodged through the provisions of the international framework (see later).

Such a review by a competition authority would reflect the fact that no adequate assessment of competition cases can be made without careful examination of the international context: competition policies cannot be identical in different countries, and that each market needs to be assessed in its own context, in consideration of the economic conditions and structures influencing the openness, and thus the competitive situation, of that market. In their review of practices, competition authorities would, as many already do, give weight to factors such as: the effect of trade barriers (tariffs and non-tariff barriers), regulatory barriers (i.e. divergent standards, restrictions on distribution or supporting services), foreign investment barriers, the import and foreign investment ratio, and the corporate groupings structure. Competition authorities would continue to base their decisions on the efficiency goals that are fundamental to competition policy. But the principle, that the international dimension needs be taken into account in international cases, would be incorporated into common rules with respect to all anti-competitive practices[25]: As a market would be assessed to be more closed, greater weight would be given to the importance of foreign competition to balance entry barriers.

This approach might also be useful in working towards agreement on *abuse* of dominant position. It is generally agreed that exclusionary practices; hindering of access to essential facilities; practices with possible foreclosure effects such as fidelity rebates or tying arrangements; and production limitation can all amount to abuse of dominant

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23 E.g. Wood Pulp - judgement of the European Court of Justice of 27 September 1988, 1988 ECR 5193.

23 Partly due to differences in underlying objectives and principles the Community and some trading partners have different approaches: the Community is relatively strict on vertical restrictions that interfere with market integration - export bans and some territorial restrictions; the US take a more tolerant view. An exception is resale price maintenance which is prohibited in most juridictions.

25 This approach is similar to the one taken in the Havana Charter (Article 46), where an absense of government action to prevent a limitation of access to markets could constitute a violation of its provisions. The jurisprudence of the European Court of Justice follows similar lines, i.e. that a practice should be assessed in its economic and legal context, and to the weight traditionally given to the objective of ensuring market access, although only between Member States. E.g. Henninger (Delimitis) - judgement of the ECJ of 28 February 1991.

position. As European competition policy enforcement has shown, these practices are capable of affecting trade and creating access barriers. Other practices would require further consideration: excessive pricing, predatory pricing, some vertical arrangements.

There has been a great increase in the number of international *mergers*. It would be premature to suggest international substantive rules in this area. At the same time firms are today having to notify the same merger to several different competition authorities. Procedural harmonisation would avoid unnecessary duplication of efforts of firms and agencies and, in encouraging cooperation, would limit the potential for contradictory decisions[26]. A first step could be taken by harmonising notification filing forms and deadlines[27].

c) Establishment of Instruments of Cooperation between Competition Authorities

Meaningful information exchange is a key element of cooperation between competition authorities. At the same time business information is subject to strict legal protection in all jurisdictions and it is difficult to imagine confidential documents being exchanged between competition authorities as a routine matter[28].

Information exchange would have to be developed cautiously. In a general sense the will of agencies to cooperate will certainly be the greatest when they are investigating a same case and intend to apply similar enforcement criteria. Exchange becomes more difficult when different solutions are being envisaged. At the extreme there may be a situation where one agency seeks clear enforcement measures while a counterpart has no intention of taking action. Although the last example is the most difficult, it is then that the need for exact information may be the most acute.

An important first step towards the development of rules on information exchange could be to catalogue the types of information that are considered confidential in different countries, and what forms of legal protection apply.

An international framework could, in the beginning, provide for the exchange of non-confidential business information between a group of core participating countries. A further step might be taken, if this mechanism is felt to function well, by considering

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26 The 1990 Merger Regulation has extrajurisdictional *effects*: it includes competence for the Commission to examine mergers of firms headquartered outside the EC, if they have a turnover of 5 billion Ecu or more and where two of the undertakings concerned have a turnover within the EC of at least 250 million Ecu. As more Agencies scrutinise mergers it is possible that one Agency may forbid it, while another imposes conditions such as divestiture of certain parts or alternatively may see no objection at all.

27 The OECD 1993 Whish/Wood "Merger Process Convergence Report" has made a number of proposals to harmonise international procedures in the field of merger notifications.

28 It should be recalled that extensive international information exchange possibilities do exist in certain sectors, for example between authorities controlling securities trade. And different levels of information exchange have already been agreed in the competition field: the EEA Agreement for example provides for a sharing of information between the Commission and the EFTA Surveillance Authority. Although the EC/US Cooperation Agreement does not provide for the exchange of confidential information, US Congress in 1994 did pass new legislation to enable the antitrust agencies to pursue reciprocal arrangements for the purpose of exchanging confidential information, even in cases where sanctions that may be taken are different to those under US law.

whether certain authorities are ready to exchange information of a more detailed nature bilaterally on the basis of consent. Clearly, such an exchange of confidential information would have to be made subject to a set of criteria and guarantees. It is conceivable that agencies would wish to make exchange subject to the fulfilment of certain conditions (e.g. guarantees on confidentiality or limits to the use of the supplied information): in particular the receiving authority would have to commit to refrain from taking extraterritorial action on the basis of that information. In any case, full exchange obligations are likely to be a longer term objective.

Clearly the European business community should be consulted and closely associated as options and conditions regarding the exchange of confidential information are explored.

In antidumping investigations officials actually have extra jurisdictional information *gathering* possibilities - they are usually given direct access to the files of the firms they investigate in third countries. A similar element could be considered in competition cooperation by enabling officials to assist their colleagues in third countries when investigations are being pursued. The cooperation procedures that apply in internal Community cases between DGIV and Member State authorities is one example of such procedures.

Another key element of cooperation between authorities is the positive comity instrument, which has already been included in recent bilateral competition agreements[29]. Options need to be explored to further develop this concept and to incorporate provisions that will generate enforcement by third country agencies, while respecting each others' autonomy. In particular it could be considered whether and under which conditions competition authorities could, within reasonable limits, be obliged to investigate on behalf of one another, and to have to indicate to a requesting counterpart within an agreed time-limit whether enforcement action is envisaged[30]. A decision not to act would have to be reasoned and supported by relevant factual material.

d) Dispute Settlement

The gains of international cooperation have been set out earlier. It is clear, however, that the advantages would be the greatest if countries can be committed to abide by agreed rules. That would generate a commitment to enforcement. A framework should therefore have a binding character.

A central question concerning the development of a dispute settlement system, which would apply between governments, relates to the standard of review that an international panel could apply. At a first stage, review by a panel might concentrate on procedural aspects: whether a country has enacted a domestic competition structure as agreed; if a country is subject to information exchange obligations, whether these have been complied with; and, if a country has commitments in this area, whether the transparency

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29 See also above in footnote 16.

30 This has implications for the allocation of resources of antitrust agencies. It may be necessary, in a first stage, to put a maximum on the amount of complaints one agency could lodge to another within a framework per year, or to have a threshold (e.g. turnover in the product concerned) below which the mechanism would not apply.

motivation and timetable requirements of the positive comity instrument have been met in a specific case. The dispute settlement system could be extended to include review of whether the statement of the reasons for the national decision was adequate, whether the facts have been accurately stated, whether there has been any "manifest error of appraisal" of the facts or whether there has been a "misuse of powers".

An important issue would be the deadlines applied to resolution of international disputes. This is because firms confronted by anticompetitive practices in many cases have the option of asking for application of a protective trade measure. These can be activated at short notice. Clearly a framework to tackle anti competitive practices through *competition instruments* will have to function with short deadlines if it is to offer a credible alternative.

Another key issue relates to remedies when a country is condemned by an independent panel. Countries could be authorised, in the absence of corrective action by a foreign agency and under specified conditions, to take extra jurisdictional action through use of their own domestic competition laws. In cases where this is not viable, (for example if there are no subsidiaries of the targeted firm or firms in one's jurisdiction), measures usually foreseen in the trade context, such as the withdrawal of tariff concessions[31], are likely to be more acceptable than competition sanctions, e.g. international fines, as a next step[32].

Insofar as an agreement on competition might include binding elements, it is possible that a derogation clause of some kind may be considered necessary. This would cater for cases where the essential interest of a party is felt to outweigh the enforcement interest of a trading partner requesting action, for example if the latter has invoked the positive comity instrument. Such an exceptional situation could arise if an authority allows restructuring agreements with restrictive effects. Such issues have been resolved in trade law cases by allowing GATT/WTO Members, in exceptional cases, to derogate temporarily from their obligations and take safeguard action to protect their domestic industries. A similar approach in competition cases, provided measures taken are time-limited, justified, non-discriminatory and transparent, might need to be considered.

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31 The WTO system is geared towards conflict resolution and the withdrawal of trade concessions is only used as a measure of last recourse. In WTO the resolution of conflicts has a sliding scale starting with (1) agreement of the parties at any point during proceedings through consultations; (2) after determination by a panel of a violation of WTO rules, a request to bring the incriminating measure or practice into conformity with the WTO; (3) if this is not possible, the offering of compensation (by means of new or enlarged market access opportunities, for example through tariff reductions or other liberalising commitments), and finally, if neither (1), (2), or (3) are possible; (4) the authorisation to suspend an equivalent amount of concessions.

32 From a competition angle the withdrawal of trade concessions may seem to contradict the objective of increasing competition, as its effect would be to lessen access opportunities to a market. In GATT/WTO practice, however, the ability to withdraw trade concessions has actually had a liberalising effect, and has pressed countries to bring their practices into line with GATT law. Countermeasures have only been authorised once.