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**COMPETITION POLICY
IN THE NEW TRADE ORDER :
STRENGTHENING INTERNATIONAL
COOPERATION AND RULES**

Report of the Group of Experts

This report represents the views of the group of experts and does not bind the Commission.

A set of annexes to the report, containing reflection papers of the three external experts and useful background information, is available (in English) in a separate volume.

**COMPETITION POLICY
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Report by the Group of Experts¹

This report is in four parts:

- I. The reasons for strengthening international cooperation in competition policy.
- II. The European Union's recent experiences in bilateral cooperation.
- III. The inadequate nature of present international cooperation.
- IV. The Group's recommendations for improving international cooperation and the application of competition policy rules.

¹ The names of the members of the group as well as the text of the letter of convocation are annexed to this report.

I. THE REASONS FOR STRENGTHENING INTERNATIONAL COOPERATION IN COMPETITION POLICY

Markets have become more and more open since the Second World War. As a consequence of eight rounds of negotiations under the General Agreement on Tariffs and Trade (GATT), barriers to trade such as tariffs have been brought down to historically low levels. Where original GATT tariffs were situated around 35%, the average weighted import duty on industrial goods for trading partners like the EU, the US and Japan will be below 4% as the results of the Uruguay Round are fully implemented. About 40% of imports into these markets will be free of duties. In parallel to this multilateral development, bilateral and regional free trade agreements have also flourished.

As barriers to trade have come down, both in the form of tariffs and through disciplines on non-tariff barriers, the growth of world trade has surpassed the growth of national economies by on average 2% per year. Trade has become the motor of economic expansion.

The effect of liberalization has been, at the micro-economic level, to impose structural changes on international economic activity. Business has become global, as firms have sought to take advantage of new markets and new production opportunities. Integrated international production methods have increasingly been adopted, whereby the comparative advantage of different countries or regions is exploited to the full. At the level of finished products, companies facing competition from a new competitor on their home market have sought new markets abroad to maintain profitability and competitiveness.

The effect of these twin developments of liberalization and globalization has been to interconnect the different markets of the world, without their being fully integrated.

While in the liberal post Uruguay Round trading system the effective application of competition law becomes an important contributor to creating and maintaining open and accessible markets, and thus to enhancing the stability of the system, there are as yet no binding rules relating to the practices of private firms at the multilateral level. Moreover, the effective application of competition law is a basic feature of open market economies - yet absent in the present framework of international rules - and should be further consolidated. It is against this background that a strengthening of international cooperation between competition authorities and a first harmonization of certain national rules and procedures is recommended.

There are several further reasons justifying such an approach.

1. Given the globalization of the economy, there are more and more competition problems which transcend national boundaries: international cartels, export cartels, restrictive practices in fields which are international by nature (e.g. air or sea transport, etc.), mergers on a world scale (e.g. BT-MCI²), or even the abuse of a

² OJ L 223 of 27.8.94

dominant position on several major markets (e.g. the Microsoft case³). Competition authorities therefore have a prime interest in cooperating to solve these problems together in order to enhance the effective enforcement of competition rules.

2. As a result of a lack of rules at international level, firms which are present in several countries are sometimes subject to different national competition rules. Procedures, time limits and the criteria for taking decisions can vary considerably. It is even possible for a merger or a concerted practice to be authorized in one country and prohibited in another. These differences push up costs (more procedures, higher legal costs, etc.) and increase uncertainties and may therefore constitute barriers (sometimes major ones) to the expansion of trade and of international investment.
3. In some countries action against anticompetitive practices is less rigorous than in others and distortions may result. Also the anticompetitive practices tolerated by one competition authority sometimes result in access to the market concerned being closed, even though foreign firms could provide additional competition which would be beneficial to the consumers of that country.
4. Some countries have sought to remedy such problems by extending the territorial scope of their competition rules. However, this approach can lead to conflicts between competition authorities. In the absence of international cooperation, there are also legal and practical obstacles to seeking on foreign territory the information necessary to establish the existence of infringements. There is then a risk of a competition authority having to abandon prosecution of the alleged infringements for lack of sufficient proof.
5. Developing countries in particular have an interest in ensuring effective controls on anti-competitive behaviour. The worldwide lowering, in the context of the Uruguay Round, of governmental market access barriers for trade in goods and services, trade-related investment measures and intellectual property rights may leave them more exposed to the risk of anticompetitive practices. In the absence of appropriate domestic rules, they may also risk being subjected to the extraterritorial application of other countries' competition laws.

All these problems are liable to undermine the positive results of the Uruguay Round agreements. This is why, as we shall see later, the Agreement establishing the World Trade Organization (WTO) contains a number of rules relating to competition. In addition, in negotiations under the aegis of the WTO, recommendations have been made to deepen the competition aspects of the trade-related provisions (e.g. those concerning commercial monopolies, trade in services, intellectual property rights and "trade related investment measures"). All the same, a more systematic and more complete approach to restrictions on competition resulting from the activities of commercial firms is still necessary.

³ IP/94/653 of 17.7.94

II. THE EXPERIENCES OF THE EUROPEAN UNION WITH REGARD TO COOPERATION

The European Union has a wealth of experience in cooperation between competition authorities and in the development and enforcement of internationally applicable competition rules.

1. Cooperation within the European Union

In accordance with the texts in force⁴ Member State competition authorities are associated with the procedures carried out by the Commission under its own competition powers.

The following provisions are particularly significant in the context of the present report :

- the most important documents in each case, including certain information of a confidential nature obtained by the Commission from firms, are to be transmitted to these competition authorities, which can also be represented at the oral hearings of firms;
- these authorities may make their opinions known on the draft decisions in individual cases within the Advisory Committees on Restrictive Practices and Dominant Positions and the Advisory Committee on Merger Control;
- Member State authorities may assist the Commission, at its request, during investigations carried out on the premises of firms; or may themselves carry out the investigations requested by the Commission;

Furthermore, the development of competition law, now extended to all Member States, and the establishment of national administrative authorities together increase the opportunities for cooperation between these authorities and the Commission⁵. Such opportunities are today exploited more widely than before, whether by leaving it to the national authorities, when they are in the best position to do so, to enforce their own or Community legislation to company activities

⁴ See EEC Council Regulation No 17 (OJ No 13, 21.2.1962, p.204) and Regulation No 99/63/EEC of the Commission (OJ No 127, 20.8.1963, p.2268). Similar provisions are contained in the Regulations applying Articles 85 and 86 to the various transport sectors and in Council Regulation (EEC) No 4064/89 (OJ No L 395, 30.12.1989, p.1 corrected by OJ L 257 of 1990) and Commission Regulation (EEC) No 3384/94 (OJ No L 377, 31.12.1994, p.1) on concentrations.

⁵ A distinction should be made between cooperation between the Community and national competition authorities and the application by national courts of Community law, which the Commission encourages (cf Notice on cooperation between national courts and the Commission, which was adopted in 1992; OJ No C 39, 13.2.1993, p.6).

which could be dealt with by the Commission⁶, or by, for example, calling on the resources of the national authorities to initiate the investigation of cases on which the Commission may reserve the right to act itself at a later stage.

Thus some of the main aspects of international cooperation in the field of competition (exchange of confidential information, one competition authority being able to make its point of view known to another competition authority which is handling a case affecting the first authority's interests, machinery whereby two authorities can agree on the allocation of a case on the basis of criteria such as the resources available or the location of the "centre of gravity" of the company behaviour in question, etc.) have been or are being, in varying degrees, experimented with within the Union, and increasingly so in the last few years.

2. Cooperation with the other countries of Europe

Apart from the experience gained within the Union, the Union has embarked on a process of close cooperation with neighbouring countries.

- 2.1 An elaborate model of cooperation was established under the Agreement on the European Economic Area (EEA), involving a full exchange of information between the EFTA Surveillance Authority (ESA) and the Commission for cases concerning both the signatory EFTA countries and the Community. The ESA and the Commission are even each entitled to formulate an opinion in the proceedings brought before the other authority. This situation was made possible by a Protocol to the Agreement derogating from the normal Community rules on confidentiality.

The accession to the Union of Austria, Finland, and Sweden will admittedly reduce the practical scope of these provisions in the future, but do not deprive the EEA arrangements of their value as a model for future international cooperation agreements.

- 2.2. With the Central and East European Countries (CEECs) cooperation is provided for in the implementing rules introduced under the Europe Agreements. The Commission and the competition authority of each country concerned undertake in particular to notify one another of the cases they are handling which also concern the other authority. However, the authorities are not obliged to communicate information where its transmission would be prohibited by law or incompatible with their respective interests. Each authority further undertakes to take account of the other's observations and to seek mutually acceptable solutions.

⁶ On the basis of Article 9(3) of Council Regulation No 17 (OJ No 13, 21.2.1962, p.204) and similar provisions in the equivalent sectoral Regulations or, for concentrations, on the basis of the referral procedure laid down in Article 9 of Regulation (EEC) No 4064/89.

3. Cooperation with the United States

3.1. Another illustrative example of cooperation is the Agreement between the European Communities and the Government of the United States of 23 September 1991⁷. The content of this agreement may be summarized as follows:

- Article II requires each Party to notify the other whenever the enforcement activities of one of the Parties may affect the "important interests" of the other Party. The text also specifies the time at which this notification is to be made;
- Article IV provides for cooperation and coordination in the enforcement of the competition rules;
- Article V contains a provision on "positive comity". This is probably the most innovative aspect of the Agreement: either Party may request the other to act, on the basis of its own powers, to investigate activities which adversely affect important interests of the first Party. The notified Party is free to decide whether to undertake enforcement activities, but if it does so it is obliged to advise the first Party of the outcome.
- Article VI contains the principle of "negative comity", which states that when each Party acts, it has to take into account important interests of the other Party.
- lastly, Article VIII provides that the Agreement shall not derogate from the confidentiality rules of each of the Parties.

3.2. This Agreement has resulted in a large number of notifications, the content of which is relatively limited because of its purely factual nature.

Bilateral meetings and many other contacts also take place, mainly to discuss priorities with regard to effective enforcement and cooperation on specific cases.

Nonetheless, it is clear that the ban on exchanging confidential information has created a major obstacle to close cooperation.

3.3. The Microsoft case (summer 1994) is unusual from this point of view, in that the company consented to an exchange of such information. This permitted closer cooperation whereby the two competition authorities jointly negotiated an eventual settlement⁸.

⁷ See OJ L95 of 27.4.1995 as corrected by OJ L 134 of 20.6.95

⁸ The recent decision of the Federal District Court not to approve the consent order as being in the public interest has no consequences for the undertaking given by Microsoft to the European Commission, which stands independently of the US remedy.

- 3.4 It should be noted that in November 1994 the United States Congress adopted the International Antitrust Enforcement Assistance Act, which contains a provision permitting the conclusion by the US competition authorities of international agreements providing for the exchange of confidential information, provided certain conditions are met. It is also worthy of note that on the basis of this new law, the US authorities could provide information to the competition authorities of countries whose important interests are affected by anticompetitive behaviour organized within the US, but which is not illegal under US law.

4. Cooperation with other third countries

Cooperation with other competition authorities is at present far less developed and gives rise to a simple exchange of notifications under the 1986 OECD recommendation (see Annex 6⁹) and to informal consultations in a limited number of cases.

With Japan, cooperation has started through the organization of bilateral meetings in which subjects of common interest are discussed (review of recent legislation, discussions on particular sectors and cases) and the organization of public seminars in which experts, and business and consumer representatives take part. The first seminar took place in Tokyo in November 1993 and the second was held in Brussels on 16 September 1994.

Links with authorities in Canada, Australia and New Zealand have been established in the same way but substantive cooperation needs to be developed further. In addition, on the basis of an authorization from the Council, the Commission has just begun negotiations with the Canadian authorities with the aim of concluding a cooperation agreement.

⁹ References to numbered annexes relate to the set of annexes published in parallel with this report.

III. LIMITS TO PRESENT INTERNATIONAL COOPERATION IN THE FIELD OF COMPETITION

1. Bilateral cooperation still too limited

In contrast to the USA, the number of international bilateral antitrust cooperation agreements and mutual legal assistance agreements concluded by the European Communities remains very limited. Apart from the restrictions with regard to the exchange of confidential information¹⁰ already mentioned, the limits to existing instances of cooperation (in particular between the European Union and the United States and between the European Union and Japan) are mainly due to the fact that competition law and its enforcement differ as between partners. For example, the purpose of Community law, via competition, is not only to increase the efficiency of firms or to improve the allocation of resources, but also to bring about the integration of the internal market. The latter concern is not so pressing or non-existent in the United States. This results in a different approach, for example, to vertical restraints or the abuse of a dominant position.

Similarly the implementation of competition policy is not always, either in degree or in its practical implementation, independent of the general policies of a given country. Thus United States competition policy has evolved in ways which are not necessarily reflected on this side of the Atlantic.¹¹ Differences in policy or in the manner of implementation of competition rules also exist between the European Communities and other of its partners.

Furthermore, in the case of bilateral cooperation between the European Union and the United States, it appears that the ambitious provisions of the existing Agreement have not (yet) been fully exploited. In particular it still remains to be seen how far the "comity" procedures are really likely to influence competition authorities' natural propensity not to be concerned with the external effects of their decisions. Despite recent court decisions¹² and views expressed some months ago by the United States competition authorities, it is important to avoid an unduly restrictive interpretation of the concept of comity which would make it applicable only in the (rare) cases of "pure conflict" of law, i.e. when a firm cannot comply with the requirements imposed by one jurisdiction except by infringing the law of another jurisdiction. Given the importance of the Agreement between the European Communities and the United States, it is to be hoped that

¹⁰ Cooperation between Canada and the United States does, however, include the exchange of confidential information for cases pertaining to criminal law.

¹¹ It should be noted that the guidelines of the competition authorities give an imperfect reflection of the real effects of applying the rules in force. The role played by the national courts, which can vary in importance, depending on the country, should be taken into account.

¹² Cf for example the 1993 judgment of the United States Supreme Court in *Hartford Fire Insurance Co v. California*, 113 S.Ct. 2909.

its most promising provisions will be fully exploited and that the way will not be open for an excessive unilateral enforcement of competition rules.

2. The absence of an international framework for competition and of common rules accepted worldwide

The post war Havana Charter was a first attempt to introduce competition rules into the international arena but failed when the Charter was not ratified by the principal countries concerned. Since then efforts to create an international competition rules framework have run aground and this despite the provisions of the 1986 OECD recommendation on cooperation between member countries on restrictive business practices affecting international trade. The situation today is one where the circulation of information and cooperation between competition authorities are inadequate.

Unlike other areas, and especially the area of international trade thanks to the role of the World Trade Organization, there are no conciliation and arbitration procedures relating to anticompetitive practices in the event of disputes and differences.

The immediate result is that competition authorities have less incentive to achieve practical results through bilateral cooperation and especially through an equally strict enforcement of competition rules or a harmonization of rules and procedures. In particular a strict competition authority generally has difficulty in influencing a less strict authority through bilateral cooperation.

It should be noted, however, that at the Ministerial Meeting in Marrakesh in April 1994 which concluded the Uruguay Round and established the WTO, competition policy was explicitly mentioned as an area for which a rules framework could be drawn up. The WTO Agreement also provides that its Council for Trade in Goods shall, not later than five years after the date of entry into force of the Agreement on 1 January 1995, consider whether the multilateral rules with provisions on competition should be complemented (Article 9 of the Agreement on Trade-Related Investment Measures). As for the Agreement on Trade in Services, it already has some rules dealing with business practices which restrict competition (Articles VIII and IX). The Agreement on TRIPS also includes various articles (e.g. Articles 8, 39 and 40) recognizing the need for competition rules so as to prevent abuses of intellectual property rights and anticompetitive practices in contractual licences. In the accession negotiations with (former) State trading countries there is increasing concern about the need to supplement the inadequate GATT rules on state trading enterprises by additional guarantees of market access and undistorted competition. An opportunity for multilateral action has therefore been created, which should be exploited more fully.

IV. RECOMMENDATIONS OF THE GROUP FOR IMPROVING INTERNATIONAL COOPERATION AND THE ENFORCEMENT OF COMPETITION POLICY RULES

The Group examined the various possible options for improving international cooperation in the area of competition policy.

Before weighing these options it must be recognized that the way in which competition functions on international markets may be affected either because of the action (or inaction) of countries, or because of company practices.

As far as the responsibility of countries is concerned, competition on international markets may be affected either by specific actions (e.g. the enactment of national rules which limit the ability of foreign business to compete, the implementation of rules which discriminate against foreign competitors, the organization of export cartels, the exemption of certain sectors of activity from the scope of competition law, etc.), or by a lack of action (e.g. because there is no national competition law, or it is not implemented).

As for company practices liable to restrict competition on international markets, several types of situation can be identified:

- collective practices of firms located in different countries which affect both domestic competition in the various countries concerned and international trade (e.g. international cartels);
- collective practices which emanate from firms in the same country and affect the ability of foreign firms to penetrate the country concerned. These may be prohibited practices such as national cartels, but also practices which are not necessarily a barrier to competition in that country or are not considered contrary to national competition law (such as certain vertical practices between producers and distributors);
- restrictive practices which emanate from firms in the same country and restrict competition in one or more other countries (e.g. export agreements or the abuse of dominant positions).

The various types of restrictions on international competition mentioned above may pose different problems from the point of view of regulating competition internationally.

For example, in the case of an international cartel, there may be an agreement between the competition authorities of the countries concerned on initiating prosecutions but problems may arise concerning competence (which authority has to act) and evidence (investigation by the designated authority implies that it has powers of discovery outside its own jurisdiction in the countries in which the other members of the cartel are located). A framework for cooperation between competition authorities and for an exchange information is then necessary.

Conversely, when the practices in question emanate from firms located chiefly or exclusively in a specific country, that country's authorities will generally be in the best

position to take action against the practice whose effects will either be chiefly felt outside the country (in the case of an export cartel or an abuse of a dominant position on international markets by a firm situated in the country concerned) or felt both inside and outside the country concerned (in the case, for example, of horizontal or vertical restrictive practices which limit the ability of foreign firms to export into the country concerned and restrict competition in that country).

In these last examples, the international community still needs to have the power to ensure that the authorities of the country in which the offending firms are located will act to eliminate the anticompetitive practice. In the absence of an international authority with investigatory and enforcement powers in all countries, the country in which the firms in question are located will itself need to have a competition law enabling it to deal with the problem and an appropriate dispute settlement mechanism is needed at international level so that the victims of the practice can be sure that the implementation of the law is effective and non-discriminatory.

It seems therefore that a combination of several options is required in order to combat anticompetitive practices which have international effects.

The Group more particularly examined in turn:

- the possibility of establishing an international authority responsible for ensuring the implementation of a worldwide competition code, an option which may be a long-term project (cf par. IV.1);
- the scope for developing bilateral cooperation, which is essential but insufficient (cf. par. IV.2);
- the progressive construction of a Plurilateral Agreement on Competition and Trade combining common principles (these principles could be incorporated in the national laws of participating countries) and an arbitration structure. This project is ambitious, but the Group considers that the Union and its chief partners could usefully start to study it right away (cf. par. IV.3).

1. International competition authority and worldwide competition code: a long-term option

For future reference, the Group discussed the drafting of an international competition code superimposed on national laws, including the establishment of a single authority responsible for its implementation. But the Group does not consider this a realistic short or medium-term option. A considerable effort to make existing national laws more convergent (along the lines of the OECD's work) is a prerequisite to any moves in this direction. Similarly, only a lasting and fruitful experience of closer cooperation between national authorities retaining the full scope of their powers will create a climate of confidence which would make the loss of sovereignty involved in this option acceptable.

Without elaborating further on the possible advantages of this long-term objective,¹³ the Group considers that it is more appropriate at this stage to concentrate on the intermediate stages. In particular, it feels that one should commence with the introduction of an adequate set of competition rules by those countries that do not yet have one; and countries which have already acquired experience in this area should provide more assistance to developing countries requiring it.

2. The strengthening of bilateral cooperation is essential

- 2.1 In recent years, many bilateral agreements have been signed: United States - Australia, Australia - New Zealand, United States - Canada, Germany - United States, United States - European Communities, etc. Other agreements are being negotiated.

Competition authorities' commitment to this type of cooperation is directed initially at facilitating the detection of restrictive practices which operate or have effects across borders, and at avoiding conflicts that result from the extra-territorial enforcement of national competition laws. This enhances the "negative comity" approach which traditionally tends to limit one country's implementation of legal measures where the important interests of another country might be affected. Henceforth, such self-restraint must be extended to circumstances in which the first country refrains from acting in order to assist the action of its better-placed partner in putting an end to a restrictive situation with transborder effects. The application of the "negative comity" principle should not, therefore, result in a lower level of enforcement of competition rules but, on the contrary, in the use in each case of the most appropriate instruments by the competition authority which is better placed in this respect. In addition increased cooperation among competition authorities, and in particular the "positive comity" mechanism, makes a significant contribution to attaining the objectives of successive GATT rounds. (This mechanism enables one competition authority to request the partner country's competition authority to act in order to put an end to behaviour which may, for example, prevent access to that partner country's market.) It is this approach which makes it possible to pursue the objectives of international action in this area: a more effective enforcement of competition rules which should have the effect of checking trends towards an extra-territorial enforcement of national rules; the creation of conditions favouring the gradual alignment of different laws, which will enhance the legal security for firms and reduce their costs; and the promotion of equal conditions of competition in all countries. All these factors are likely to favour the opening up of markets and the expansion of international trade.

¹³ Cf in particular the report published on 26 January by the Commission on Global Governance (see Chapter 4).

Cooperation between competition authorities will not, in the foreseeable future, make it possible to relinquish trade protection instruments. However, as the effectiveness of cooperation increases, instances of conflict likely to lead to the use of these instruments will decrease.

- 2.2 The EU's most interesting experience of bilateral cooperation so far has developed under the aforementioned agreement with the United States. Although positive, this experience remains nonetheless limited in scope.

The Group considers that cooperation should as a priority be taken further, both because of the importance of transatlantic relations and because of the role fulfilled by the EC/US agreement as a model for the development of cooperation between each of the two partners and other countries in the world. Primarily this implies a commitment by the parties not to act unilaterally unless all the means provided by comity have been exhausted; it also implies, on a reciprocal basis, the elimination of current obstacles relating to confidentiality rules applicable to exchanges of information. On the United States side the recent adoption of a new law on the matter should reduce the scope of this problem. On the European side the protection of confidential data is guaranteed by Community regulations. The European Communities are entitled nonetheless to conclude an international agreement which, under the procedure and in return for certain negotiated guarantees, derogates from the internal rules they have laid down.

While the Group considers that the deepening of the EC/US agreement should be a priority for the Commission's action in the months ahead, it also feels it appropriate to establish a network of bilateral agreements with other partner countries taking into account the specific nature of each case - and primarily Japan, in view of its economic importance and the volume of its trade with the Community. The Group is also convinced that the establishment of bilateral agreements would serve as a good example for countries whose anti-trust activity may so far have seemed insufficiently strong; it is therefore of the view that a network of bilateral agreements should, as soon as possible, extend beyond the circle of countries which are today the most "activist" in the enforcement of competition policies. From this point of view a "positive comity" procedure as envisaged by the European Communities-United States Agreement should come into general use.

3. The Group's main recommendation: the gradual construction of a plurilateral agreement

Despite their great value in the more effective application of competition rules to transborder restrictive practices, bilateral agreements cannot in themselves suffice to solve all problems: while they enable a closer coordination of action - especially if the confidentiality constraint were lifted, even if only in part - and provide a framework for reconciling divergent approaches or concerns, these agreements are not vehicles of conflict resolution. Although the incipient dialogue which is established between the parties helps to bring the practices of

competition authorities closer together, even on the basis of rules which may originally be far apart (e.g. the treatment vertical restraints on either side of the Atlantic), it cannot replace the need to agree on basic principles relating to their enforcement. The Group considers, in particular, that commercial frictions may remain unresolved in the absence of a dispute settlement procedure based on a set of jointly determined competition rules. It is also difficult to imagine the emergence of a level playing field if this were to be founded only on a group of inevitably heterogeneous bilateral agreements.

For these reasons the Group is of the view that a framework based on a set of common rules and a dispute settlement procedure is necessary to:

- ensure that restrictive practices which are implemented and have effects across borders are effectively monitored;
- contain the risks of commercial frictions resulting from the heterogeneity (or even the absence) of national competition policies.

To this end, the Group recommends the elaboration of a plurilateral agreement, comprising a new structure designed to resolve difficulties between contracting parties and between competition authorities. Three major issues have to be tackled in order to achieve this:

- geographical coverage of the agreement
- determination of common rules
- establishment of a new structure

The Group is of the view that each of these problems can be overcome by adopting a "building-block" approach within the framework of a plurilateral agreement on cooperation.

3.1 *Geographical coverage of the agreement*

The geographical coverage of the agreement should be wide enough to include the main trading partners at world level, in order to reduce the distortions which may result from differences in the enforcement of competition rules.

3.1.1. At the present time there are three areas within which very close cooperation already exists in the field of competition:

- United States and Canada (particularly with regard to the prosecution of criminal infringements)
- Australia-New Zealand (an agreement providing for the harmonization of competition laws, and cooperation and exchange of information between the national competition authorities; the agreement goes so far as to provide, in some circumstances, for these two countries to be integrated in a single jurisdiction)
- the European Communities and their partners in the European Economic Area; this group is being enlarged by the Central and East European

Countries (CEECs), which are linked to the EC by agreements providing for close cooperation on the basis of Community competition rules; (similar agreements could be concluded with certain countries in the Mediterranean basin).

Between these three areas "bridges" exist (or are being established) such as the EC-United States agreement, the draft EC-Canada agreement, the Australia-United States agreement, the Germany-United States agreement or the draft France-United States agreement. Despite the inclusion of important provisions (such as the "positive comity" provision in the EC-United States Agreement or in the draft EC-Canada agreement) these agreements are more limited in scope in that they do not provide for the possibility to exchange confidential information. However, even if this problem of "interconnection" still has to be overcome, it is clear that all the countries concerned, in view of their experience in the field of cooperation, should logically be among the founder members of any plurilateral structure.

3.1.2 Nevertheless, the goal of this structure would not be achieved if it did not integrate Japan or the other Asian industrialized countries and certain Latin American countries, if necessary over time. The United States and the European Union in particular have taken or are taking retaliatory trade measures against these countries for behaviour considered to be unfair. All the same it is clear that the establishment of a plurilateral competition discipline will not lead to the abandonment of trade protection instruments, if only because the effects of the new system will make themselves felt gradually. Moreover, the implementation of competition policy cannot in all cases by itself lead to the opening up of markets.

Nevertheless it is clear that as and when it becomes effective the stricter enforcement of competition rules, stimulated by international pressure, will have to be taken into account by those responsible for trade policy.

3.1.3. In taking account of these factors, the Group recommends:

- as a first stage, the negotiation of a plurilateral agreement within a group of countries, which might consist of the OECD countries (including Mexico which has recently become a member), the central and east European countries, and, for example, Hong Kong, Korea, Singapore, and Taiwan. Other countries could also participate in the agreement and its negotiation provided they were ready to accept the same rights and obligations.
- the extension as soon as possible of this agreement to the most advanced countries in Latin America.

On the global level, this goal could be achieved by concluding the proposed competition agreement as a "plurilateral agreement" under Annex 4 to the Agreement establishing the WTO¹⁴. However, the Group has chosen to refrain

¹⁴ The WTO has to date played an important role as an international forum of economics-based rules.

from making a specific recommendation on which forum and institutional framework might be most appropriate for negotiating and implementing the proposed agreement. Nonetheless, the Group considers it important to bear in mind the practical experience - as in the context of European integration, NAFTA and the Australian-New Zealand Closer Economic Relations Trade Agreement - that competition rules and trade rules, their interpretation and their judicial enforcement, need to be mutually supportive.

3.2. *Determination of common rules*

The ambition to go beyond a simple "comity" agreement and to establish a structure for dispute settlement implies agreement on a list of minimum principles. The Group considers that these principles should be incorporated into the national law of the participating countries in much the same way as European Directives: each country would have an obligation as to the result to be achieved, but would not be obliged to amend its current legislation if it already contained these principles or if it was open to similar interpretation.

Even if it is too soon to make a detailed list of the common principles which should be adopted, it seems that a consensus could be built between the countries mentioned above on a prohibition of horizontal cartels relating to the fixing of prices, restriction of supply or the sharing of markets. This prohibition would include export cartels.

Other types of cooperation agreement should not, however, be ruled out from the outset since these can also lead to serious restrictions of competition. A "rule-of-reason" approach is desirable in these cases. Vertical agreements raise even more difficulties since opinions differ as to the conditions under which they are acceptable from competition perspective. One solution might be to prohibit agreements where their restrictive effect on competition is not offset by an advantage for the consumer and/or where they constitute a barrier to market access.

As regards the control of dominant positions, a regime similar to that of Article 86 of the EC Treaty appears appropriate in so far as it focuses on the abusive behaviour of enterprises in a dominant position.

In the field of mergers, priority should be given to a harmonization of procedures, on the basis of the Whish Wood study carried out by the OECD¹⁵, in particular as regards the time limits for examination of cases, so as give competition authorities sufficient time to consult each other.

These include rules on intellectual property, subsidies, investment, state enterprises, deregulation and trade liberalization, which are all related to competition law. Importantly, the WTO also has a developed dispute settlement system, which could be adapted to the particular needs of competition cases.

¹⁵ OECD Merger process convergence project

Lastly, Article XVII of the GATT relating to the obligations of national monopolies or companies with "exclusive or special privileges" would need to be strengthened in so far as these enterprises should generally be subject to the same rules as other enterprises exercising a commercial activity.

3.3 *Setting up a new structure*

The Group considers it necessary that an international body be entrusted with three functions:

- (a) to serve as a forum for drafting and then permanently reviewing, adapting, and, in so far as possible, extending the common principles for incorporation in the various national laws and for their enforcement; this exercise would be carried out in conjunction with analyses covering all aspects of the relationships between competition and trade.
- (b) to establish a "register of anticompetitive practices" within the contracting States to the agreement. This register would initially concern only individual cases relating to firms (or cartels) satisfying specific criteria, and would be established on the basis of notifications by the contracting countries of the agreements they had required or encouraged. The existing regimes of general application (such as the block exemptions within the EU) or the derogatory regimes (e.g. the rules applicable to maritime transport in the United States) would also be notified.

This register would be supplemented by a register of non-notified restrictive practices, i.e. practices which had come to the knowledge of the international body, through countries other than those in which these practices were used, or because it had been approached by enterprises which were victims of these practices. The international body could question the Member State whose legislation was likely to apply to such practices whether it was aware of them and which measures it intended to take to deal with them. The results of this investigation would be forwarded to the other countries.

- (c) provide a structure for settling disputes between participating countries. At procedural level the WTO dispute settlement mechanism (including the appellate body) seems to correspond fairly closely to the structure which might be established to arbitrate on disputes concerning action by competition authorities, even if some aspects (in particular time limits) should be reconsidered to take account of the inherent nature of competition cases. (For further discussion of the GATT/WTO dispute settlement mechanism, see Annex 4.)

3.4 *Establishment of an effective international dispute settlement and enforcement procedures*

As in the field of international trade law and the GATT/WTO dispute settlement system, the international dispute settlement system in the context of the proposed plurilateral competition agreement should serve as a framework for the settlement of a variety of possible conflicts, e.g. over the domestic implementation of the international rules and over their application in concrete cases. In particular the following categories of disputes should be actionable.

a) Disputes over international procedural obligations

In case of non-notified anticompetitive practices, or if information on these practices is inadequate or contested, an adversely affected country could invoke the obligations set out in a plurilateral cooperation agreement (PCA) under the following conditions:

- If the notification and information requirements were not voluntarily met, the injured party could request a PCA Committee to order specified notifications and informations.
- If invocation of the "positive comity" obligations provided for in the agreement did not lead to enforcement activities by the other country, the adversely affected country could either request a finding by a PCA panel on whether the non-enforcement of domestic competition rules violates the international standards of the PCA; or it could unilaterally apply its own competition laws to the anticompetitive practices provided this is consistent with its own legislation and with the "negative comity" obligations included in the PCA.
- An alternative option could be to resort to domestic court proceedings in the foreign country for a judicial review of whether the alleged anticompetitive practices are consistent with the domestic competition law.

Insofar as the objective of the above dispute settlement procedure is to foster enforcement of competition law while avoiding conflicts of jurisdiction between Agencies, both the information exchange and positive comity provisions should be subject to strict procedural obligations and time limits. This will enable a requesting authority to ascertain rapidly whether the third country agency intends to act in a specific case.

b) Disputes over international per-se-prohibitions

Where a competition authority has had a case referred to it by another country (party to the PCA), in conformity with the positive comity procedure, yet fails to act against behaviour subject to per se prohibition, the matter could then be brought before a PCA dispute settlement panel. A panel finding of such a violation would trigger the international "secondary obligations" recognized in GATT-WTO law (i.e. cessation of

the illegal act and possibility of authorization of countermeasures pending the withdrawal of the illegal act, such as suspension of reciprocal market access obligations). The PCA could also provide for additional civil law sanctions such as that anticompetitive practices violating per-se-prohibitions are not enforceable at law. Such a rule would have the political advantage of making domestic courts part of the international enforcement system. Both PCA panels and domestic courts would have the power to order the submission of relevant factual information and to decide on the basis of presumptions and rules on the allocation of the burden of proof.

c) Disputes over international rules-of-reason

In those areas where there is no international consensus on justiciable per-se-prohibitions of anticompetitive practices, the PCA would only define minimum standards for national rules-of-reason and rules of conflicts of jurisdiction. This is an area where the experience gained under bilateral agreements can contribute to progressive consensus building. But, since the application of the domestic rules-of-reason would be guided only by international minimum standards and would require the appraisal of complex economic matters, the international PCA panel could apply only a limited standard of review with due deference to the national scope of discretion (e.g. through review by PCA panels of whether the relevant procedural rules have been complied with, whether the statement of the reasons for the national decision is 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").

d) Disputes over nullification or impairment of market access as a result of anticompetitive practices

Another course of action could be created by tying the PCA to the framework established by the WTO governing international trade. If this option were retained it would have the advantage of strengthening the linkage between market access commitments as embodied and negotiated in the WTO on the one hand,¹⁶ and rules on anticompetitive practices on the other. This would both contribute to open trade and promote mutual consistency.

A major step in enhancing the complementarity between trade and competition policies would be taken by the inclusion, within a competition framework, of provisions by which the "nullification or impairment" through private practices of market access commitments negotiated under the WTO would be actionable, unless appropriate corrective measures are taken by country concerned. A similar approach was taken in the Havana Charter (Article 46), where an absence of government action to prevent a

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The GATS Agreement, in its Article VIII, already contains a prohibition to impair, through monopolies and exclusive services suppliers, benefits granted under specific commitments in services schedules.

limitation of access to markets could constitute a violation of its provisions. It is clear, however, that in assessing private practices that may limit access to markets, the efficiency goals fundamental to competition policy would be upheld. Thus the international dimension would be one of the factors of review competition authorities would have to weigh following an international request.

In addition to the above, a case of "nullification or impairment" of market access commitments negotiated under GATT law or GATS law could be constructed on the basis of as a "non-violation" complaint as traditionally recognised in the WTO. The principles underlying "non-violation" complaints could be progressively refined and developed through agreed definitions and dispute settlement practice.

4. Summary of the Group's recommendations

In summary, the principal recommendations of the Group are as follows:

- 4.1 Given their common interest in preventing anti-competitive activity, countries or regional groupings of countries should be encouraged to ensure that they have in place an adequate set of competition rules and that these are effectively enforced. Where necessary, technical assistance should be provided for those countries requiring it, in particular developing countries.
- 4.2 The building block approach proposed by the Group is to make headway on two fronts in parallel.
 - On the one hand, there should be a deepening of bilateral Agreements (i.e. to include the possibility of exchanging confidential information and to strengthen the use of the positive comity instrument). In this respect, a "second generation" agreement between the EC and the USA is a priority. This agreement would create a framework for even closer cooperation between the competition authorities of both sides. A necessary further step for the EC would be to negotiate a bilateral agreement with Japan.
 - On the other hand a plurilateral framework should be developed (i.e. including most elements already incorporated into the bilateral Agreements, to which would be added a set of minimum appropriate competition rules, a binding positive comity instrument and an effective dispute settlement mechanism). It is realistic to assume that a plurilateral framework would, in the first instance, include a group of core disciplines and core countries only (i.e. the EC, the OECD member countries, the central and eastern European countries, and for example Korea, Hong Kong, Singapore and Taiwan), although it should be open to wider participation. The creation of an effective competition law enforcement structure requires sophisticated legal instruments and analytical capabilities: having these may not be considered a priority in all

developing countries. Such a plurilateral agreement would develop and expand its coverage progressively through a domino effect, both in terms of its geographic scope, substantive coverage and surveillance. The surveillance structures would concentrate on the transposition of common international rules into national law and on ensuring the respect and enforcement of these common rules.

- 4.3 The Group considers that these recommendations can develop in parallel as both initiatives are complementary and mutually supportive. Countries may wish to maintain bilateral relations with certain other countries. At the same time, they may wish to move more quickly to plurilateral agreement with a group of countries with which they have common interests. It would, however, be counter-productive to have the creation of a multilateral structure dependent upon the willingness to participate of all potential partners. In this respect the development of a plurilateral framework is more likely to succeed in an environment which allows it to evolve and expand over time.

The elaboration of a plurilateral framework is likely to take some time, and progress in negotiating such a framework would be enhanced by strengthening bilateral agreements, a goal which could be reached at shorter notice.

Given the compelling arguments for moving ahead in this field, the Group is convinced that the European Union and its principal partners should without delay take the necessary steps to implement these recommendations.

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¹⁷

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Text of the letter of convocation

The recent success of the Uruguay Round and the resulting progressive elimination of public restraints to world trade has reemphasized the need to put an end to private practices which disrupt trade between the world's major trading areas.

The institution of international competition rules, as well as the creation of effective implementation procedures once foreseen in the Havana Charter, are issues that are now being revisited.

In order to consider these issues and contribute towards a European community approach - based largely on our past experience on the integration of the internal market - Mr. Van Miert seeks to convene a small group of high level experts.

Mr Van Miert has therefore requested that I contact you to invite you to participate in the work of this group.

C.D.EHLERMANN
Director General

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