

**"The Global Competition Forum : How it should be organised and operated"**

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**I. The need for a Global Competition Forum**

- In the recent years antitrust enforcers came to realise that the transnational character of today's competition cases clashes with the traditionally territorial scope of domestic antitrust rules. In practical terms this means that competition authorities worldwide have to find ways to overcome the **jurisdictional barriers** inherent in the territorial nature of antitrust enforcement jurisdiction. When we are asked to apply our antitrust rules today, we increasingly observe that consumers whom we are mandated to protect are being adversely affected by anticompetitive behaviour taking place outside our jurisdiction. Often, we have to overcome a number of legal and practical obstacles to discover the necessary evidence and to impose sanctions on global cartels which are detrimental to the efficient conduct of business and harm consumers. The same applies to abuses or attempts at monopolisation by dominant players on the world market.
- Further, we need to take into account the issues arising in connection with **multijurisdictional mergers**. As a growing number of jurisdictions adopt merger control regimes, with differing notification requirements and substantive standards, we face an increased risk that we reach conflicting decisions and impose on firms remedies which may be incompatible with each other. From the point of view of business, which have to take account of the different regimes that claim jurisdiction to control their mergers, acquisitions and joint ventures, the situation is one of increased transactional costs and uncertainty.
- Further, there is here a question of **global governance**: in essence how competition authorities can ensure that the international integration of markets leads to maintained competitive outcomes, thus making the globalisation process both economically more efficient and socially more acceptable. In this context, competition policy – and specifically international co-operation on competition policy - has an important role to play, if we are to avoid resentment against globalisation and a protectionist backlash.

- Finally, **developing countries** expect to be let into the game. The introduction of competition policy is an essential part of efforts by developing countries and countries in transition to restructure their economies and integrate them fully to the world economy in order to be able to exploit new opportunities to compete. In order to claim their share in the benefits of globalisation, more developing countries adopt economic reform packages, which liberalise entire sectors, privatise state owned enterprises and introduce competition laws and policies. They naturally look to established competition authorities for cooperation, support and technical assistance.

## II. Stocktaking of efforts to address the problems and recommendations so far

- Our response to these challenges so far has been focused on **bilateral cooperation**. A number of cooperation agreements exist and work well between the interested countries. As examples one could mention the agreements between the EC and the US or Canada, or the ones between the US and a number of 3<sup>rd</sup> countries. In most cases, cooperation on the basis of such agreements yields the expected results. However, bilateral agreements of this type are clearly not enough. In cases with significant overlaps across multiple jurisdictions the limitations of this approach are obvious to everybody. This framework of cooperation is also quite heavy and its benefits may in some instances appear disproportionate to its costs.
- In my view we should look beyond cooperation based on bilateral country-to-country agreements. Involving more competition authorities in the discussion of international competition cases will yield better results both for bilateral as well as multilateral cooperation. One should keep in mind that, even in the absence of an agreement, when the pressing interest is there, competition authorities will find a way to cooperate.
- We should profit from our experience with bilateral instruments and use their tools to put in place a more open and inclusive cooperation framework. This will enable us to achieve some convergence among competition authorities towards best practices. I believe that we need to be creative and find an effective way to open cooperation to more competition authorities dealing with international cases and issues.
- **Beyond bilateral cooperation**, there have been numerous efforts to deal with these challenges in **multilateral fora**. Organisations such as UNCTAD, the WTO and the OECD have in recent years multiplied their efforts to study the problems and have come up with valuable insights. The EU has supported this work all along and has been instrumental in most of

these projects. For instance, our efforts within the WTO Working Group for Trade and Competition have focused on engaging a productive discussion with all developed and developing countries on these issues. Our proposals on the core elements that a future WTO framework should include have - over time - incorporated a vast number of comments, reactions and points of view.

- Such plurilateral and multilateral fora will undoubtedly continue to deal with international competition problems and we will all contribute to their work. However, these are **long term endeavours** and their outcome can not be controlled or even influenced by competition authorities in a decisive manner. We do not have to wait until these processes yield results. I would like to discuss with you what has been done by and among competition authorities themselves and what we **need to do on our own** to push this issue further.
- The issues stemming from globalisation and market integration and from their impact on competition enforcement are not new to competition enforcers. A number of competition authorities have already studied the problems in depth. Both the **European Commission in July 1996** and the International Competition Policy Advisory Committee (ICPAC) **in February 2000**, have recommended the strengthening of international cooperation between competition authorities world-wide as the most appropriate short term response.
- A number of proposals are on the table. According to a key recommendation in the ICPAC Report, embraced by the US competition authorities, it is necessary to "explore the scope for collaborations among interested governments and international organisations to create a new venue" : a "**Global Competition Initiative**" in the words of the ICPAC. This venue should provide a forum "where government officials, as well as private firms, non-governmental organizations, and others can exchange ideas and work toward common solutions of competition law and policy problems".
- Both myself and Commissioner Monti, have repeatedly stated that **we welcome these ideas**. We have also contributed to the debate by offering some ideas on what could be an international forum for competition among authorities from all over the world. This initiative has been gathering momentum over the recent months. As you know, at the beginning of February a number of senior competition officials as well as other practitioners in this area, met at **Ditchley Park in England** to discuss the design and exchange views on this forum.

- I must say that we were there in an individual capacity and that this gathering was essentially a **first "brainstorming"** between like-minded professionals in the competition law enforcement world. The meeting at Ditchley Park was the first in a series of meetings to discuss the issues and build the momentum that will make it possible for us to launch the forum in the best format and conditions possible.
  
- What I retain from the Ditchley meeting is that there was **broad consensus on the timeliness of this initiative** in view of the rapid transformation of the world economy. I will briefly conclude my remarks by summarising the main themes that emerged from that event:
  - there is a need to **add practical value** to the work of existing institutions without duplicating work carried out elsewhere; in this context, what should make the GCF unique would be its readiness to draw together all competition professionals.
  
  - the GCF **should not be a new institution** – it is not meant as an alternative to the involvement of the OECD or the WTO in competition policy. It should be first and foremost be a competition authority forum, involving a minimum of permanent infrastructure, with support primarily provided by participating authorities and facilitators. However, it should draw together all interested parties - both public (e.g. other international organisations) and private (e.g. business, professional, consumer and academic bodies); these should be appropriately associated with the forum, as participants and/or facilitators.
  
  - participants were **open-minded about the precise topics** that the forum should be called upon to discuss: these could range from substantive competition law and policy issues, to enforcement-related and systemic matters. With competition authorities constituting its core membership, the GCF must attract the broadest possible participation from countries with new and developing competition regimes.
  
  - the Forum should make a particular effort to **focus on the concerns of developing countries** and of those countries with fledgling competition law regimes. Early, focussed attention is likely to prove worthwhile on issues associated with the increasing number of national merger review systems, the convergence of review processes, multijurisdictional cartel enforcement, the challenges associated with co-operation and information exchanges among competition authorities.
  
  - there is a **need to move towards a formal launch of the initiative**, most likely this autumn, following a further meeting of interested

competition authorities and parties. It will be vital to attract to such a meeting strong representation from countries with new or recently introduced competition laws.

- the new “virtual” organisation would ultimately need to put in place a **Steering Committee to oversee its formal birth and ongoing management**. In the meantime a small number of participants were asked to form a temporary planning group with responsibility for identifying potential candidates for the Steering Committee, and to assist with interim planning.

### III. The objectives of the GCF

- We are now at a point where we need to carefully consider the precise mission of the forum and flesh out the elements that will constitute its structure and its methods of work.
- For me, the main mission of the forum should be to **put in place an inclusive venue** where those responsible for the development and management of competition policy worldwide could meet, engage in constructive dialogue and exchange their experiences on enforcement policy and practice.
- Competition authorities and other participants in the forum should strive to **achieve a maximum of convergence** and consensus on fundamental issues such as the substance and economics of competition policy, the enforcement priorities of competition authorities and other issues such as ones raised by the new economy. Such consensus should result from a common understanding about the best approach to solving the problems. It could then lead to the promulgation of general guidelines or the issuing of non-binding "best practice" recommendations.
- Finally, the forum should foster and **develop a common worldwide "competition culture"** and be open to deal with issues of importance to developing economies and economies in transition. The forum would encourage developed and developing countries world-wide to introduce and enforce sound competition policies, coordinate technical assistance projects and contribute to avoid duplication between donors.

### IV. The Agenda and events of the GCF

- As I mentioned, the forum is expected to discuss a wide range of antitrust issues:
- It could address **enforcement issues** related to the role, the priorities and the enforcement procedures of the bodies entrusted with the application of the substantive competition rules. We could include here:
  - topics related to the difficulties of enforcing domestic competition rules in an international context [examples: the discovery of evidence located abroad, the methods to serve orders and execute decisions imposing remedies and sanctions in international competition cases]
  - issues related to the review of global mergers falling under multiple jurisdictions [examples: filing requirements, procedural issues, timing, coordination of remedies],
  - the sharing of cases or of various enforcement tasks between agencies [examples: positive comity, lead-taking],
  - the various instruments of inter-agency cooperation [examples: notifications, fact-finding assistance, obtaining and sharing confidential information].
- It would also tackle **systemic issues** related to the application of the principles of good governance in the area of competition law and policy. Topics here would include the need for sound administrative and judicial systemic guarantees of due process, including the availability of judicial review, the transparency of antitrust proceedings, the adequate protection of the rights of defence, the establishment of a legislative framework and enforcement regime which respects the principle of non-discrimination.
- As regards these substantive and systemic issues, having a comparative view would enrich our knowledge of each other's system and will be a valuable experience for both established and new competition authorities.
- The forum would further deal with the formulation and application of **substantive competition rules and economic analysis** in cases having a prominent international component. Topics that could be addressed here include the prohibition of international cartels and collusive practices between competitors, the abuses of dominance by global players or the attempts of such players to monopolise global markets. Other areas would relate to the monitoring and control of international mergers and acquisitions and new economy" issues such as e-commerce and information technology. One could discuss the liberalisation of sectors opened to

international trade, as well as issues related to the restructuring and vertical separation of monopolies in transitional/developing economies.

- Finally, the forum should consider issues which are important for **developing countries** and new competition authorities. Topics here could include the dissemination of know-how and expertise, notably by "experienced" enforcers for the benefit of "emerging" antitrust enforcers, the organisation of "peer reviews" to evaluate the design of member's competition regimes and assess their enforcement record, eventually accompanied by recommendations and guidance.
- The main event of the forum would be an **annual conference** (some sort of "plenary session") which would discuss more general competition matters and issue reports, discussion papers and recommendations. Apart from the annual conferences, the forum could organise peripheral or regional workshops for discussion of specific issues, informal meetings and "peer review" exercises. These would have more limited participation and would address particular issues.
- Meetings could be held both at regular intervals and ad hoc when there would be a specific need or a useful opportunity. The participating competition authorities could provide venues and/or logistical support on a rotating basis, on their own or in cooperation with another member or facilitator.

## V. The membership and organisational structure of the GCF

- The forum should be open to all countries which have a competition law enforcement regime, i.e. a basic legislative framework of competition rules, an administrative and/or judicial enforcement capacity, and some kind of enforcement record. These would be the **core members** of the forum and will orient its agenda and priorities.
- Developing countries which are in the process of putting in place a competition regime and building the requisite institutional capacity could be encouraged to join the forum and would benefit from technical assistance activities carried out by it. Of course, since the forum will be in principle a "competition authority forum" these countries could be considered "**candidate members**" for an initial period of time until they have had the opportunity to put in place an enforcement regime (basic rules, enforcement structures).

- It should also be possible to associate in the forum, in an appropriate way, international organisations with a vested interest in global competition issues (I have here in mind the UNCTAD, the WTO the OECD etc.) and other non-public bodies representing, for example, the legal profession (for instance the International Bar Association), the business community (for instance the International Chamber of Commerce), and consumer representatives (for instance Consumers International), as well as antitrust academics and other experts. These would be considered associated or **strategic partners and facilitators** of the Forum.
- In essence the forum should be an inclusive venue bringing together competition authorities, int'l organisations and professional bodies having an interest in the issues put on the Agenda.
- A few words now on the organisational structure of the forum. In the opinion of most parties interested in this project the forum should be a **"virtual" and not a "bricks and mortar" organisation**. This is understood as a means to avoid new bureaucracy, to keep the budgetary implications of the forum limited (in keep with our limited resources and our wish to remain independent).
- However, as with all projects (including "virtual" ones) some form of management is necessary, if we want to achieve something concrete. This could be done by putting in place some sort of **Committee to steer the whole project**. This "Steering Committee" (I will call it so for the moment but another term may prove preferable in the end) would be constituted of a limited number of rotating members from interested competition authorities. It would oversee the forum, establish working parties as needed, schedule and organise the regular and extraordinary events of the forum and steer its overall course.
- The Committee would need **assistance and some sort of secretariat**. The core members could – on a rotating basis – provide over a time period the logistics and the secretarial work required for the proper functioning of the Committee (they could also finance the organisation of an annual conference during their rotation time). Secondment of officials between the agencies involved or the establishment of an executive bureau (or board) in the form of a **troika** composed by the agency "en exercise" and its predecessor/successor could ensure the necessary continuity.

## VI. Conclusions



- I will conclude by emphasising that all these ideas are now **on the drawing board** and there is a lot of discussion going on between interested competition authorities. We clearly need to spend some more time reflecting on these particular items, options and solutions, but the momentum that has been developing in recent months should not be lost. Our objective is to launch the forum this year.
- We are open to all **constructive ideas from all interested bodies**. We should all aim at putting in place a flexible instrument not a bureaucratic organisation. The forum should be able to address the real issues and provide valuable work to all competition authorities world-wide as well as to practitioners in this area.