

“Is it time for an International Agreement on Antitrust ?”

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* This speech – to which Messrs Kiriazis and Roebing from DG COMP A4 have greatly contributed – expresses the personal view of the author and does not bind the European Commission.

I. Introduction

When I was preparing for this speech, I came across the proceedings of the Seminar organised in Zurich in July 1999 on the prospects of WTO Competition Rules. I had contributed to that seminar by analysing the EC experience with international cooperation in competition matters and taking stock of developments since the Van Miert report of 1995.

Browsing through other contributions in that publication (by some of the speakers and panellists that are here with us today), I was reminded once again of the rapidly changing environment that is currently making the issue of international competition rules, cooperation mechanisms and enforcement convergence a fascinating and challenging topic.

Some of the trends, that I tried to sketch out in the essay of 1999, seemed quite far away on the horizon at the time of writing. Now, almost three years after that Seminar, two of these trends are already in full swing : I am referring here to the adoption of the Doha Development Agenda (DDA) and the creation of the International Competition Network (ICN).

In the light of these two events of considerable significance for antitrust practitioners worldwide, I would like to use today's opportunity to visit the questions surrounding the need for an International Competition Agreement, the benefits it could deliver in terms of global antitrust policy and the alternative means we have in our quest towards a more effective and coherent response to international competition concerns.

However, before turning more in detail to the prospects of the DDA and of ICN, I think that it is necessary to firmly place them into the broader international context.

II. Globalisation and Competition

The conclusions of the Van Miert Report in 1995 are today largely accepted.

First, globalisation has also had a significant impact on competition and on competition policy:

- the successive achievements of trade liberalisation, on a unilateral or multilateral basis, appreciably freed trade in goods and services from artificial obstacles. The broad market opening through the results of the Uruguay Round lent renewed momentum to this development. And barriers to capital movement have generally diminished substantially over the last years.
- with regard to international cross-border company mergers, the growth rates are enormous if we look at the transactions notified to the Commission. The number of transactions more than doubled between 1991 and 1996, and in each of the years 1997 to 2000 it grew by 20 to 30 percent.

Second, for competition authorities – which today are essentially national or regional - these global trends pose an unprecedented challenge.

- we need to bear in mind that over 90 member countries of the World Trade Organisation have, or are in the process of establishing, antitrust enforcement regimes and authorities. These regimes are characterised by a considerable degree of variety in their objectives, organisational forms and enforcement priorities. As more and more of these jurisdictions begin to deal with antitrust cases and issues of international dimension, it becomes obvious that there is a pressing need for governance mechanisms.
- the pole of stability and attraction that has been in the 90ies the highly successful EC/US bilateral competition cooperation is no longer sufficient as a response to the challenges we face in this area. There is now an increasing number of fully aware and interested parties who want to participate in cooperation activities and make their antitrust concerns regarding global transactions known to us. In practical terms, we cannot realistically expect to build the same intensive bilateral cooperative relationship with all of our counterparts around the world. The price, in terms of expenditure of scarce administrative resources, would simply be too high, and I will leaving aside the quite legitimate doubts about the efficiency and

the benefits of such a "bilateral only" approach. It has become evident now that we need to intensify the pursuit of multilateral solutions.

Third, as you will recall, a key recommendation of the Van Miert report in 1995 was precisely to push for the elaboration of a plurilateral framework for competition ensuring the respect of certain basic competition principles. I have stressed during my intervention back in 1999 that the World Trade Organisation would appear to me to be the institution best suited to house such a framework. Back then this was not the shared wisdom that it has become in the wake of the adoption of the Doha Development Agenda at the 4th WTO Ministerial. It took the EU and other proponents of this project considerable time and effort in the period between Seattle (November 1999) and Doha (November 2001) to convince the sceptics that there is a valid case for such rules in the WTO.

III. Competition policy in the World Trade Organisation : The DDA

But let me briefly present you this case.

1) You will admit that, in the absence of a specialised world-wide competition organisation and in view of the complementary relationship between trade and competition policy, the World Trade Organisation is the institution best suited to house an International Competition Agreement. The WTO possesses the advantages of a very broad membership and a tradition of enforcing binding rules. That is why the Commission has been at the forefront of efforts to persuade member countries of the merits of a WTO multilateral agreement in the area of competition. In view of the complementary relationship between trade and competition policy, the incorporation of a competition dimension into the organisation would serve to underpin the impressive progress which has been made in trade liberalisation over the past few decades, by facilitating the effective combating of anti-competitive behaviour which might otherwise have the effect of undermining that same progress.

It must also be underlined that a WTO agreement in the area of competition must take into account the specificity of competition policy vis-à-vis trade policy. I will come back to this point later.

2) I believe that the inclusion of competition policy in the Doha Development Agenda (see “competition” extract in Annex) – the “blueprint” for the new phase of WTO negotiations - is a satisfactory result for a number of reasons:

- first, all parties signing up to the Doha Development Agenda - including some of the sceptics among developing countries – recognised for the first time that there is scope and merit for the WTO to negotiate and conclude a Multilateral Competition Agreement. Up to now even the principle of having such an agreement at the WTO was controversial. The recognition of the importance of developing such a framework and its relevance for international trade and development, will contribute towards the introduction and more effective application of domestic competition regimes and will be of considerable benefit to consumers world-wide.
- second, even if we have to wait for the 5th Ministerial in a year's time, in order to enter the formal phase of negotiations on the multilateral agreement, there is now a clear commitment to launch such negotiations at a certain date and the issue will fall within the single undertaking. We are now in a "preparatory phase" where we can do useful work to clarify with our partners from developing and developed countries the elements that such an agreement could contain.
- third, the relevant passages on Trade and Competition in the DDA have been largely inspired by the EC proposals. The EC has been driving this issue for some time, so we are quite satisfied that the Declaration focuses on the elements that we have highlighted as items that need to be taken up first for clarification. I will present later on these elements in more detail.
- finally, as the Working Group in Geneva shifts now its attention to the discussion of these elements, the DDA provides us with an opportunity to engage in a more focused technical assistance and capacity building exercise. This will help

emerging and developing economies to better understand and appreciate the significance of these issues. In this process, the EC in cooperation with UNCTAD and other international institutions has a key role to play, so that all WTO members – developed and developing ones – are perfectly ready to open negotiations in the next Ministerial.

The regional conferences on competition organised by UNCTAD in recent months (Panama for the Americas and the Caribbean, Tunis for African and Arab countries, Hong-Kong for Asia and the Pacific basin) were particularly helpful in clarifying for developing countries the issues that will come up for negotiation and played a key role in terms of understanding the requirements of the countries in these regions for enhanced technical assistance. I participated in the very interesting conference of Tunis which provided African and Arab countries with the opportunity to discuss the emergence of some concrete experiences of competition policies in these countries, to exchange views about technical assistance and about their position vis-à-vis the inclusion of competition policy in the WTO agenda.¹

3) What will happen from now till the next WTO Ministerial in Mexico ?

In the beginning of the year, it was decided to accelerate the schedule of the meetings of the Working Group. Instead of the traditional 2 substantive meetings per year, the Working Group will hold 4 meetings in 2002. This is crucial in order to have a chance to examine in Geneva all relevant issues in detail, particularly the concrete implications of WTO core principles such as transparency and non-discrimination, the commitment to fight hard core cartels, the scope for flexible arrangements requested by developing countries and the measures of technical assistance and capacity building that they need to be able to envisage a competition framework. The European Union and its Member States will be striving in the coming months to elaborate concrete proposals and clarifications on all these and other issues that will be put on the table.

¹ See Jean-François Pons, “Conférence “post-Doha” de la CNUCED sur la concurrence à Tunis, les 28 et 29 Mars 2002, to be published in the EC Competition Policy Newsletter, June 2002.

We obviously expect – and I assure you this is quite feasible – to open formal negotiations on a Multilateral Agreement immediately after the 5th WTO Ministerial in 2003 in Mexico. We will use the pre-negotiating period from now till then to clarify with our partners from developed and developing countries the issues on which we will negotiate. This will mostly take place within the Working Group on Trade and Competition in Geneva.

4) Let me now say a few words on our preliminary views regarding the modalities for negotiations and the possible contents of the envisaged WTO agreement.

The EC is pragmatic when it comes to the contents of the multilateral framework to be put in place : WTO negotiations on trade and competition should be realistic and should focus initially on what can be achieved in the context of a short global round. Our aim is therefore to confine the scope of such negotiations to three issues which appear negotiable at this stage:

- first, we should strive to reach an agreement on the core competition principles of domestic competition law and policy. They should essentially evolve around the transparency of rules and regulations, the removal of discrimination between firms based on their nationality, the provision of due process and recourse to judicial review procedures. Most crucially the agreement should include a commitment of members to prohibit hard core cartels.
- second, the agreement should put in place a framework that will facilitate cooperation between competition authorities world-wide. These cooperation modalities could modelled closely after existing and well functioning bilateral agreements. They could include, for instance, provisions regarding notification of competition cases, assistance to enforce domestic competition rules, positive and traditional comity mechanisms etc..
- third, the envisaged agreement should pay close attention to ensuring that the development dimension is an integral part of the new multilateral framework. The EC believes that the introduction of competition law regimes in the least-developed and developing countries would have to be of a progressive and

flexible nature. I must stress that a WTO multilateral framework agreement would assist developing countries in the process of progressively establishing effective enforcement mechanisms at the domestic level. It would make it easier for such countries to resist pressure often exercised by powerful domestic vested interests against the implementation of competition laws and policies and to gain the support notably of consumers and SMES, often the first victims of anti-competition markets. Finally, it would also ensure that such countries can benefit from effective multilateral cooperation and contribute towards better addressing anti-competitive practices with an impact on their trade.

- Fourth, we also favour a flexible and progressive approach to the issue of sectoral exclusions from the application of competition law. Some exclusions of a horizontal nature – like, for instance, those which may apply to small and medium-sized enterprises – may be driven by legitimate development considerations and have only an insignificant impact on international trade. During the initial stages of its application, a WTO multilateral framework agreement could limit itself to ensuring the necessary level of transparency concerning exclusions from the application of domestic law.
- Finally, for developing countries who may not yet have adopted a domestic competition law or have only recently done so there are additional gains to be achieved from international cooperation. Such cooperation would also render valuable support to the process of reinforcing the domestic capacities of developing countries in the competition area. The benefits from international cooperation on competition matters are also recognised in the UNCTAD Set which includes some provisions on consultations and enforcement cooperation.

IV. The International Competition Network

As you will have noticed, the content of the envisaged WTO agreement will necessarily be modest. Furthermore, it will undoubtedly take some time before such a framework becomes operational and can begin to produce concrete benefits.

Beyond the core provisions of the future WTO rules, competition authorities are already in the process of enhancing their cooperation. In parallel to the recent developments in the WTO, another multilateral initiative which remains totally independent of any established structures is currently rapidly growing in importance. I am referring to the International Competition Network, or ICN, as it will undoubtedly soon be generally known.

The ICN is the imaginative response of competition authorities all over the world to the challenges posed in a globalising economy.

The ICN was launched already last October in New York with the European Commission as one of the driving forces to bring this initiative to life. It was not least the statement of Joel Klein, the then most senior US anti-trust official, made at the conference for the tenth anniversary of EU merger control in autumn 2000, that gave one of the crucial starting signals. The movement was strongly supported since the very beginnings by European Competition Commissioner Mario Monti, and it is fair to say that the close cooperation of the competition agencies on both sides of the Atlantic has immensely facilitated the creation of the ICN.

The ICN will not be just another brick and mortar international organisation. It will have a kind of virtual structure without a permanent secretariat, flexibly organised around its projects, guided by a steering group which is chaired by Konrad von Finckenstein, the Head of the Canadian Competition Authority. This Steering Group will identify projects and devise work plans for approval by the ICN as a whole.

Any national or regional competition agency responsible for the enforcement of antitrust laws may become a member of the ICN. It is remarkable to see that within less than six months after its launch, the ICN has already attracted some 65 anti-trust agencies from five continents. Among the further increasing membership of the ICN we find not only the well-established competition agencies, but also many younger anti-trust authorities, especially from emerging and transition economies. Indeed, the participation on an equal basis of younger authorities is one of the key features of ICN. We hope that these authorities make ample use of this possibility to make their voice heard.

I would like to stress one point: this is the first time that so many competition authorities take an autonomous initiative designed to come together in order to share and discuss their practical problems in handling international competition issues. The truly global reach of the ICN will put it in a unique position to provide antitrust agencies from developed and developing countries alike a stronger and broader network.

The new network will actively seek advice and contributions from the private sector and consumer organisations, from the legal profession and individual members of the academic community. It will also cooperate closely with other international bodies working in the same field, such as in particular the WTO, UNCTAD, and the OECD.

Apart from the global reach of ICN, another of its salient features is that it is strictly project-oriented, and I am pleased to say that real work on several projects has already got off the ground.

Currently, the main thrust of ICN's work is directed at two topics:

- merger control in a multi-jurisdictional context, and
- competition advocacy.

On the first topic, three dedicated working groups look into the following issues: (i) merger notifications and procedures, (ii) the analytical framework of the assessment of merger cases, and (iii) the relevant tools for merger investigations. The ultimate aim of all these activities is to identify best practices and elaborate guidelines on how best to deal with merger cases that are relevant for several jurisdictions world-wide.

Under the second topic, competition advocacy, we understand those non-enforcement activities of the competition agencies that seek to prevent or address distortions of competition created by intervention of the state. Another ICN working group, chaired by Fernando Sanchez Ugarte, Chairman of the Mexican Federal Competition Commission, is currently trying to identify the best practices of the ICN Members in this area. The ambition is to get a good overview over and understanding of what is already undertaken now by the different agencies, in order to make our own efforts

more effective in the future. I would like to add that competition advocacy is by many believed to be at least as important as traditional enforcement especially in developing and transition economies, or economies where the state still holds control over many sectors.

The preliminary results of these working groups will be presented to the first ICN Annual Conference that will be hosted by the Italian Competition authority in Naples in September this year. To encourage the fight against international hard-core cartels – one of the most harmful distortions of competition from the point of the consumer – we are also planning a training conference in the United States this autumn to further increase the ability of our staff in the tools to detect such cartels.

In view of this broad range of initial activities, I am optimistic about the International Competition Network. The synergies between voluntarist efforts in the ICN and the framework for competition that we strive to build in the WTO are important. I am confident that in the future the ICN will be seen as a milestone in the world-wide convergence of competition enforcement and in the strengthening of cross-border co-operation. In particular, ICN can help the developing countries through exchange of best practices around the world.

Conclusions

Let me conclude this brief survey of developments towards an international competition agreement and an enhanced multilateral cooperation between agencies focusing on the enforcement of competition rules. I have tried to illustrate the positive impact of the increasing globalisation of business: it encourages the progressive creation of new multilateral legal instruments and structures as the basis of a future system of international governance.

Regarding our work in Geneva, I must admit that – despite the key step taken at Doha – a difficult part of the work is still ahead of us. This reminds me of a French socialist Minister coming for the first time in office in June 1936 in the middle of a general union strike and declaring with enthusiasm : “Enfin ! le temps des difficultés

commence”. Like him, I remain quite enthusiastic about the prospects for us to succeed. We have now a clear commitment, a destination to reach, a time-proven method of work and adequate tools at our disposal. If we can make time work on our side and not against us, I am confident that the Multilateral Competition Agreement can see the day in 2005.

I want also to stress my conviction that the ICN constitutes a valuable instrument that will bear fruit in the short to medium term. It is important for us and complements our bilateral cooperation efforts. It will also support our long term work in the different multilateral fora such as the WTO, the OECD and UNCTAD, and our increasing presence as a donor of capacity building and technical assistance projects in the area of competition policy destined to the African, Caribbean and Pacific States that participate in the New Partnership Agreement of Cotonu.

Finally, I am confident that competition agencies world-wide, international organisations focusing on competition policy and non-governmental experts and practitioners in this area – and in the first place the participants of this conference - will wholeheartedly support and contribute to our efforts within the WTO in the coming 2-3 years as well as to the less formal – but no less valuable – work within the ICN. I am certain that the antitrust community senses how important the period ahead of us is in terms of promoting competition culture, better harnessing globalisation and putting in place much needed governance mechanisms for the global markets. In particular, I believe that non-governmental experts like the participants of this conference can play a useful role in helping developing countries to make progress towards the building of a “competition culture” and of a good enforcement of competition rules in their own interest.

Thank you for your attention.

Extract from Doha Declaration on Competition

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INTERACTION BETWEEN TRADE AND COMPETITION POLICY

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.”

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