

COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following communication, dated 19 November 2002, has been received from the Permanent Delegation of the European Community and its member States with the request that it be circulated to Members.

Core Principles

Introduction

1. The core principles of transparency, non-discrimination and procedural fairness are explicitly mentioned by Ministers in para. 25 of the DDA as issues for clarification in the Working Group. The present submission will focus on the objectives pursued by these core principles and on how the scope of such principles could be clearly defined. Before doing so, however, it seems useful to recall some general considerations on where these core principles could fit in an agreement on competition. In earlier written submissions and oral interventions during the meetings of the Working Group, the EC has consistently made the point that a WTO framework agreement on competition does not and should not aim at providing a "solution" to all the issues which may arise from the growing interrelation of international trade and competition policies. However, what such an agreement could and should do is to establish a solid basis for dealing with basic competition policy issues, which have an impact on international trade, and facilitate multilateral cooperation on these issues.¹ Once such a framework agreement is in place, the establishment of a WTO Competition Policy Committee would provide a well-placed forum for examining whether greater convergence can be promoted on other competition policy questions of importance for the multilateral trading system of today.

2. As also consistently argued by the EC, a framework agreement would *not* require a harmonisation of domestic competition laws. The proposed framework would be fully compatible with existing and future differences in national competition regimes.

3. However, it should be noted that the diversity of national competition laws - while important - is not a point to be exaggerated. There is a core of commonality regarding a number of the key elements of competition law and policy. If one analyses the nearly 100 existing competition law regimes, a high degree of convergence can be detected regarding the following main characteristics of competition law and policy despite differences on substantive provisions and institutional structures:

¹ The possible scope and design of such cooperation modalities, including as they relate to hard core cartels, has been addressed in the previous EC and Member State submissions, WT/WGTCP/W/184 and 193.

- the need to treat hard-core cartels as the most serious breach of domestic competition law;
- the importance, despite differences in institutional settings, of the fundamental principles of non-discrimination, transparency and procedural fairness
- the need to narrowly define sectoral exclusions and exemptions in a transparent and predictable² manner;
- the important role of competition authorities in competition advocacy;
- the basic principles of national jurisdiction in relation to anti-competitive practices with an international dimension; and;
- the importance of international cooperation and the basic principles which should guide such cooperation.

4. The EC continues to be firmly convinced that these elements constitute a solid ground on which a multilateral framework agreement can be successfully negotiated to the mutual benefit of all WTO members and that the conclusion of such an agreement could bring about an even higher degree of convergence.

1. Core principles – general observations

5. A first consequence of the choice that a WTO competition agreement would *not* imply harmonisation of domestic competition laws and would be able to accommodate differences in national legal systems, as well as in institutional capacities, is the need to define core principles in an unambiguous manner, but without attempting a detailed description of how they would operate.³ Moreover, such core principles can be defined in such a manner that their application takes into account the need for progressivity and flexibility for developing countries, and in particular the least-developed among them.

6. Affirming core principles such as transparency, non-discrimination and procedural fairness as WTO commitments would serve to further reinforce and anchor their significance in the domestic legal system and thereby establish a stronger foundation for mutual trust and deeper cooperation among competition authorities, including through bilateral cooperation arrangements. Furthermore, for those WTO Members who have yet to adopt domestic competition laws, a WTO agreement would provide important guidance for the drafting of such laws. Finally, a WTO Agreement would help lock Members into these principles, making their legal regimes transparent and predictable and at the same time limiting the possibility of recourse to formal discriminatory treatment at a later point in time.

2. Flexibility and progressivity

7. The EC proposal for a WTO competition agreement is premised on the basic assumption that all WTO members – at some point in time – will have a domestic competition law and a domestic enforcement authority in place. However, as also stressed, progressivity and flexibility would be guiding and qualifying principles as regards this basic assumption.

² It is understood though that in specific circumstances – because of the operation of the rule of reason or other similar considerations in the domestic rules - exemptions from these rules can also be introduced ad hoc by means of an individual administrative decision or a court judgement.

³ Therefore, any reference in this submission to the manner these principles are applied in EC competition law and policy should be taken as merely illustrative.

8. More specifically, the concepts of flexibility and progressivity could mean that:

- there is no need to aim at a more detailed definition of the substantive scope of domestic competition laws. It would be sufficient to envisage that such laws would be firmly based on the core principles (and would include a ban on hard core cartels). Presumably, a number of WTO members (as is already the case in a number of jurisdictions) would also want to include other substantive issues in their domestic competition laws such as abuse of a dominant position, monopolisation and merger control. However, a WTO agreement should not entail an obligation for domestic competition laws to include such substantive provisions.
- as regards least-developed countries and certain smaller economies, the absence of a domestic competition law regime will often be due to capacity constraints. Any WTO commitment to adopt a domestic competition law and establish an enforcement authority would therefore have to be flexible and progressive in nature, e.g. some WTO members cannot reasonably be expected to have a law and enforcement authority in place from the time of conclusion of a WTO agreement or shortly thereafter. Moreover, there is a need to define such a commitment in a flexible manner so that different economies can put in place the administrative systems best suited for their particular circumstances. Obviously, technical assistance and capacity building activities as discussed in previous meetings of the Working Group and in numerous written submission, would have an essential role to play in this respect.
- even more to the point, in those cases in which a competition law regime has been established at the *regional* level, all or some of the parties to such regional agreements - particularly small countries/economies - may consider that the development of a separate *national* competition regime (or certain parts of it, such as merger review) is unnecessary and that the regional competition regime is sufficient to effectively enforce competition law throughout the region;
- in view of differences in legal cultures and systems, it would be inappropriate to aim at a more detailed definition of the powers of enforcement authorities. As in other WTO agreements, it would be sufficient to include more general references to adequate investigative powers and sanctions, capable of detecting and deterring effectively anti-competitive behaviour.
- although not limited to developing countries, the question of sectoral exclusions and exemptions from the application of competition law has particular importance for many developing countries; a flexible approach to this issue would be to leave the domestic legal framework free to define the scope and the modalities of such exclusions and exemptions, provided they do so in a transparent and predictable manner.

9. To summarise, what matters is that an effective competition regime (comprising adequate rules and the capacity to enforce them) is applicable to each WTO member and that such a regime is geared towards the specific needs and capacity of the WTO member in question. What is crucial is not necessarily that such laws and authorities be national, but rather that they be of a character that will enable all WTO members to combat international anti-competitive practices and that there will be enforcement authorities which can be partners to real and meaningful international cooperation.

3. Core principles – in particular

10. The core principles discussed below are certainly the most relevant ones for the envisaged WTO multilateral framework on trade and competition. They are firmly embodied in the WTO system and are also of key relevance for domestic competition regimes. All three of them have been explicitly mentioned in para. 25 of the Doha Development Agenda. However, the use of the term “including” in para. 25 implies that there could be other core principles that could have a place and a

role in a WTO trade and competition agreement. Additional core principles could emerge from discussions within the Working Group and during future negotiations, if WTO Members consider it necessary to endow the envisaged multilateral framework with principles coming from their competition policy experience and being well-suited to the needs of such a policy.

4. Non-discrimination

11. The importance of non-discrimination - *both* MFN *and* national treatment - for the multilateral trading system as well as national competition laws hardly needs stressing. It is difficult to imagine any situation in which a competition law regime would establish a distinction on the basis of the nationality of firms and to date discussions in the Working Group have shown no such examples. It is also our assessment that most if not all existing domestic competition laws do not prescribe discrimination against firms on the basis of nationality. Although significant substantive differences remain between various domestic competition laws, non-discrimination, as well as transparency, come across as important elements of commonality in these laws.

12. By suggesting the inclusion of provisions on non-discrimination in a WTO framework agreement on competition, we envisage an obligation according to which domestic competition laws should be firmly based on the principle of non-discrimination as regards the corporate nationality of firms. In other words, what would be at issue would be the *treatment accorded to firms pursuant to the terms of domestic competition laws* as such, and not the treatment accorded to firms under a range of other policies. This important distinction - and with that the equally important and necessary limitation on the reach and implications of non-discrimination – are discussed in further detail below.

13. As to how such a principle should be drafted, although the overall aim of “non-discrimination” generically speaking will be the same under the various WTO agreements, namely that of ensuring a level playing field between domestic and foreign operators (and their goods and services), i.e. national treatment, as well as between all foreign operators, i.e. most-favoured nation treatment, the manifestation of discriminatory treatment takes widely differing forms such as the discriminatory use of internal taxation and other measures under the GATT, cf. GATT Article III. Consequently, there is an obvious need for the inclusion of the non-discrimination principle in a WTO framework agreement on competition by way of a separate, specific provision, which would take into account the particularities of competition law and policy.⁴

5. *De jure* vs. *de facto* discrimination

14. It is important to stress, however, that we are *only* suggesting a binding core principle as regards *de jure* discrimination in the domestic competition law framework, i.e. the treatment accorded to firms according to the wording of the laws, regulations and guidelines of general application. The main reason for limiting WTO provisions to *de jure* discrimination is that, when transposed to a competition context, the concept of *de facto* discrimination could raise complex questions about the enforcement policies, priorities and prosecutorial discretion of competition authorities, including how competition law is being applied to individual cases.

15. Moreover, we propose to define *de jure* discrimination *exclusively* in relation to the domestic competition law regime. We are not proposing that a competition agreement should seek to introduce an absolute standard of national treatment to be applied to *any form* of government law or regulation.

⁴ Similarly, despite the competition-related provisions in a number of existing WTO agreements such as TRIPS and GATS (including the reference paper on basic telecommunications), all of these are area and/or issue-specific.

As regards industrial, social, developmental and other policy objectives pursued by WTO members, there is no reason, *a priori*, to consider that the non-discriminatory application of competition policy would be in conflict with such legitimate policies. Discussions in the working group have in fact shown that there is basic complementarity between competition, industrial and other development policies rather than a conflict. Moreover, as discussed below, the flexible framework of commitments proposed would still leave ample scope for maintaining policies that limit the application of domestic competition law regimes. One should also bear in mind that the instruments typically used to promote industrial and other policy objectives – principally certain forms of subsidies and temporary border protection – are covered by other disciplines in the WTO and would not be affected by a WTO competition agreement.

16. Finally, the term “binding core principle” implies that compliance with these principles is subject to dispute settlement. Of course, the modalities of the application of dispute settlement to competition law need to be worked at, in particular in order to adapt dispute settlement to the specificity of competition law and policy.

6. Cooperation arrangements

17. Provisions on non-discrimination would not be extended to cover existing or future cooperation arrangements in the competition area, including bilateral cooperation agreements on competition as well as consultation and cooperation provisions contained in bilateral or regional free trade agreements. Were such a limitation not to be placed on the non-discrimination core principle, situations could occur whereby one or more WTO members not parties to e.g. a bilateral cooperation agreement would seek to avail themselves of the provisions of such an agreement by invoking MFN.⁵ As previously discussed in the Working Group, bilateral cooperation agreements are the result of a long-standing, continuously evolving relationship between competition authorities with regard to the application and enforcement of their respective competition law regimes. Extending the provisions of such agreements to countries not originally parties to such agreements would not only defeat the underlying foundation for such agreements, i.e. the evolving relationship, but could also place considerable burdens on developing countries in administrative and financial terms. It is in the light of this that the EC has been proposing flexible modalities for international cooperation as explained in detail in previous submissions, most notably WT/WGTCP/W/184.

7. Market access

18. Non-discrimination - in relation to a competition agreement - has no bearing on the question of whether foreign firms have access to a particular market. This depends on a range of trade and investment factors outside the scope and ambit of a WTO competition agreement. In other words, by making the operation of the domestic market more efficient and more transparent, an effective domestic competition policy enables traders and investors to fully benefit from market access concessions the importing or host country may *already* have made, but does not imply any greater market access concessions. As a matter of fact, effective application of competition policy actually helps importing or host countries to avoid some of the perceived risks that are sometimes associated with market access concessions or FDI, that is, of foreign firms or investors with market power disproportionate to that of domestic firms, abusing such power.

⁵ By the proposed limitation of the non-discrimination principle the ensuing situation would in essence be that which would prevail under normal rules of public international law, cf. Article 34 of the Vienna Convention on the Law of Treaties according to which; “A treaty does not create either obligations or rights for a third State without its consent”, and, Article 36 (1) according to which; “A right arises for a third State from a provision of a treaty if the parties to the treaty intended the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all states, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.”

8. Transparency

19. Transparency is a fundamental principle both for the multilateral trading system and for competition authorities seeking to develop and establish a "competition culture". In addition to this important objective, transparency of competition law regimes is of great importance for firms engaged in international trade as well as for consumers. Furthermore, transparency as regards "behind-the-border" measures such as competition law and policy is an important means by which to strike a balance between, on the one hand, establishing a predictable rules-based trading system and, on the other hand, ensuring that the reach and coverage of any WTO disciplines are not unnecessarily intrusive.

20. At the same time it has to be acknowledged that certain aspects of transparency, including the public availability of laws, regulations and guidelines of general application, may entail administrative costs and therefore would have certain capacity-building implications. However, one should also take note of the fact that newly established competition authorities have frequently pointed to the fact that developing transparent procedures is a key requirement for ensuring respect for the law and establishing credibility regarding its enforcement. This would suggest that a multilateral agreement should be based on sufficiently high standards of transparency, while at the same time recognising that certain elements may need to be introduced progressively and be identified as a priority for technical assistance programmes.

21. Specific transparency provisions are included in most WTO agreements. Such provisions are specifically tailored for the type of government measures covered by the agreement. Transparency is already firmly incorporated in WTO Agreements such as GATT (Article X regarding publication and administration of trade regulations), GATS (Article III regarding transparency), and TRIPS (Article 63 regarding transparency).

22. In the competition field, a transparency commitment would obviously apply to laws, regulations, and guidelines of general application. The obligation would be for WTO members to ensure public availability in a comprehensive and timely manner – be it in print or on a publicly accessible web site – of all laws, regulations and guidelines of general application.⁶

23. The second part of a transparency obligation would be a notification requirement for WTO members concerning their laws, regulations and guidelines of general application. The logical body to which such notification would be made is the proposed WTO Competition Policy Committee. This Committee could also be charged with ensuring the coherence and greater effectiveness of technical assistance and capacity-building activities by providing a forum for all donors and recipients, just as voluntary peer reviews of WTO members' legislation could be undertaken with the involvement of the Competition Policy Committee if not by the Committee itself. For purposes of facilitating both the design of multi-year programmes in the area of technical assistance and capacity-building, as well as voluntary peer reviews, notification of existing laws, regulations and guidelines of general application to this Committee would greatly facilitate the efficient discharge of those responsibilities.

9. Sectoral exclusions and exemptions

24. The issue of sectoral exclusions and exemptions from the scope and application of competition law is of great importance from both a competition and a trade perspective. At the same time it must be acknowledged that it constitutes a question of great sensitivity and complexity both

⁶ On the obligation to provide information in a comprehensive and timely manner, see Japan-Trade in Semiconductors, BISD 35S/116, L/6309, adopted on 4 May 1988 and European Communities-Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R.

among developing countries as well as several OECD members, including the EC. Some countries have made the point that, in order to gather consensus for the introduction of competition legislation, it has proved necessary to introduce certain sectoral exclusions and exemptions, but that these have then been limited over time. When analysing the recent developments, the trend has clearly been to eliminate such exclusions or to define them in increasingly narrow terms. We suggest that a flexible approach would be to focus - at this stage - on the essential question of transparency and its application to sectoral exclusions and exemptions, as well as their review over time. For instance, the Working Group could also usefully examine the experience of WTO Members who have phased out exemptions and exclusions (including the reasons for and the timing of such phasing out), as well as the domestic processes employed to enact such exemptions and exclusions.

10. Procedural fairness

25. As is the case in other WTO agreements⁷, provisions related to core principles should also address the issue of "procedural fairness" and under this heading, the availability of effective and adequate domestic remedies. This would include certain procedural guarantees under which private parties have access to the competition authorities, guarantees during the course of competition investigations and enforcement, a right of appeal against administrative decisions and the role of the judiciary in the enforcement process.

26. Procedural guarantees which would fall naturally under this heading refer mainly to the so-called "rights of defence" that competition authorities should observe in all proceedings in which sanctions may be imposed. Such "rights of defence" in favour of firms involved in administrative proceedings before a competition authority could include for instance:

- (i) the right for parties to proceedings under the domestic competition law to have access to the agency or court applying the law and to be informed of the objections of the authority to their conduct.
- (ii) the right for such parties to express their views within a fair and equitable procedure in advance of an adverse decision addressed to them.
- (iii) the right to be notified of a reasoned final decision detailing the grounds on which such a decision is based.
- (iv) the right to appeal such administrative decisions by competition authorities and to have them reviewed by a judicial body.

27. Another issue to be subsumed under the core principle of procedural fairness would be the issue of protection of confidential information, including business secrets. As already pointed out in previous EC and Member State submissions, the need to protect confidential information – and the legitimate expectation on the part of firms who have submitted such information that adequate protection will be afforded – entails legal and practical limitations on what information can be exchanged. A WTO agreement would need to set out certain basic standards for the protection of such information.

28. What is important to a competition authority is to provide adequate protection for the business secrets and other confidential information provided by companies, physical persons and public

⁷ WTO Agreements which contain provisions relation to procedural fairness include GATT Article X.3(a)-(b) regarding the administration of laws, regulations, decisions and rulings in a "uniform, impartial and reasonable manner", as well as TRIPs Article 41(2) which refers to administrative procedures as "fair and equitable", as well as TRIPs Article 42 ff. regarding civil and administrative procedures and remedies.

authorities involved or co-operating in proceedings under domestic competition rules. Failing to provide adequate protection would seriously impair the effectiveness and credibility of a competition regime, may make firms in that jurisdiction hesitant to provide it with the information it needs to carry out its tasks and could even expose a competition authority – in certain legal systems – to claims for damages.
