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**Working Group on the Interaction
between Trade and Competition Policy**

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COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following communication, dated 9 March 2001, has been received from the Permanent Delegation of the European Commission with the request that it be circulated to Members.

Introduction

In previous submissions to the Working Group, the European Community (EC) and its member States have addressed a number of specific issues as they arise in relation to a possible WTO framework agreement on competition, including the development dimension of competition law and policy.¹ In its submission to the October 2000 meeting of the Group, the EC and its member States presented its ideas on possible elements that could be included in such a framework agreement and offered its views as to why an agreement on competition policy would be in the interest of all WTO Members.²

We have considered it useful in the present submission to address some of the questions that have been raised by other Members during previous meetings of the Group and which are now contained in the Note by the Chairman of 24 January 2001.³ In particular, we have focused on those questions which relate to the elements of a possible WTO framework agreement – as proposed by the EC and others – as well as to the development dimension of any such agreement. For ease of presentation, questions have been grouped into a few clusters, although some of the questions relate to more than one cluster.

1. Possible elements of a WTO framework agreement on competition, the adequacy of existing WTO agreements and the application of the WTO dispute settlement mechanism

With regard to the assertion that the principles of non-discrimination and transparency are fundamental to competition law and/or policy, is there any evidence that those principles are not being observed by Members in their competition law/policy regimes? Is an additional multilateral instrument needed given that there are already non-discrimination obligations in relation to trade in goods? Would a transparency obligation in relation to competition apply to states, institutions or to private sector entities?

¹ See e.g. submission from the EC and its member States, WT/WGTCP/W/140.

² See WT/WGTCP/W/152.

³ Updated list of questions raised by Members (Job 520), 24 January 2001.

Does the non-discriminatory application of competition policy give rise to conflicts with economic development and/or policies favouring the advancement of particular social groups?

How far could the problems identified be addressed through existing WTO agreements/activities touching on competition policy questions? To what extent is application of the Dispute Settlement Understanding a necessary component of action in the WTO framework?

The principles of transparency and non-discrimination are the cornerstones of the multilateral trading system. Together, they ensure a level playing field and equal competitive opportunities for firms, their products and services, and help bring about a higher degree of predictability to enable firms to familiarise themselves with existing rules and regulations before making major business decisions, just as consumers may become more familiar with their rights.

Transparency is already firmly incorporated in a number of WTO Agreements such as GATT (Article X) and GATS (Article III), but as an overall principle, transparency goes further than what is set out in these provisions. Specific transparency provisions are included in most WTO agreements. Such provisions are specifically tailored for the type of government measures covered by the agreement. The same goes for the existing provisions on non-discrimination to be found in WTO agreements such as GATT and GATS.

As regards transparency in the competition field, any commitment would obviously apply to laws, regulations and other government measures taken in application of domestic competition law. The transparency obligation would apply not only to publications of relevant laws and regulations, but also, perhaps more importantly, to guidelines, as appropriate, for their future application and interpretation, as well as possible exclusions and exemptions as they may apply.⁴

The application of the principle of non-discrimination, i.e. MFN and national treatment, within the context of competition law and policy would mean an obligation not to formally discriminate against firms on the basis of their corporate nationality.

Although the overall aim of non-discrimination will generally 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) as well as between all foreign operators, 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, we believe there is a need for the inclusion of the principle of non-discrimination 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. 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. The globalisation of our economy calls for a horizontal, generally applicable framework. Clearly, principles on interconnection for telecommunication would alone offer little help in tackling international cartels.

It is our assessment that most existing domestic competition laws – if not all – do not prescribe discrimination against firms on the basis of corporate nationality. Although there are significant substantive differences to be found between domestic competition laws, both transparency and non-discrimination are important elements of commonality in these laws.

The fundamental importance of transparency and non-discrimination does not depend, however, on the extent to which current laws are or not in contradiction with such principles.

⁴ The panel in the Kodak-Fuji case interpreted GATT Article X as also covering administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases.

Affirming such principles as WTO commitments would reinforce their value in the domestic legal system and establish a stronger basis for mutual trust and cooperation among competition authorities. Furthermore, for those WTO Members who have not yet adopted domestic competition laws, a WTO agreement would provide important principles to be incorporated in the drafting of domestic competition law. Finally, a WTO Agreement would help lock Members into the principles of transparency and non-discrimination, making their legal regimes transparent and predictable and limiting the possibility of recourse to formal discriminatory treatment at a later point in time.

There is no reason, *a priori*, to consider that the non-discriminatory application of competition policy could be in conflict with industrial or social policies. The instruments typically used to promote such goals – 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. In some cases, there may be an interface between industrial policy considerations and exceptions from the application of competition law. The EC considers that a WTO agreement should follow a flexible approach to the issue of exceptions from the application of domestic competition law. This is the reason why we suggest that, as regards exceptions and exemptions, disciplines could focus on transparency. In general, a competition agreement should be firmly based on flexibility and progressivity so as to be fully responsive to developmental concerns, including those relating to the promotion of certain industries.

Finally, as regards the application of the DSU, we believe this should be limited to the obligation of WTO Members to have a domestic competition law based on the core principles. In other words, application of the DSU to individual decisions of competition authorities would be excluded. The application of the DSU would play an important systemic role in ensuring credibility of the commitments assumed by WTO Members. The particular modalities of dispute settlement should of course be subject to discussions and negotiations among WTO Members.

2. A WTO framework agreement and international cooperation

How would an agreement on international cooperation apply to and generate benefits for countries at different stages of development and with differing degrees of experience and resources in competition law and policy?

How would the independence of national competition authorities be reconciled with a multilateral agreement?

How would the cooperation provisions in a multilateral framework, for example regarding the exchange of information and enforcement assistance, actually operate?

If cooperation is to be essentially voluntary in nature, why is it necessary to have a multilateral framework? Would voluntary tools of cooperation be sufficient to address the problems and concerns of developing countries in the area of anti-competitive practices, particularly in light of existing disparities of bargaining power and resources?

To the extent that action on the proposed new modalities for cooperation is warranted, how should it take into account the diversity of, and asymmetries in, Members' national economic situations, competition regimes and resources, and legal and constitutional cultures?

In an increasingly globalized economy, we remain convinced that all WTO Members – developing as well as developed – would stand to benefit from international cooperation on competition matters. It is a widely documented fact that firms of today are essentially global in nature and that they conduct their activities globally as well. When firms in addition to this also engage in international anti-competitive practices such as hard-core cartels, these practices adversely affect a

multitude of jurisdictions. This leads to complicated jurisdictional issues regarding the application of domestic competition laws when faced with such international anti-competitive practices, just as there are a number of practical problems that arise, most notably impediments to the collection of evidence.

The question of gathering evidence located outside the jurisdictional reach of the intervening authority provides a good example of how international cooperation would be a two-way street that could benefit all WTO Members. In the *French/West African Ship Owners Conference case*, the European Commission was investigating a cartel operating freight routes between the ports of 12 West African countries and the EC. The cartel meant higher freight rates whereby African exporters suffered. The Commission encountered difficulties in gathering the evidence needed for successful action to be taken against the cartel as much of this evidence was located in the West African countries in question and no cooperation agreements existed. Clearly, in this case access to international cooperation would have benefited all countries affected by the cartel activities.⁵ Several other cases have also illustrated the importance of cooperation for the effective application of competition law by developing countries, particularly in cases with an international dimension, including those relating to the activities of multinational corporations.

A WTO agreement could establish flexible modalities for cooperation whereby all WTO Members – regardless of their level of experience with investigation of competition matters – could be allowed to take part in and benefit from such cooperation. Needless to say, the experience of some competition authorities would be greater than that of a country which has only now adopted a competition law and established a competition authority, but that is not to say that less experienced countries should be precluded from the benefits of cooperation. On the contrary, they would be likely to gain the most from access to international cooperation.

In our earlier contributions (WT/WGTCP/W/140 and 152) we have explained how we foresee the cooperation under a WTO framework agreement, namely cooperation that would range from exchanges of experiences and discussions on areas of common interest to case-specific cooperation. We believe a WTO framework agreement is necessary to sustain such cooperation as nothing similar exists and most developing countries are not parties to existing bilateral cooperation agreements. Our suggestion would also meet the frequent and justified calls made by developing countries for access to international cooperation such as during the recent UNCTAD 4th Review Conference of the Set.⁶

The exchange of information under a WTO framework agreement would cover both factual and legal information that is not deemed confidential as well as confidential information where a waiver has been granted regarding its transmission to other competition authorities. Clearly, as regards both types of information, this is not the kind of information that is readily available. As regards case-specific cooperation where important interests of a WTO Member are affected, this would extend to three types of anti-competitive practices with an international dimension, namely practices that affect international markets (including international cartels); practices that affect market

⁵ For a more detailed summary of the case, see the Annex attached submission WT/WGTCP/W/140 from the European Community and its member States.

⁶ See document TD/RBP/CONF.5/L.2, para. 5-6:

"5. Calls upon State to increase cooperation at all levels between their competition authorities and Governments in order to strengthen effective action in the field of merger control and against cartels as covered by the Set, especially when these occur at the international level;

6. Notes that, while bilateral competition cooperation efforts are essential, there is need to promote regional as well as multilateral competition initiatives, particularly for smaller and developing economies, and requests the UNCTAD secretariat to study the possibility of formulating a model cooperation agreement on competition law and policy, based on the UN Set of Principles and Rules on Competition;"

access (including exclusionary abuse of a dominant position and import cartels), and; practices with an effect on a different market than where they originate (including export cartels and abuse of dominance by a foreign corporation).

In more concrete terms, WTO Members should stand ready to enter into consultations to address anti-competitive practices with an international dimension. To facilitate such consultations, a WTO Member may inform other Members whose important interests may be affected by an ongoing investigation and proceeding under its competition laws. Similarly, a WTO Member could draw the attention of another WTO Member to evidence of anti-competitive practices, which adversely affect its trade or investment and seek information about any possible competition investigation regarding such practices. This could have been used in the *French/West African Shipowners Conference case*, where the European Commission could have brought the anti-competitive practices to the attention of the competition authorities of the 12 West African countries, just as these authorities could have requested information about the ongoing investigation conducted by the European Commission. As pointed out, African exporters suffered as a direct result of the anti-competitive practices by way of higher freight rates. Furthermore, the Commission could have made a request to the West African competition authorities for assistance in obtaining the physical evidence relating to the anti-competitive practices, which was located within the jurisdictions of these countries. Cooperation may also be particularly useful in situations in which a developing country seeks assistance from the corporate home country of a foreign multinational in relation to an ongoing competition investigation or seek information which could be of value for enforcement activities in relation to international or export cartels. Consultations would also provide an opportunity to exchange views about market analysis or possible remedies. Where anti-competitive practices adversely affect several markets and are subject to parallel investigations by competition authorities, WTO Members should endeavour to co-ordinate their actions.

The above modalities of case-specific cooperation would be "voluntary" in the sense that countries would not be required to provide enforcement assistance. WTO Members would, however, have a commitment to enter into consultations and consider sympathetically such requests. The circumstances under which consultations can be envisaged would be provided in the framework agreement. It can be expected that this would create particular incentives to develop such cooperation, including when requests are made by developing country competition authorities. Participation in the framework agreement would also contribute to remedy information asymmetries and to develop a network of contacts between competition authorities at different levels of development. While cooperation can also be established on an ad hoc basis, it is unlikely to be sustained in the absence of a solid institutional framework.

It should be noted that under the proposed flexible modalities for cooperation the independence of national competition authorities would remain wholly untouched. In fact, national competition authorities along with domestic competition laws will be the backbone for the effective operation and implementation of a WTO framework agreement as we envisage it. As already noted, binding commitments would relate to a WTO Member's domestic legislation and not to individual decisions taken by national competition authorities in order to implement it. Participation in an international organization, such as the WTO, would indeed reinforce the domestic standing of national competition authorities.

3. Is the WTO the best international organization for a framework agreement

Is the WTO an appropriate forum in which to take action on competition policy at a multilateral level? What might be the advantages or disadvantages of unilateral action or cooperation in bilateral and/or regional contexts or in other multilateral fora, as compared to action in the WTO, to address the perceived detrimental impact of anti-competitive practices on international trade and/or development?

Given the clear and undisputed link between trade and competition as well as the near global membership of the WTO with its 140 plus Members, we remain convinced that the WTO is the right and proper forum for multilateral action regarding rule making on competition policy.

Unilateral action, when faced with international anti-competitive practices, has limited effectiveness and can result in jurisdictional conflicts. Bilateral cooperation arrangements have worked well in the past and offered substantial benefits for all parties involved. However, they suffer from a number of shortcomings, most notably that they are (predominantly) concluded between developed countries only. In a globalised economy, international anti-competitive practices affect a number of jurisdictions and are often directed at developing countries, which have limited investigative capabilities and hence a lower risk of detection. In light of the increasing number of jurisdictions with a domestic competition law regime, a network of bilateral agreements would, moreover, be extremely costly to administer.

By our proposal for a WTO framework agreement on competition we are not suggesting that the WTO should be the only forum competent to deal with these issues. Rather than "either or" we see it as a question of all relevant organizations working together towards the attainment of a common goal, namely the adoption and implementation of sound competition laws and policies that would contribute to equitable growth and development. Other organizations, including but not limited to UNCTAD and the World Bank, should continue doing their valuable work in the area, but the WTO would be the forum for international rule making in the area and provide an overall framework to promote international cooperation in relation to anti-competitive practices of an international dimension and to support enhanced capacity building efforts.

Similarly, we are not suggesting that international cooperation should replace regional cooperation. Such arrangements are also likely to prove beneficial to developing countries and smaller economies. The countries of the Caribbean region (CARICOM) and those of Eastern and Southern Africa (COMESA) will now be addressing anti-competitive practices through a regional arrangement, thereby allowing them together to tackle anti-competitive practices that affect several jurisdictions. Indeed, the European Union strongly supports efforts of developing countries to reinforce regional cooperation on competition policy matters. It is clear, however, that - in view of the global nature of anti-competitive practices - the parties to regional cooperation arrangements would also benefit from cooperation with countries outside the region, both developed and developing.

In conclusion, the adoption of a WTO framework agreement on competition would not in any way replace existing organizations and the work they undertake in the competition field. Multilateral, regional and bilateral cooperation arrangements are mutually supportive and would continue to be so.

4. The development perspective and technical assistance

What is the most appropriate phasing-in of competition law from a development perspective, taking into account relevant resource limitations? In particular, should developing economies attempt to deal with anti-competitive mergers early in the process of applying competition policy, or should this be postponed until a later stage?

Could the proposed elements of a multilateral framework dealing with technical assistance be more expeditiously pursued outside the context of the WTO?⁷

⁷ This question subsumes the following question which was incorporated in the previous checklist of questions (Job 5696, 21 September 2000): "What might be the advantages or disadvantages of action on the various possible new modalities in the WTO, as compared to unilateral, bilateral and regional action or action in

Just as the EC has continuously stressed that a WTO framework agreement on competition would not imply a harmonisation of competition law, it must be stressed that domestic competition laws are not based on a "one-size-fits-all" model. On the contrary, such laws and policies need to be carefully designed and adapted to adequately reflect the stage of economic development of a given country as well as its overall policy priorities.

On the question of the most appropriate phasing-in, this again would depend entirely upon the particular situation of the country in question, including its available resources for competition enforcement as well as the anti-competitive practices – be it domestic or international – that the country is facing. Empirical evidence clearly supports that competition laws and policies ideally should be implemented in tandem with trade liberalisation and other regulatory reform to avoid that private barriers to trade will shoot up where governmental barriers have been removed as well as have private monopolies replace government monopolies. This of course should all be seen in the light of the developmental stage of the country in question.

Just as EC competition law has continued to develop and be refined over the last decades in light of the changing business environment and practices, so it may reasonably be expected that it will be the case with developing countries. One might easily imagine a situation where a country in the early stages of the implementation of competition law and policy would choose to focus on certain core substantive areas such as cartels and abuse of a dominant position. Following the successful introduction and ensuing enforcement of disciplines on these practices and the attainment of institutional experience, the country might then choose to move on to address certain vertical restraints and mergers and other concentrations. It should be noted in this context that the EC proposal on substantive issues to be included in a framework agreement only suggests to focus on hard-core cartels (i.e. price fixing, bid rigging, market allocation, and output restrictions), which are the most serious and universally recognised breaches of competition laws.

On the issue of merger control, obviously it will be for each country for itself to assess the extent to which they are affected by merger activity and whether they wish to adopt merger control rules in this regard. Discussions in the Working Group have shown differing opinions on this issue, and some Members – especially smaller economies - have expressed doubts as to the desirability for them of merger control. Again, drawing upon our own experience in the EC, it was not until 1990 that the Merger Control Regulation was adopted and this Regulation only applies when the concentrations in question are over a certain threshold. For concentrations falling below this threshold, the competition authorities of individual EC member States are at liberty to act.

As regards technical assistance in the competition field, such assistance is presently provided by a number of international organizations such as UNCTAD and the World Bank, just as the EC and a number of bilateral donors are also providing assistance. However, there is no structure or framework within which such activities can be discussed and coordinated to provide the most optimal results for the recipients. Consequently, there is a real risk that there could be unnecessary duplication of work.

A WTO framework agreement on competition policy could have an important catalytic role and facilitate the design of more coherent and multi-year technical assistance programmes which could cover issues ranging from initial economic analysis and the drafting of competition laws to training and exchange of staff in order to further the expertise and enforcement capabilities of all WTO Members and their competition authorities. The assistance provided should be demand-driven and should help developing countries to take an active part in the WTO agreement and reap the

other multilateral fora, in particular for addressing the problems of anti-competitive practices that are most relevant to trade and/or development?"

benefits from access to international cooperation from as early a stage as possible well while bearing in mind the particular situation of a country.

We are not suggesting, however, that efforts to develop a more coherent and enhanced approach to technical assistance should wait until such time as a WTO agreement has been concluded. Already now, the EC is engaged in an effort to integrate competition policy with its bilateral cooperation programmes and we would favour enhanced cooperation and coordination with other donors within the overall framework of national development strategies. These efforts should continue and be intensified in parallel to the negotiation of a WTO agreement. Indeed, our expectation would be that an integrated approach to technical assistance in the competition field be established no later – and preferably before – the conclusion of such a WTO agreement on competition.
