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Til underretning for Folketingets Europaudvalg vedlægges EU's konceptpapir vedrørende handel og konkurrence – "Fleksibilitet og Progressivitet" – som EU har fremlagt i Genève under WTO-drøftelser.

21 May 2003

Submission from the EC and its Member States to the WTO Working Group on Trade and Competition Policy on "FLEXIBILITY AND PROGRESSIVITY"

INTRODUCTION

Discussions in the WGTCP since the beginning of its work in 1997 have often touched upon the development dimension of competition policy and a number of illustrative examples of competition laws which had been specifically adapted to the particularities of developing economies have been shared with the rest of the group.[1] In addition to this, the paragraph 25 of the Doha Ministerial Declaration explicitly mentions that "[F]ull account shall be taken of the needs of developing countries and least-developed country participants and appropriate flexibility provided to address them."

An effective competition regime is a key element of good governance, helping governments to make their economies more efficient and better able to benefit from increased trade and investment flows. As such, an effective competition regime is an important element of a development strategy that integrates trade and investment as a major source of economic growth and of the resources needed for development. As for a WTO Agreement on Competition, its purpose would be to make a "culture of competition" develop and take root in the economic fabric of all WTO Members. Also, the increasingly international dimension of anti-competitive practices calls for a co-ordinated international response, and this is another key area where a WTO Agreement on Competition can play an important role, not least in the interest of developing countries, by setting up a model of international co-operation and helping all WTO Members to become active partners in such co-operation, bearing in mind that competition enforcement has to take place first and foremost at the domestic level[2]. To this end, it would provide a core of principles and provisions that could guide WTO Members in laying down the basic design of their competition regime, thus underpinning existing competition regimes and stimulating and facilitating the creation of new ones. In line with these goals, a WTO Agreement on Competition should not aim at harmonising competition laws across the WTO Membership, as doing so would defeat the very purpose of such an Agreement.

Finally, there seems to emerge, from the discussion in the WGTCP, a sense that a WTO Agreement on Competition of the type suggested by the EC and other proponents should offer real benefits for *all* WTO members alike and consequently all WTO members would have an interest in – and should be put in a position of benefiting from - such an agreement, including the provisions on international co-operation, from as early a stage as possible. In other words, this would imply creating the necessary incentives for all WTO members to adhere to an agreement while at the same time avoiding the obligations of that agreement becoming burdensome to such a point that they may outweigh the benefits.

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[1] The EC and its Member States have tabled two written communications specifically addressing various aspects of competition and development. See WT/WGTCP/W/140 and 175

[2] "Domestic" being understood in this context as within one jurisdiction, be it national or regional, as the case may be..

Within these general considerations on the role of competition and of a WTO Agreement in development strategies, the "developmental" aspects of the debate in the WGTCP have been targeted at three main objectives:

(a) Identify the most basic principles and provisions, which could be implemented by all WTO Members, including developing and least developed Members, without imposing a given model of competition regime drawn from the experience of only part of the Membership[3] (in other words, no "harmonisation" of competition regimes).

(b) Address the capacity constraints that could make implementation of both a WTO Agreement on Competition and – even more important – of a domestic competition regime, no matter how desirable, difficult or even impossible for developing and least developed Members.

(c) Identify ways to make the scope and applicability of a WTO-based domestic competition regime adapted to the need of each WTO Member, and in particular of developing and least developed Members.

The EC and its Member States have addressed the issues concerning the objective (a) above in many submissions to the WGTCP[4] in as full a manner as possible and they will be referred to in this submission only in passing.

The issues under (b) and (c) have been addressed by many participants, including the EC and its Member States, as part of many written submissions and oral statements, under the headings of either "flexibility and progressivity" and/or "special and differential treatment". At this stage of the debate in the WGTCP, however, it appears useful to present the ideas that have emerged in this connection in a more coherent fashion. Some of these issues concern essentially developing and least developed countries. As such, they could be dealt with under the heading of "special and differential treatment". Other issues concern all Members and, even though they have a more dramatic impact on developing and least developed countries than they have on developed Members, it would be hard to justify dealing with them under the SDT heading. Yet, all these issues are intertwined and it is only by looking at them together that one could begin piecing together the picture of problems and solutions in this area.

For these reasons, the EC and its Member States have chosen to address all issues concerning both capacity constraints and scope and applicability together, under the overall heading of "flexibility and progressivity". It must be clearly understood, however, that these issues affect exclusively or disproportionately developing and least developed Members and that, taken together, the ideas suggested to address them represent special and differential treatment, even though some of the relevant provisions could apply to all WTO Members, irrespective of their level of development.

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[3] This regardless of the fact that a majority of WTO Members, comprising both developed and developing countries, has already adopted a competition regime.

[4] To list only those tabled since the Doha Ministerial Conference: WT/WGTCP/W/184, 193, 222 and 229

A. FLEXIBILITY

1. The scope of a WTO Agreement and the "design" of domestic competition law: no harmonisation

The structure and substantive content of a WTO Competition Agreement as proposed by the EC provides for a high degree of flexibility, necessary in order to respect the differing levels of development, needs and policy priorities of all WTO members.

To begin with, the EC proposal does not call for a complete multilateral definition of the substantive scope of a domestic competition regime. The only substantive provision that we envisage would be an obligation for WTO Members to enact in their domestic competition law a ban on hard core cartels. We do expect that a great number of WTO members (as is already the case among those who already have a competition law) would want to include other substantive provisions in their domestic competition laws, dealing with issues such as a wider range of cartels, abuses of a dominant position, monopolisation and merger control, in addition to a ban on hard core cartels. Nevertheless, a WTO agreement should not entail an obligation for domestic competition laws to include any such additional substantive provisions. That should be a policy choice of each WTO member.

As regards provisions dealing with the basic foundations of a domestic competition law – whatever its substantive scope – the EC proposal is based on the three core principles of transparency, non-discrimination and procedural fairness. The use of the word "principles" is not casual here. While the exact wording and degree of precision of multilateral provisions on these three issues is obviously a matter for negotiations, we have tried to make it clear that these must remain general and must not dictate how they are going to apply in a domestic competition framework. For example:

(a) In the area of transparency, a multilateral obligation to make laws, regulations and guidelines of general application publicly available cannot prescribe the means to achieve this (for example, actual publication vs. electronic dissemination).

(b) In the area of non-discrimination, our core principles submission[5] allows a maximum of flexibility to WTO members by proposing a limitation to prohibition of discrimination in the letter of the law, regulation or guideline of general application, in order to eliminate any hint of interference with the way individual decisions are taken.

(c) In the area of procedural fairness, we have suggested that an obligation to provide a judicial review of administrative decisions should be drafted so as not to prejudge (i) whether or not competition law is enforced through administrative decisions (in some legal systems this can be done through judicial decisions only) and (ii) what kind of judicial body should do the review (the ordinary courts, administrative tribunals where they exist, a specialised competition tribunal, ...).

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[5] WT/WGTCP/W/222

These are obviously only a few examples, but we hope they give a clearer idea of what kind of core principles provisions we envisage in a WTO Competition Agreement.
In conclusion, the EC proposal is for a minimum set of multilateral provisions which will influence and guide WTO Members in setting up a domestic competition regime, including mechanisms that will make it "self-correcting" (a typical such provision would be the obligation of a judicial review of some sort), while avoiding any tendency towards harmonisation of such regimes across WTO Members.

2. Exclusions and exemptions

In our earlier submission on "core principles"[6] we stressed that 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. We believe that WTO Members should retain the policy space they need to maintain and implement important domestic policies that respond to their social, economic and developmental objectives.

We also recognised that it constitutes a question of great sensitivity and complexity both among developing countries as well as OECD members, including the EC and its Member States, even though it may be of particular significance for those developing countries who do not yet have a domestic competition law or whose law is still relatively recent and untested.

When analysing recent developments, the trend has clearly been to eliminate such exclusions or to define them in increasingly narrow terms[7]. We have therefore suggested 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 (and later the proposed Competition Policy Committee) 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. Furthermore, the domestic legal framework should be left free to define the scope and modalities of exclusions and exemptions, provided they do so in a transparent and predictable manner.

3. Regional approaches

In cases where a competition law regime (and along with that possibly also an enforcement agency) has been – or will be - established at the *regional* rather than national level, parties to such regional agreements - particularly small countries/economies - may find the development of a separate *national* competition regime (or certain parts of it, such as merger review) unnecessary and decide that the regional competition regime is sufficient to effectively enforce competition law

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[6] WT/WGTCP/W/222

[7] The EC itself has virtually no such exclusions or exemptions from competition rules laid down in the treaty. For example, agricultural cartels are fully included, as a recent fine imposed from the EC Commission on a cartel concerning bovine meat shows. EC Regulations known as "block exemptions" are, despite the name, a means of applying EC competition law by declaring certain types of agreements authorised.

throughout the region. This, of course, will not – and should not - exclude the country in question from adopting a domestic competition law as well, later or at the same time, and which could co-exist with a regional competition regime. For example CARICOM and COMESA are examples of regional groupings with competition among their competences[8]

Moreover, the role of competition regimes in fostering regional economic integration, consolidating regional markets and making them more attractive to both domestic and foreign direct investment should not be overlooked.

4. Administrative and resource implication of competition enforcement

While a number of jurisdictions in both developed and developing countries have chosen to establish a competition authority charged solely with the application and enforcement of competition law (for the sake of brevity, "administrative enforcement"), this should by no means be taken as the only way of ensuring such application and enforcement. To begin with, some countries may choose to rely on judicial enforcement of competition law, either exclusively or in combination with administrative enforcement. Moreover, judicial enforcement itself can take different forms (e.g. private actions by affected competitors and/or actions by a public prosecutor).

Among countries who have a preference for administrative enforcement, the more frequent model is that of a "dedicated" competition agency or authority (that is, one that is solely dedicated to the task of enforcing competition law) and a fairly large number of countries have chosen to establish such an independent competition authority. Yet, there may be a number of reasons, including the administrative structure and tradition of a country, as well as budgetary restrictions, which may lead a country to either establish or designate an authority charged with other tasks as well to also apply and enforce its competition law. This could be an agency for consumer protection or other regulatory matters, just as it could be a government ministry. For example, many competition enforcement agencies, in both developed and developing countries, deal with both competition and consumer protection[9].

Clearly, in order to have any deterrent effect, a competition enforcement agency needs to establish its credibility by completing successful investigations, and this cannot be done without adequate staff and resources. Moreover, it should also be a real partner in international co-operation. However, there cannot be any established norms for "adequacy", as this depends on individual factors such as the size of the relevant market, the level of economic activity within it, the nature and sophistication of the economic operators, other laws and regulations affecting the competitive behaviour of firms, as well as more "subjective" factors, such as how well rooted a "culture of competition" is among firms operating in that market. Thus, it is obvious to us that a WTO Competition Agreement could not possibly aim at establishing international

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[8] In 2002, the EC approved €745,000 of technical assistance to COMESA for competition capacity building, and on March 3 2003, an EC-funded €1.5 million programme for competition law and enforcement in ANDEAN was announced.

[9] Examples are the Office of Fair Trading in the UK, the Australian Competition and Consumer Commission, the Polish Office of Competition and Consumer Protection, and the Jamaican Fair Trade Commission.

standards for the level of resources that a country chooses (or rather, in most cases, can afford) to allocate to competition enforcement. All which can be said at this stage is that the resource implications for a small developing economy are, in absolute terms, very much smaller than those needed for the implementation even of similar provisions in a large developed economy such as the EU or the US, while recognising that, in relative terms, this could still represent a considerable expenditure of resources for a developing countries with many competing priorities. Nevertheless, this has to be seen also in light of recent studies such as the research paper initially presented before the WGTCP in February 2003[10], the World Bank report Global Economic Prospects 2003, and other studies, which have pointed to the *net* benefits for developing countries that might arise, in the medium- or long term, from the existence of a competition policy and its effective implementation, in particular as regards to a ban on hard core cartels.

B. PROGRESSIVITY

5. Implementation periods and plans

The concept of progressivity would apply principally to those WTO members who have yet to adopt a competition law and/or establish a competition agency or other relevant enforcement authority. For this group of countries, an obligation to have a domestic law and enforcement authority in place from the entry into force of a WTO competition agreement could place an unreasonably onerous burden upon them.

Rather, such countries should – in the light of their particular circumstances, including level of development as well as administrative and judicial "infrastructure"– be allowed reasonable and more individualised time-periods within which to adopt a domestic (or regional) competition law and establish an enforcement authority. Such time-periods could be modulated according to the level of development, as well as to the wishes and needs of each country.

In order to avoid de facto "implementation backloading", these time periods could be accompanied by indicative implementation plans, who could help these countries map out the steps needed to establish a WTO-compliant domestic competition regime and the time needed for each step.

Needless to say, the provision of adequate technical and capacity-building assistance will be of key importance here. Developed countries should assume their responsibility for supporting the implementation, through technical assistance and cooperation. Also, through the activities of a WTO Competition Policy Committee, implementing countries could benefit from the experience of other WTO members.

6. Progressive development of a domestic competition regime

This is an issue that links to the point made earlier, under the heading of "flexibility", in relation to the substantive scope of a domestic competition regime. As is known, our proposal envisages only a minimum of substantive provisions: those concerning a ban on hard-core cartels. It is obvious that countries that choose to go beyond that can

[10] WT/WGTCP/W/228

do so in a progressive manner. Indeed, as a matter of fact, while broad anti-cartel provisions and some form of anti-monopoly or abuse of dominance provisions are very common at an early stage, merger control provisions tend to appear in domestic competition regimes only at a later stage. Clearly, the kind of WTO Competition Agreement we envisage would leave total freedom to WTO Members to expand the substantive scope of their competition law beyond hard-core cartels (if they so wish) at their own rhythm and according to their own priorities.

In this respect, the establishment of a WTO Competition Policy Committee and of an appropriate mechanism for WTO Members to exchange views and experiences would be an important support for Members in making their competition regime evolve and stay adapted to their economic situation and needs.

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