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Competition policy as a tool of EU Foreign Policy: multilateralism, bilateralism and soft convergence

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Within the group of existing and prospective EU members, competition policy has been the driver of EC integration. Furthermore, the EC approach represents the standard by which prospective members are evaluated. Required institutional changes are negotiated bilaterally country by country. Technical assistance is provided to help compliance and the system has proved to be quite effective. With respect to developing countries a multilateral approach on competition was launched in 1996 at the Singapore WTO intergovernmental meeting, following a proposal by the EC Commission. A WTO working group was created. After five years of study, there was no consensus for starting negotiations on an international agreement on competition. The issue is now suspended. A softer approach is now providing good results in terms of convergence. Best practice recommendations are more and more adopted by the international competition network, the virtual network of competition authorities founded in 2001 by a group of leading jurisdictions, including the European Commission. These are influencing legislation and enforcement practices worldwide. However for many relevant issues, like multi-jurisdictional mergers or abuse of dominance with respect to conduct that produces its effects in a number of jurisdictions, some binding multilateral instrument might be needed, should diverging decisions become more common.

1. Introduction

1. The Treaty establishing the European Economic Community, signed in Rome on March 25th 1957, was designed to achieve a unified market across the six founding member countries, on the belief that, after two world wars, both of them originated in Europe, economic integration would represent the most effective solution in order to avoid wars and conflicts. Instead of forcing Germany to become an agricultural country, a solution that was briefly discussed after the end of the war, the influence of Kelsen (1944)[1] led to the construction of a system that was pursuing integration with a combination of political and legal instruments. A free trade zone was not considered sufficient. The ambition of the founding fathers of the European Communities was to create an institutional setting governed by the rule of law, so as to constrain member countries and make sure that the objectives of the Treaty would not be set aside. According to the Treaty, the Commission was the guardian of the Treaty and the European Court of Justice the supreme court of the unified market.

2. This articulated institutional setting was necessary because, together with the elimination of tariff and non-tariff barriers[2], the Treaty introduced a system of legal obligations, especially designed to discipline the regulatory power of Member States, that would accompany trade liberalization, ensuring that the objective of market integration would be achieved. Competition rules were meant to impede private restraints aimed at segmenting national markets, thus preventing the creation of the common market. Additional provisions prevented governments from maintaining or introducing protectionist regulations insulating national markets or from benefiting firms with anticompetitive State subsidies. No other international organization (or for that matter no other country) had a similar portfolio of instruments aimed at achieving an integrated and unified market.

3. Indeed, one of the objectives of the Treaty, together with the creation of the internal market, was maintaining a fair and undistorted competition in Europe (article 2f of the Rome Treaty and article 3g of the Maastricht Treaty). This is no longer so. According to the recent deliberation of the Council of Lisbon in December 2007, competition has been downgraded and is no longer explicitly cited among the objectives of the Treaty. This downgrading has been justified by the desire of creating greater clarity and a better articulation between objectives and instruments. The problem is that other objectives have been maintained in the Treaty that, like competition, are clearly not final objectives. For example, the creation of the internal market cannot be considered a final objective either.

4. The argument that competition was downgraded because it was an instrument rather than an objective proves too much. There must be other justifications. Indeed the revision of the Treaty started from the question ‘what has competition done for Europe?’ posed by the newly elected French president Sarkozy[3]. The elimination of competition from article 3 originates from a negative implicit judgement on the role of competition in Europe. That judgement seems to be shared by the majority of the Council. It is true that Protocol 27 on the internal market and competition acknowledges that “the internal market includes a system ensuring that competition is not distorted”, but politically, the fact that competition is no longer in Article 3, but in Protocol 27, must have an effect. Which one is yet to be seen. Legally nothing has changed.

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1 See Hans Kelsen (1944) *Peace through law*, Chapel Hill: the University of North Carolina press. Kelsen proposed for the whole world a very similar system to the one adopted in Europe.

2 Non tariff barriers were eliminated with the completion of the internal market in January 1993.

3 For example, at the EC Summit in June 2007, the newly elected President of France, NICHOLAS SARKOZY, reportedly asked "Competition as an ideology, as a dogma, what has it done for Europe?". See FINANCIAL TIMES (2007).

5. Competition has been the driving force of European integration, but it also had a foreign policy dimension, as a standard to be imposed on candidate countries and on the world at large. With respect to new members, competition has been a discipline imposed on them and an important chapter over which to decide whether membership was appropriate. As for international antitrust, the Commission attempted first to suggest a multilateral approach to antitrust enforcement, but the international community was not ready. The Commission then contributed to the founding of the international competition network, a soft convergence exercise. This paper will first very briefly address the role of competition internally and then it will describe the major initiatives the Commission took internationally.

2. The role of competition in the EC

6. Although, the development of Europe was driven by a market integration objective, this does not imply that the usual benefits of competition (lower prices, increased quantities, enhanced technical progress, wider product differentiation etc.) were disregarded. Indeed internal market and competition have been interpreted as being one and the same thing, as reflected, by the way, in the wording of Protocol 27 to the Lisbon Treaty where it is mentioned that "the internal market includes a system ensuring that competition is not distorted".

7. Certainly the important role competition has played in the Treaty was not expected. Like the internal market, also a competition regime is hampered by protectionist regulation and by private restrictive conduct. The Treaty with its provisions and its institutions has been the right response to these challenges under a political economy perspective. As Mancur Olson argues in 1982[4] stable societies with unchanged boundaries are particularly prone to accumulate over time protectionist provisions and private associations aimed at promoting collusion. The political process by which such an evolution takes place is strictly dependent on the fact that special interests are concentrated and gain substantially from any restriction of competition. On the other hand, losers from such restrictions are scattered across our societies, each losing a minimal amount, so that, individually, they do not have much incentive to contrast the efforts of special interests organizations. Only by organizing their own coalitions losers might be able to counterbalance the activity of the other lobbies. However such coalitions may be difficult to come about, since participants may change depending on the issue involved, so that the organizational cost of coalition formation may be so burdensome as to make the effort not worthwhile. Furthermore, special interests have a dominant interest in one subject, while the rest of society pursues a number of differentiated goals. This is why the voice of consumers is seldom heard in the political debate and, more importantly, why special interest are listened to with such great attention.

8. In Olson's analysis, free trade, the opening of markets, thorough changes in the social order, political upheavals, wars and destructions are all events that tend to eliminate existing distributional coalitions, making it easier for competition to operate to the benefit of consumers and of society at large. However, the problem with these structural shocks is that, except for free trade, they are really exceptional and cannot be relied upon as a disciplining device. Furthermore, free trade, which at first glance seems to be quite a general instrument, is not in itself neutral with respect to existing protectionist coalitions. For example, a free trade policy would affect only markets open to import competition, but would not exercise much influence on markets with a local dimension. Therefore, in order to foster and maintain competition in all markets, free trade is actually not enough.

9. Frederick Hilmer, in the 1993 Australian Report on "National competition policy" by the Independent Committee of Inquiry, suggests that the best option for gaining support for competition

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4 See Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities,* Yale University Press.

oriented legislation is to adopt a constitutional norm of a general nature. In fact special interests do not find sufficient incentives to organize themselves to fight a general rule that does not seem likely to affect them directly. Indeed, while discussing a constitutional norm that would for example constrain the introduction of any restrictive regulation to be justified by the general interest, special interests are not particularly concerned. In particular, it might astonish even the proponents of such rules that they would then be applied to "minor" issues such as the rules governing the professions, retail trade or other activities generally not considered of primary importance. Furthermore, while everyone would like to become a monopoly seller, at the same time everyone would like to be a customer of a competitive industry. This is why the incentive to form a global alliance against a constitutional constraint based on competition principle is quite weak.

10. At the time of the signing of the Treaty, the only vocal opposition against it was by manufacturers, in some countries protected by tariffs up to 50%. Their consensus was achieved by referring to the larger market that the Treaty was creating and by the greater business opportunities associated with it. Every other category was silent. On the other hand, whenever in the course of the years there was a measure taken against a specific protectionist rule, the affected category protested very vigorously, sometimes successfully. Given the strong opposition on every liberalization measure the Commission undertook, a more realistic explanation for the lack of opposition by the business community to the signing of the Treaty, was that the European Community was an abstract and distant construction and there was a general understanding that it would not have made much difference.

11. Indeed in 1957 competition was not widely considered an important policy tool and it has been so for a number of years afterwards. This is probably the main reason why governments did not find it necessary to strictly control the enforcement of competition rules and left the application of competition rules to the Commission, not the Council of Ministers. The Treaty, probably because the importance of antitrust was not fully appreciated, insulated antitrust enforcement from political control and put the decision making of the Commission under the jurisdictional control of the Court of Justice. As a consequence, the Court took upon itself the task of becoming, through the jurisdictional role it played in the enforcement of competition law, the key player for enhancing European integration. The Court did not limit itself to a narrow view of competition policy. Following the Commission, the Court promoted a very broad interpretation of the rules of the Treaty, setting the foundations for the important developments that competition policy, both with respect to liberalization measures and antitrust enforcement, would have in the Community[5].

12. Developments at the European level have also influenced the evolution of member States' institutional settings and fifty years after the signing of the EU Treaty all member States have a competition law and an institutional structure very similar in substance (and procedurally) to the European one. The imitation of a very successful model was the major driving force of such positive developments, with the necessity of better cooperation within the network of European competition authorities playing an additional reinforcing role. In the antitrust field, consensus on substantive provisions and institutional design mainly originated from the deliberate choice of an efficient model. Furthermore member States, equipped with a competition regime aligned to the European one, were able to play a more influential role in European decision making on competition matters, thereby reinforcing the drive to conform to the European model.

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5 See on this David Gerber (1998), *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press

3. Competition rules, the new member States and the role of the European Commission

13. Right after the fall of communism in 1989, the European Commission started a process of bilateral short-term technical assistance with the former Eastern European countries. The program was quite costly, but was quite ineffective because the Commission relied on outside consultants, most of the times university professors with a vague experience on the working of a State administration. Furthermore, since the projects were short term, consultants had only at best a very general understanding of the specific circumstances of the beneficiary and, as a result, their advices were not very useful. In 1998 as a result of these shortcomings the Commission launched the “twinning projects”. These projects (there were around 1000 of them) covered all areas of Community interest and have addressed sectors like agriculture, customs, police cooperation and of course competition and State aid. Thirteen of these projects have been on competition policy and have benefited Bulgaria, Croatia, Estonia, Lithuania, Macedonia, Malta, Romania, Poland, the Czech Republic. The idea behind these projects was to train the administration of a beneficiary country with the help of an administration of a member State in a long term relations whose aim was to bring the administration in question to the “European standard”. In practice this has not only meant convergence on “hard” law, which was the easier part, but also on soft law, on organizational matters and on the application of the law. While the bilateral short term advices used before 1998 were a one-shot exercise, this long term relationship between sister administrations was quite successful because the assistance was fine tuned to the needs of the beneficiary and policy suggestions were followed up, either by the member State administration or by the Commission itself.

14. My experience with these projects (the Italian Competition Authority actively either led or was responsible of the competition component in four of these thirteen projects) is that their success was related to the fact that they were demand driven. There was a demand for technical supply. Member States would then compete to supply the services that the beneficiary required. A covenant would then be written with all the details of project, including a precise indication of the results to be achieved and be signed by the administrations of the two countries together with the Commission.

15. It is true that the successful conclusions of these projects was quite important for countries that were eager to acquire EU membership, because it signalled to the Commission that in a specific subject matter that country had reached the European standard and therefore was ready for accession. So in a sense there was a risk that demand for technical assistance be driven by a political objective more than by a modernization objective and that the beneficiary would try to comply only formally with the European standards. Sometimes of course this was the case. In many others, and in my experience it was the majority, there was a genuine desire by the beneficiary to modernize, not just to passively comply with EC rules and EC regulations just as to gain the green light for accession.

16. The prime objective of these twinning exercise was to also to promote an effective application of antitrust law, not just that right substantive provisions be in place. This has meant ensuring that legal provisions are interpreted according to the European standard and in a way that would reduce the possibility of mistakes, both wrongly prohibiting behaviour that would not be anticompetitive and wrongly letting anticompetitive practices go. Furthermore, procedural matters were also important, such as guaranteeing the right of defence of companies accused of an antitrust violation and ensuring transparency, as well as organizational issues, like obtaining and maintaining high quality staff, organizing the authority in a way that would guarantee an efficient decision making process, making sure that there were enough resources for the most serious cases, etc.

17. More in general, through partnership and free trade agreements the Commission has encouraged the adoption of competition rules based on the EC approach, not simply for allowing accession to the EU. An OECD survey of 86 regional agreements incorporating provisions on competition policy identified two broad "families" of such agreements, one associated with the EC and one with North American (NAFTA-

style) approaches[6]. While Anderson and Evenett (2006)[7] suggest that this characterisation is overly simplistic, it is nonetheless clear that the EC has used its partnership and other agreements effectively as a vehicle to promote the adoption of EC-style rules internationally. As a result, the rules encountered by EC businesses operating abroad are more likely to be similar to those with which they are already familiar – an important benefit for European firms in a globalising economy.

4. The WTO effort to incorporate competition in trade agreements

18. In the wider international community, the number of jurisdictions that adopted a competition law rose in recent years quite substantially. The increased importance of antitrust law enforcement worldwide led the European Commission in the mid 1990s to launch a number of initiatives that had the objective to somehow constrain national administrations on their interpretation of their domestic antitrust laws. In particular the 1996 WTO intergovernmental conference of Singapore, picking up on a proposal by the European Commission, created a working group to "study issues raised by Members relating to the interaction between trade and competition policy". The mandate of the group was very open, but it is clear from a number of speeches of DG Competition representatives that the agenda was very ambitious. Jean-François Pons, deputy director general of DG Competition at the time, in a speech he delivered in Rome in 1995[8], refers to the possibility that within the WTO a multilateral agreement on competition be negotiated, where countries would commit themselves to adopt a minimum set of antitrust rules and be subject to a dispute settlement mechanism. Pons (1995) does not go further, but in his intervention in Rome he cites several times the 1995 Report on "Competition policy in the new trade order: strengthening international cooperation and rules" drafted by a group of three external[9] and five Commission [10]experts where clear reference is made to the possibility that the proposed plurilateral agreement on competition would also deal with controversies over the way a jurisdiction would decide on specific antitrust cases, a matter that would raise a lot of concerns over the following years.

19. Indeed a first try in that direction was made by the United States (later joined by the European Commission and Mexico) with the WTO Fuji-Kodak dispute. In that controversy, initiated in 1996 and concluded in 1998[11], the United States government alleged that Japan was impeding efficient access of Kodak films in the Japanese market, by failing to enforce Japanese antitrust laws against Fuji and allowing exclusive distribution agreements between Fuji, the Japanese rival of Kodak, and most retail shops in Japan. The criticism was even more fundamental and the US government was arguing that "Japan's entire retail system puts foreign competition at an unfair disadvantage."[12] However the report of the dispute settlement panel is mostly based on fairness and equity considerations and, in particular, on comparisons of

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6 See Solano, Oliver and Andreas Sennekamp (2006), *Competition Provisions in Regional Trading Agreements*, OECD Trade Policy Working Paper No. 31.

7 Anderson, Robert D. and Simon Evenett (2006), *Incorporating Competition Elements into Regional Trade Agreements: Characterization and Empirical Analysis,* Internet: http://www.evenett.com/working/CompPrincInRTAs.pdf.

8 Jean-François PONS, Règles, Institutions et Relations internationales: Politique de concurrence et développement des échanges : pour un renforcement significatif de la coopération, Rome, 20-21/11/1995

9 Ulrich Immenga, Fréderic Jenny and Ernst-Ulrich Petersmann

10 Claus-Dieter Ehlermann, Roderick Abbott, François Lamoureux, Jean- François Marchipont, Alexis Jacquemin.

11 See http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm

12 Nelson, Emily. The Wall Street Journal. "Presentation of Data in Kodak's case against Japan and Fuji delayed by US" Sep. 20, 1996 Sec B, p.4

Kodak market shares in Japan and Fuji market shares in the United States. Antitrust considerations surely entered in the report. In particular, the panel acknowledged that Japanese rules (including its antitrust law) did not discriminate foreign companies and therefore could not be challenged by the United States.

20. The substance of the matter, i.e. whether a nation would violate the GATT/WTO rules because it failed to enforce its antitrust laws against private practices that might foreclose its domestic market, never made it in the Kodak-Fuji dispute. The problem was that exclusive distribution agreements are considered restrictive by modern antitrust only in fact specific circumstances. And indeed it would have been almost impossible for a WTO panel to argue, contrary to the competition agency conclusions, that Japanese consumers were actually hurt by the disputed practice. Unfortunately the WTO panel was not confronted with this issue and therefore did not address it.

21. Nonetheless the debates stirred by the Kodak-Fuji case and, more importantly, the discussions within the WTO Working Group were not able to eliminate all concerns and in the WTO meeting in Doha in 2001, Ministers provided further clarifications on the mandate of the group:

> "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."

22. As Clarcke and Evenett[13] (2005) recognize, paragraph 25 of the Declaration shifts the focus away from market access issues and requires the WTO's Working Group on the Interaction Between Trade and Competition Policy to focus on hard-core cartels, an area almost not touched in the early discussions. Indeed, as Pons (1995) had indicated, the original objective of the Commission was directly linked to achieving specific outcomes in domestic antitrust cases, especially in restrictions of competition originating from vertical restraints and from abusive unilateral conduct. In the course of the discussions within the WTO working group and in the OECD it had become clear that such results would have been impossible to achieve, given the judicial nature of antitrust decisions and the case law approach so common in antitrust.

23. Even with this strong reduction in the scope of the objectives to be pursued in a multilateral negotiation, there was not support for it and the WTO General Council "July package" of 2004 put the

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13 The State Secretariat of Economic Affairs and Simon Evenett (EDS.), *The Singapore issues and the world trading system: The road to Cancun and beyond*, World Trade Institute, June 2003

whole subject of trade and competition in a limbo. As Anderson and Jenny (2005) suggest, the WTO General Council decision leaves open the possibility of resuming work in this area in the WTO following conclusion of the Doha Round. How likely this will be, it is certainly not clear at this stage.

24. Already in 1948 the Havana Charter would have required nations to address trasnational restrictive business practices by authorising the then proposed International Trade Organization to "take every possible remedial action"[14] against them. As is well known, the Havana Charter was never adopted, as a result of the lack of support by the US government. Very similar developments have characterized this most recent attempt to launch negotiations on antitrust matters. As Fox (2006) argues:

> "Although strongly supported by the EU, the antitrust proposal lacked support from the United States, which feared a transfer of powers to a global bureaucracy and a lowest-common-denominator law, and it was opposed by developing countries because they feared a Trojan horse that would open floodgates to imports and disarm them from protecting their nations' interests"

25. What can be concluded is that this result has been a defeat for the Commission, considering all the hopes that had been put in the project. The issue was not so much that the US was not enthusiastic of the original project, because the US criticism was easy to handle and indeed in the course of the years the objectives of the possible negotiations changed considerably, accommodating most of the problems that the US had identified. The major criticism of the US authorities to the original project of the EU was that antitrust laws were enforced by judges and it would have been contrary to any principle of law to make governments responsible, should a judgement (not a legal provision) be considered unsatisfactory by a foreign nation. And indeed the 2001 Doha declaration rightly limits to hard core cartels the possibility to impose that they be prohibited by nations laws. What led to the defeat of the trade and competition dossier was the opposition of developing countries. They argued that any negotiation on antitrust would only help the developed world and their multinationals, a political opposition that could not be solved at a very late stage of the process, i.e. after almost ten years of discussion. If the Commission (and member States as well) had started with a much less ambitious, but feasible agenda, aimed to help developing countries in their efforts to introduce a domestic competition law system (as the Doha declaration implicitly acknowledges), there would have been greater chances for the trade and competition dossier to flourish.

5. The International Competition Network and the cooperation agenda

26. In February 2000 the International Competition Policy Advisory Committee published its final report which sets forth recommendations to competition agencies throughout the world designed to enhance merger enforcement and to improve cooperation to address private restraints of competition that impede market access. On the subject of the intersection of trade and competition policy, as reported in the Department of Justice press release[15],

> "the report recommends further development of bilateral agreements with "positive comity" provisions (which allow a nation affected by anticompetitive practices to request that the nation in which the alleged conduct is occurring initiate an appropriate enforcement action) as well as the use of extraterritorial enforcement tools where necessary. Further, the report argues that new multilateral approaches are also needed, although it does not see the WTO as the natural home for all global competition policy initiatives. Instead, it proposes a new Global Competition Initiative for addressing the broad global competition agenda".

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14 See Havana Charter for an International Trade Organization, Chapter 13.

15 See the department of Justice press release available at http://www.usdoj.gov/atr/icpac/4272.htm

27. In particular, the report recommended that "the United States explore the scope for collaborations among interested governments and international organisations to create a new venue where government officials, as well as private firms, non-governmental organisations (NGOs), and others can consult on matters of competition law and policy" [16] .

28. In September 2000, Joel Klein, at that time assistant attorney general for antitrust, speaking in Brussels at the 10th anniversary of the EC merger regulation, took the ICPAC recommendations forward, suggesting that "whatever happens on antitrust at the WTO (…), we should move in the direction of a Global Competition Initiative". More in particular he suggested that "interested jurisdictions along with the international bodies already thinking about these issues e.g., the OECD, WTO, UNCTAD, World Bank, and others might establish a joint working group -- first for exchanging information and views (e.g., about ongoing and planned activities, common challenges, approaches each are taking to support sound enforcement practices, areas that are most vexing, greatest opportunities for cooperation, etc.) and then for fully exploring a Global Competition Initiative along the lines laid out in the ICPAC report"[17]. Mario Monti, at the time EC commissioner for competition, speaking at the same conference, endorsed Assistant Attorney General Klein suggestion to create a new forum addressing the international challenges of antitrust enforcement.

29. A year later in October 2001, meeting at the Fordham conference on international antitrust in New York City, a group of top antitrust law officials from 14 jurisdictions[18] created the International Competition Network (ICN), with the objective of becoming "an informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure"[19]. The ICN was quickly going to become the world forum for convergence of antitrust law enforcement practices. Six years after it was founded, the ICN has more than 100 members, a simple sign of its success.

30. Within the ICN there are three working groups whose mandate is to identify best practices in merger control, in the identification of cartel behaviour and in abuse of dominance. Furthermore there is a working group, the competition policy implementation group, that aims to overcome the challenges developing countries face in building up an efficient antitrust authority and an effective enforcement practice.

31. Such good results are mainly due to organizational efficiency. The ICN is a virtual organization that operates without a Secretariat. Every report is written by members or by non-governmental advisors that work for ICN on a voluntary basis. Discussions are held via conference calls and every agency that so desires can participate. Decision making is for members only (i.e. antitrust authorities) and is consensual.

32. Of course the larger agencies, like the US department of Justice, the US Federal Trade Commission and the European Commission, have more resources than the others and therefore can put more people at work on ICN issues than the other agencies. However the fact that decision making is

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16 See Icpac report at page 282.

17 See Joel Klein (2000), " Time for a global competition initiative?", talk at the EC Merger Control 10th Anniversary Conference Brussels, Belgium, available at http://www.usdoj.gov/atr/public/speeches/6486.htm

18 The founding authorities of the ICN originated from Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia.

19 See the "Memorandum on the Establishment and Operation of the International Competition Network", at http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/operational-framework

consensual represents a very important safeguard that allows even very small agencies to count. And indeed in many instances the veto power of small agencies has been successfully used. Of course as time goes by, more difficult issues will be taken up by the ICN, raising the barriers to entry for small agencies. In this sense the risk of them being excluded increases. However the fact that the ICN was created for ensuring convergence in antitrust enforcement especially in developing countries, will maintain the right incentive on the part of the most developed agencies to engage the smaller one and to make sure that they actively participate.

33. The ICN issued more than 100 recommended practices to member Agencies on issues like merger control, cartels, abuse of dominance, banking, telecommunications, advocacy, etc. These practices are non-binding, and it is left to governments and agencies to implement them as appropriate. Over the past six years since the recommendations were adopted, they have increasingly become the benchmark that agencies and the private sector use to evaluate the appropriateness of laws and policies – and in that respect, there can be pressure for agencies to adopt regimes that conform to them. Three recent examples highlight the influence of the recommended practices on merger procedure and review.

- During the past two years, Korea has made significant changes to its merger notification thresholds and in doing so it indicated publicly its desire to bring national law into line with the Recommended Practices for Merger Notification and Review Procedures.
- In another case, India adopted a merger regime last summer that was at odds with the on of the most important merger procedure recommended practices . Immediately thereafter there was widespread complaint from the private sector, within and outside of India, with the majority using the ICN recommendations as a benchmark for their complaints. Last February, the Indian agency proposed implementing regulations that would bring the regime into greater conformity with the ICN recommendations.
- In countries like China that are just adopting merger control regimes, the ICN has been cited time and again by outside bodies commenting on various proposals. There was considerable interest by the Chinese government to understand and incorporate the ICN recommendations into their merger control regime.

34. As these examples show, the influence of the ICN, in terms of compliance to recommended practices has been so far limited to rules and regulations sometimes being out of line. There is no experience of applying ICN recommendations to actual cases. It might be difficult to do so for a consensual organization.

6. Is the ICN sufficient to guarantee convergence in international antitrust? The Microsoft example

35. The recent flurry of cases in various jurisdictions involving the Microsoft corporation clearly have repercussions for international markets. In such cases, different approaches to the assessment of liability and, particularly, the imposition of different remedies can give rise to spillovers in the sense that measures adopted in one jurisdiction can affect commercial decisions and/or the welfare of consumers in another jurisdiction.

36. In many cases, the spillovers will be positive in the sense that measures taken to protect competition in one market will also benefit consumers in other markets and will have no adverse effects. However, negative spillovers can also arise. To take an extreme example, the breaking up of a large international corporation as a result of a finding of abuse of dominant position in one jurisdiction might be deemed negative in another jurisdiction in which behavioral remedies for the alleged abuses are deemed sufficient. Yet once a corporation is broken up for the sake of one jurisdiction it may well, for practical purposes, be broken up in respect of the rest of the world.

37. The recent example of remedies implemented by various jurisdictions in respect of practices of the Microsoft corporation illustrates the extent of concerns that may arise in transnational abuse or monopolization cases where different jurisdictions impose differing remedies in respect of similar practices. As is well known, in the course of a number of related cases the competition authorities of the United States and the European Communities have taken different positions regarding aspects of Microsoft's conduct. In reviewing the EC decision[20], the Antitrust Division of the US Department of Justice issued a press release stating as follows:

> "The U.S. experience tells us that the best antitrust remedies eliminate impediments to the healthy functioning of competitive markets without hindering successful competitors or imposing burdens on third parties, which may result from the EC's remedy. […] Sound antitrust policy must avoid chilling innovation and competition even by 'dominant' companies. A contrary approach risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it. It is significant that the U.S. district court considered and rejected a .... remedy [similar to that imposed by the EC] in the U.S. litigation." (US Department of Justice, 2004)

38. In a related vein, in early December 2005, the Fair Trade Commission of Korea made public an order requiring Microsoft to sell in Korea a version of its Windows operating system that includes neither Windows Media Player nor Windows Messenger functionality, requiring Microsoft to facilitate consumer downloads of third party media player and messenger products selected by the Commission, and prohibiting Microsoft from selling in Korea a version of its server software that includes Windows Media Services. In response, the Antitrust Division of the US Department of Justice issued a press release stating as follows:

> "The Antitrust Division believes that Korea's remedy goes beyond what is necessary or appropriate to protect consumers, as it requires the removal of products that consumers may prefer. The Division continues to believe that imposing 'code removal' remedies that strip out functionality can ultimately harm innovation and the consumers that benefit from it. We had previously consulted with the Commission on its Microsoft case and encouraged the Commission to develop a balanced resolution that addressed its concerns without imposing unnecessary restrictions. Sound antitrust policy should protect competition, not competitors, and must avoid chilling innovation and competition even by 'dominant' companies." (U.S., Department of Justice (2005))

39. Without taking a position on the substantive merits of the approaches taken by the three jurisdictions (the US, the EC and Korea), the foregoing exchanges illustrate clearly the potential for conflicts where different jurisdictions take different approaches in addressing transnational abuses of a dominant position (or monopolization). As emphasized by Campbell et al (1995), a minimum requirement to avoid conflicts in such cases is adherence to the well-known principle of national treatment (one of the founding principles of the WTO), which broadly requires that countries not impose burdens on foreign producers or products that they do not impose on their own firms/products.[21] However, it is not clear that this, by itself, will answer all possible concerns, particularly where differences in the remedies imposed by particular jurisdictions result not from discrimination as such but from substantive differences in enforcement philosophies and approaches.

40. There are no simple solutions to such issues. It may well be that the answers will be found in further international discussions aimed at fostering intellectual consensus on the substantive issues involved in transnational abuses of a dominant position and related remedies. However, the potential for

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20 The decision is briefly described in the paper in the sections on refusal to deal and on tying/bundling.

21 The application of the principle of national treatment in the WTO varies as between relevant agreements. See "The Fundamental WTO Principles of Transparency and Non-discrimination" (WT/WGTCP/W/118).

conflict in cases of abuses of a dominant position affecting multiple jurisdictions at least raises the possibility that something more than this - i.e. a system of international coordination - will eventually be needed.

41. Fox (2004), re-proposing the Draft international antitrust code she had contributed to develop back in 1993[22], recalls that together with professor Lawrence Sullivan she had prepared at the time an alternative proposal, setting out 15 principles that would discipline the behaviour and the power of the International Antitrust Authority the Group had proposed. Principle 11 is particularly relevant to the issues raised by the Microsoft case:

> "11. Contracting nations should be invited to assert in a proper case, that another nation's enforcement will impair competition, efficiency or technological progress so as to undermine an important national or world interest. If the complaining nation has been unable to obtain satisfaction from the enforcing nation, it should be entitled to seek an order of non-interference from a panel of the International Antitrust Authority. The enforcing nation should be obliged to respect an order of non-interference."

Commenting on principle 11, Fox (2004) adds:

> "The main aspect of competition policy is: people have the freedom to compete and invent. Overbroad prohibitions can undermine competition. If proscribing jurisdictions always win out over authorizing jurisdictions, competition is impaired. If one jurisdiction proscribes conduct that another determines is good for competition, progress, markets and consumers, this constitutes a clash. … The proposal is that the IAA (the International Antitrust Authority) resolve the clash … by reasoned analysis … Legitimate and respected resolutions will require a panel with expertise, impartiality and credibility."

42. This is the type of clashes that the ICN might avoid through a process of substantive convergence. Should it fail to do so and should the problem of diverging decisions become serious, the need of a multilateral agreement on competition might well arise again.

7. Conclusions

43. In recent policy debates, the role of competition in economic policy has been widely questioned. In particular the uncertainties associated with competition have taken precedence over the opportunities that competition offers. In this paper I have described the contribution of competition policy to European prosperity and welfare. It all originates from the prominent place that competition had in the 1957 Treaty of Rome. In particular, competition provisions were needed to facilitate efficient market integration and break down barriers to internal trade. From this perspective, competition policy in the Treaty has clearly an international trade origin. However in the course of the fifty years since the Treaty entered into force, the role of competition was greatly enhanced, becoming one of the funding policies of an integrated Europe. And indeed competition policy and related institutions and expertise have played an important role in the accession of central and eastern European States to the European Community, with technical assistance helping to ensure substantive and procedural convergence.

44. Turning to the continuing (present-day) contribution of competition policy in Europe, this has three main dimensions: (i) the role of competition (antitrust) law enforcement in deterring business

22 International Antitrust Code Working Group, Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (Published on July 10 1993), BNA Antitrust & Trade Regulation Report, Special Supplement, Volume 64, n. 1628 (Aug 19 1993).

practices that thwart competition and harm consumers; (ii) the role of the Commission in addressing government measures that can impede competition, thereby preventing realisation of the full potential benefits of market integration; and (iii) the treatment of state aid to industry (i.e., industrial subsidies). Antitrust enforcement deters cartels, anti-competitive mergers, and other practices that are manifestly harmful to consumer welfare. European membership promotes the adoption of effective antitrust enforcement also by domestic authorities. Regarding liberalization, competition has encouraged reforms that have advanced the interests of consumers and also provided enhanced flexibility for suppliers in key sectors, especially private services and public utilities. To be sure, the process of competition-oriented reforms is not yet complete; continuing efforts and policy adaptation will be needed to realise the full potential benefits for European citizens. In regard to State aid, the enforcement of European provisions has ensured that the use of subsidies does not distort competition in the unified market.

45. Competition policy however was not only an instrument of European integration, but also a strategy for international relations. As is well know the 1948 Havana charter was never completed and the competition discipline that was to accompany trade liberalization never materialized. The Commission pushed very strongly the trade and competition agenda within the WTO, proposing competition as one of the four new issues over which the 1996 WTO Singapore intergovernmental conference decided that there was a prospect for negotiations to start. The Commission strategy, as it had been explained in those years, was clearly to use international constraints on antitrust enforcement to force market access. The opposition to this project by the United States led eventually to the Doha declaration that greatly restricted the scope for negotiations. In 2004 the whole dossier, especially because of the opposition of a number of developing countries, was put in a limbo.

46. In 2000, understanding that the WTO option was difficult or at most slow in leading to positive results, the Commission accepted the US proposal to create the International Competition Network. This virtual organization was going to become in a few years a very important and successful centre for the creation of convergence on substantive and procedural issue in antitrust enforcement worldwide. The need for the adoption of more binding trade instruments has not necessarily been eliminated by the ICN. Soft voluntary convergence may indeed eliminate all the problems of contradictory decisions by several jurisdictions. It is not guaranteed that it will. Should the need come up again, the WTO option will come back from the limbo where it has been parked since 2004.