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International Competition Rules for Private Business:
Why and How ?

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Introduction

The growth of world trade since World War II and the decline in restrictions on international trade contained first in the GATT agreements and now carried on by the World Trade Organization (WTO), have produced what truly can be called „a global economy“. However the main targets of GATT and the WTO have been government restrictions on trade. As these have fallen and trade has expanded, the importance of private restrictions on trade has grown. Still the effects of such a competition policy is not beyond controversy on the global level as many countries follow different approaches targeting diverse aims. To overcome the existing potential of difficulties for harmonizing competition laws and rules in countries all around the globe is a wearisome and sensitive process not to be underestimated by anybody. Taking into consideration the vast speed of the growing volume of trade between OECD and non-OECD countries in the last years there is an emerging necessity for bringing up international rules to standardize trade transactions and to prevent possible unfair competition distortions in the affected countries.

This paper makes effort to show up reasons for creating international competition rules extending the current framework and the tools necessary to launch and enforce such rules in a worldwide environment of an advancing globalization process of world markets. Many different policy proposals came up recently reaching from multilateral agreements over independent competition authorities as well as including interaction between competition policy and international trade policy, which certainly contributes additional complexity to the existing difficulties of spinning a patchwork of rules with a consensus acceptable to both industrialized and less developed countries taking part in economic trade.

Such a binding, multilateral agreement on competition policies with an enforcement mechanism does not appear to be feasible at the present time. The lack of competition law in certain countries, concerns over the possible infringement of national sovereignty, and the aversion to the creation of yet another bureaucratic superstructures are some of the reasons behind the skepticism.

Need for Competition Rules – Basic Economic Considerations

From the perspective of the economic theory and analysis, competition policy is typically assessed in terms of “economic efficiency” also called “Pareto efficiency” which is based on the efficient allocation of resources, at a point with no alternative way to organize the production and distribution of goods while making some consumers better off without making other consumers worse off. One basic policy proposition stemming from the pursuit of economic efficiency is that any government intervention should be targeted as directly as possible at its objective in order to minimize the undesirable side effects, or distortions, with which policy interventions are sometimes associated. Apart from the basic notion of economic analysis there are other factors influencing the decisions of competition policy authorities beside economic efficiency. To make this principle operational, many economic analyses view the purpose of competition policy to maximize welfare, which is defined as the sum of consumer surplus and producer surplus in the industry under consideration. The outcomes of distribution of consumer surplus, which is a monetary measure of the net benefit flowing to consumers and the analogue producer surplus on the other side are difficult to determine in an economic sense and therefore left out of consideration. Maximizing the “cake” would therefore be the best way to describe the purpose of competition policy.

Perfect competition as one of the standard models employed in economic analyses of markets and the optimum status for a market is rather used as a bench-mark for evaluating the extent to which other market structures deviate from full efficiency than as an approximation of actual markets. To fight the real life imperfect competition most countries direct their competition policy to maintain a healthy degree of rivalry among companies in markets for goods and services, which is linked to broader economic and social policy objectives such as¹ “protecting consumers from the undue exercise of market power, promoting economic efficiency, promoting trade and integration within an economic union or free trade area, facilitating economic liberalization (including privatization, deregulation and the reduction of external trade barriers), preserving and promoting the sound development of a market economy, promoting democratic values, such as economic pluralism and the dispersion of socio-economic power, ensuring fairness and equity in marketplace transactions, protecting the “public interest” minimizing the need for more intrusive forms of deregulation or political interference in a free market economy as well as protecting opportunities for small and medium-sized businesses.

¹ Trade and competition policy, an overview of competition policy, OECD report 1997

Though imperfect competition may be important for some economic processes to be initiated it is likely to produce sub-optimal results in case of market-failures such as abuse of market power, information asymmetries, external effects, inadequate protection of property rights, and insufficient supply of public goods due to their “non-excludability” and non-rivalrous joint consumption, which all would end up in welfare loss on either the consumer or the producer side or even in a deadweight welfare loss as a measure for lost allocative efficiency in case of monopoly prices. A governmental competition policy designed to promote public goods and to prevent market failures like abuse of market power, cartels, anti-competitive mergers and acquisitions seems to be the right tool to achieve the goals of market contestability and undistorted competition as requirements for an efficient allocation of resources. Drawing conclusions upon the given economic theories there is still a dispute among economists and policy makers, who often disagree on the optimal policy instruments for promoting competition. Facing different perspectives on the optimal instruments of domestic competition, investment or environmental policies, countries established different national competition laws at different stages regarding matters like the use of per se prohibitions (general restrictions), rules-of-reason (depending on the given case) or requirements to balance pro-competitive and anti-competitive effects. Additional divergence stems not only from institutional frameworks of national competition laws but occurs furthermore in form of the available legal remedies and the effective enforcement of competition regulations, which vary considerably among jurisdictions.

Despite different views on the competition issue there are some core elements most likely considered anti-competitive business practices and thereafter primarily tackled by competition policy mechanisms. ²Horizontal agreements, particularly “naked” or “hard-core” cartel agreements among companies including price-fixing, output restrictions, market division, customer allocation and collusive tendering as well as other anti-competitive cooperation between companies seem to solely serve the purpose of shifting surplus from consumers to producers, at the cost of dead-weight losses, organizational inefficiencies and rent-seeking and tend to be prohibited or restrained for those reasons. Mergers and acquisitions in all appearing forms like horizontal, vertical and conglomerate mergers also represent suitable targets for competition-policy restraints by reducing the competition in some cases though acquisition policies may also be used for industrial policy purposes. Another abusive business strategy are vertical market restraints, as a form of distribution

² Petersmann E.U., “ International Competition Rules for Governments and for Private Business”, Journal of World Trade, Volume 30, No. 3, pp. 5-35.

strategies between manufacturers, suppliers or distributors including resale price maintenance, exclusive dealing, territorial restraints and bundling of goods. Further harming practices include abuses of intellectual property rights in terms of non-competition clauses and non-contestation clauses, which are going to be dealt with in the international context later on. The last potential targets for competition policy regulations to be mentioned are abuses of dominant market position, also called monopolization, where companies accounting for significant market shares try to take over markets through excess prices, price discrimination, predatory low prices, refusal to deal, vertical restraints or the control of distribution channels, scarce facilities and vital inputs.

Establishing competition policy regulations to fight the costs of imperfect competition namely the dead weight loss due to output restrictions, organizational inefficiency due to a lag of competition and foremost the concept of rent-seeking needs to be evaluated on a bigger scale due to the process of growing international markets and international trade-engagement of private business companies worldwide. Based on national competition policy systems there is a wide array of overlapping issues concerning international trade, which requires binding regulations for implementation of international business transactions.

Competition Policy In An International Context

Starting off with the point that in recent years, markets have been confronted with major changes including the process of globalization of production and service activities, interpenetration of national markets through international trade, and the surge of new technologies, these developments could lead to a tremendous increase in competition. Further factors contributing to this process are falling transportation and communication costs, a more liberal trade regime and increasing foreign direct investment flows, involving developed as well as developing countries. Simultaneously there are still substantial types of ‘barriers to trade’³ with major international markets. Bringing up some examples we have to mention the misuse of technical barriers including certification procedures, labeling rules and testing requirement, discriminatory government activity particularly in the areas of government procurement, increase of contingent protection particularly anti-dumping measures and anti-competitive business practices by dominant companies and business organizations.

Knowing that the shifting and increasingly competitive climate our companies operate based on the ongoing process of lowering of tariff and non-tariff barriers, the growing efficiency of transport and communications techniques and the international dissemination of technology and capital, has boosted the globalization of economies, there are different emerging factors that need to be scrutinized. Some diverging factors between international and national competition are for example the immobility of the national territory, less international mobility of capital and labor, and different monetary and legal systems. On the other hand both national and international competition is influenced not only by “natural” factor endowments as the ones identified above, but also by government-determined conditions of competition, therefore a country’s competitiveness in international trade can be positively or negatively affected by created factor endowments like national legal and economic systems. This set of measures employed by a government to ensure and enhance competition including competition laws serves the purpose to restrict the misbehavior of companies, in contrast to that of international trade policy which is to prevent the misbehavior of governments in the trade arena. Despite a clear distinction both policies do overlap i.e. in terms of non-border trade barriers with international aspects of competition even interfacing with further important questions such as cross-border mergers and acquisitions, industrial policies of national governments, strategic business alliances and more.

Resulting from the companies’ increasing international activities transnational operations outnumbered purely national operations in all categories like mergers, majority acquisitions and joint ventures. In order to meet the large proportion of cooperative agreements and the business operations mentioned above, the external dimension of competition policy becomes crucial. Two aspects⁴ have been identified in this context, which require a closer examination. First, we have to take a closer look at problems of the impact of external actors and practices on the domestic markets. A second aspect are the problems, emerging on the other side during the conduct of domestic actors in foreign markets. Considering the first factor it is a well known fact, that competition from imports limits the market power of domestic producers simultaneously causing harm to domestic industries and cutting the surpluses of domestic producers. The consequences originating from this effect not only affect certain trade areas like the European Union or the NAFTA countries but reach out

³ Petersmann E.U., “ International Competition Rules for Governments and for Private Business”, *Journal of World Trade*, Volume 30, No. 3, pp. 5-35.

⁴ Jaquemin A., “Towards an Internationalization of Competition Policy”, *The World Economy*, Volume 18 (1995), pp. 781-789.

like the tentacles of an octopus crossing all trade area borders, which means a growing overlapping between both national and regional competition with the rest of the world. As a result the geographic reference market is synonymous with the world market in many situations having main competitive pressures coming from the rest of the world. In the context of strategic trade environment and oligopolistic competition, countries may try to control activities occurring abroad and harming domestic consumer welfare. This is one major reason why many countries become more and more interested in setting up international competition rules for private business being confronted with international competition and trying to restrict negative effects on their domestic markets. The evolved question of extraterritorial application of competition policy, which rather has heated up the discussion than solving the existing dispute about the appropriate limits of antitrust laws, as implemented in the U.S.A., which would have to be bound into more complex structures of international law.

Regarding the second aspect namely problems of the conduct of domestic actors in foreign markets there are several concerns to be considered beforehand. Taking the example of European Union countries, adopting of a selfish policy would first of all result in the maximizing of the net European welfare standards at the same time ignoring the perverse effects on the rest of the world, particularly welfare losses. Disadvantages resulting for European Union competition policy confronted by countervailing international restrictive practices would be reductions in EU consumer surplus. The only gains on the other hand would be increase in European producers profits. Looking at larger scales, the net European gain in welfare resulting from international restrictive practices would be greater the larger the degree of EU companies' involvement in these practices and the lower the proportion of the corresponding output consumed in Europe. So even though the overall costs of market power may outweigh its overall benefits, the costs to the European economy may be lower than its benefits. Back to theory a result of one global market is that protectionist instruments of national trade policies such as anti-dumping actions have been replaced by shared competition rules on predatory pricing and price discrimination. The potential for conflict of jurisdiction increases as national competition laws acquire broader geographical jurisdiction as indicated by many recent cases. International competition policy can help to reduce the jurisdictional complexities of overlapping authorities and lead to three types of benefits⁵. The first type of benefits is the decrease of private transaction costs of compliance due to a higher level of transparency, a reduction of learning costs in means of a lighter procedural burden and less

uncertainty . A combination of common rules, coordinated surveillance and enforcement would also contribute to reduction of undesirable regulatory arbitrage costs such as externalization, extraterritoriality and evasion also resulting in cost reduction for several compliances because of overlapping and differing regulations. Another occurring problem of overcoming inefficiencies created by transnational externalities can be met by some internalization of competition policy.

The disadvantages of extraterritoriality are reasons, why considerable emphasis has been put in recent years on the development of mechanisms for co-operation between countries in the field of competition law, in particular in regards to its enforcement. A growing integration of the world economy and the consequence of anti-competitive practices as described with their increasingly transborder dimension are the reasons and justification for the development of international trade rules on countries concerning their treatment of foreign companies operating in their territories, drawing attention to parallel international cooperation to deal with possible anti-competitive practices by such companies. Wrapping up reasons calling for strengthening of international cooperation on competition issues there are growing competition problems transcending national boundaries (i.e. international cartels, export cartels, international restrictive practices, global mergers or abuse of a dominant position), overlapping of different national competition rules and higher business costs due to a lack of international rules, diverging national anti-competitive practices resulting in distortions, absence of international cooperation on information exchange extending the territorial scope and finally enforcement of effective controls on anti-competitive behavior particularly in developing countries, which didn't develop appropriate domestic rules yet. Before picking up on any tools and procedures for international competition policy the following paragraph will give a briefly overview on the development of international competition authorities.

International Framework on Trade and Competition Issues

An International Trade Organization (ITO) was the subject of negotiations held after the second World War containing competition law and multilateral policy disciplines to countervail anti-competitive practices, which never came into being. Instead the General Agreement on Tariffs and Trade (GATT) just took over the ITO provisions on restrictive

⁵ Trachtman J., „International Regulatory Competition, Externalization and Jurisdiction“, Harvard International

business practices in a best ⁶“endeavors clause”. Though not perfectly suited the GATT was undoubtedly the most important trade-liberalization activity in the post-World War I period, a voluntary association of countries, which began in 1947 with 23 members and grew to more than 100 members. GATT members developed a basic set of rules under which trade and trade negotiations take place. GATT’s most important activity was sponsoring rounds leading to a number of multilateral reductions in tariffs and the increasingly important and complex non-tariff barriers for its members, particularly in the areas of industrial standards, government procurement, subsidies, countervailing duties, licensing and customs valuation, agreeing on a code of conduct in each of these areas.

following another negotiations, the Uruguay Round, which began in 1986 , reached agreement in 1993, and took effect in 1995. The biggest change from the Uruguay round was the agreement to replace the GATT secretariat with the World Trade Organization (WTO), which has more authority to oversee trade disputes among countries.

The call for resolute application of competition rules in international framework highlights the role that this policy plays in eliminating market rigidities and improving flexibility in an increasingly global economic context. Both GATT and the WTO existed with the possibility for countries to become member of one, both, or neither. GATT has been phased out as the WTO gained more members taking up GATT’s former activities. The move towards the WTO took place because countries committed to freer trade, believe that the use of rounds is more cumbersome than continual activity possible with a stronger organization, and perceive a need for a stronger organization to monitor adherence. While in the liberal post Uruguay Round trading system the effective application of competition law becomes an important contributor to creating and maintaining open and accessible markets, simultaneously enhancing stability of the system, there have been no binding rules relating to the practices of private firms at the multilateral level.

Addressing the Problems of International Cooperation

Discussing the topic many different proposals came up regarding the best response to the pressures of internationalization on competition policies, some of them relating to various degrees of harmonization or convergence of competition principles, procedures, and laws. It

Law Journal, 34, 1 (Winter).

⁶ Art. XXIX GATT

should also be noted that these developments are taking that open place against the background of a growing worldwide convergence of thinking that open and functioning competitive markets are the economic structure most conducive to economic development. Although trade liberalization remains of the most important means for increasing the contestability of markets it cannot meet the requirements of effective competition all by itself. Pursuing the old idea of free trade and free market access to be the best anti-trust policy even international competition in the context of free trade still will be affected by market imperfections and market failures creating static and dynamic inefficiencies leading to international concentration, barriers to entry and exit, product differentiation and asymmetric information. There just is no guarantee that free trade alone will lead to a social optimum. To overcome the perverse effects resulting from the globalization of economic operations as well as the legal uncertainty sometimes resulting for companies, there is need for strengthening of cooperation between competition authorities. Today we are confronted with a double challenge to both ensure that the commitments of the liberalization of international trade within the framework of the Uruguay Round are not compromised by company behavior restricting competition and that companies operating on an international level remain subject to competition discipline to the same extent as companies operating in national markets. In order to meet the challenge of developing substantive rules to solve conflicts in international competition there is a 'list of principle issues and options'⁷ to determine the formulation of rules. Starting off with the preservation of market access as the first principle, there is also need for the development of rules as close as possible to existing GATT rules, harmonization of competition and trade rules, introduction of basic rules, which are internationally accepted, the basics of implementation, a careful enlargement of existing institutions of international trade, the development of rules against governmental business behavior and eventually development of rule-oriented competition and trade policies.

Having this specific set of prerequisites in mind there are different proposals for approaches supplementing to the work, the GATT and now the WTO have primarily been focusing on for nearly 50 years bringing governmental measures that restrict or distort international trade under multilateral discipline as well as remedying 'unfair' business practices and exploring the possible areas for enhanced international cooperation. A variant⁸ of the proposed measures is the adoption of a core of competition principles. Considerable

⁷ Annex 1, Reflection paper of Professor Immenga, Competition policy in the new trade order: strengthening international cooperation and rules, European Commission, 1995

⁸ Mavroidis P.C., Van Siden S.J., "The Application of the GATT/WTO Dispute Resolution System to Competition Issues", Journal of World Trade, Volume 31, No. 5, pp. 5-48.

progress towards convergence has already taken place among OECD member countries regarding objectives and other principles, analytical tools, enforcement practices and some areas of substantive law such as horizontal agreements and resale price maintenance.

Developing a consensus around basic rules of trade corresponding to the concept of ‘deep integration’, according to which the degree of integration required in our globalized economic environment goes beyond the principle of national treatment. The ongoing harmonization process of competition principles also brings along dangers due to differences in attitudes toward economic power or the basic functions of anti-trust, what could result in harmonizing to the wrong standard, since there have not been determined the ‘correct’ one. Another variant of the competition among rules proposal to improve efficiency of competition laws through competition has been the bilateral or plurilateral adoption of a core of competition principles, which would be easier to achieve than in a multilateral agreement, diminishing the costs of non-uniformity relative to no agreement. Despite different approaches among countries, there are at least 37 developing countries and economies in transition already having competition legislation and another 21 in the process of revising or adopting such laws⁹, suggesting that such an agreement may be well feasible.

Another major option would be to establish linkages between competition law disciplines and anti-dumping allowing anti-dumping actions to be contested on the basis of anti-trust considerations and introducing competition law type thresholds and criteria into the anti-dumping process, e.g. using relevant market instead of like product approach to defining the product market in an investigation, including an injury to competition standard as well as allowing for competition-based defenses by exporters and abolishing provisions allowing for suspension of anti-dumping investigations following negotiation of voluntary price undertakings¹⁰. Making WTO anti-dumping rules more competition friendly may be difficult to attain due to apparent confluence of interest between defenders of strong anti-trust laws and the anti-dumping lobby. Clearly a necessary condition for introducing anti-trust criteria into anti-dumping rules will be significant concessions in other areas by developing countries.

A further option for international competition rules could be to extend the reach of WTO ‘Nonviolation’ Dispute Settlement Mechanism to cover entry-restricting business practices that are tolerated by a government. Governments may use anti-trust as a substitute for trade policies that are prohibited by the WTO. Art. XXIII: 1 of the GATT already allows WTO members to challenge actions by government that, although not illegal under WTO

⁹ Hoekman B., “Competition Policy and the Global Trading System”, *The World Economy*, Volume 20 (1997), pp. 383-406.

rules, nullify or impair concessions obtained in trade negotiations. Further development of this option clearly requires countries to have national anti-trust legislation, which many developing countries do not have and would therefore have to adopt.

The fourth option would mean giving the WTO a competition advocacy mandate to monitor the competitive impact of government policies as well as enforcing competition laws. Granting the WTO a competition advocacy mandate requires acceptance by members to be subjected to multilateral surveillance. Before the adoption of the Trade Policy Review Mechanism (TPRM) in the late 1980s there was little reason to be optimistic regarding the willingness of members to do so because of the loss of sovereignty on this area. As long as competition advocacy is restricted to a trade-related focus, agreement is likely to be feasible.

A last separate option would be to pursue sector specific agreements or commitments, where some efforts have already been made within the WTO. Those sectoral or issue-specific agreements should be feasible in principle as in any negotiation the acceptability of a proposal will depend on its impact on individual WTO members. Experience made in the past, show that agreement on a wide variety of issues is possible, although many that would be welfare enhancing may not be feasible because of opposition by powerful interest groups. Such specific agreements like the basic telecom agreement or the Agreement on Safeguards can include regulatory commitments having competition policy elements, and should be easier to achieve than seeking a consensus to apply general anti-trust laws in particular ways.

Conclusions

Summing up the topic which is of a very complex structure due to overlapping in many areas like antitrust and competition issues, civil vs. Common law, sovereignty vs. Extraterritoriality, there is no clear path private business could be directed to. It is more likely to be a combination of the discussed options with different extents of the diverse components. The paper also showed the growing international dimension of competition problems. Despite the mentioned developments right now we are far from reaching a binding multilateral competition policy agreements and even farther from the consensus required for setting up a global competition authority for enforcing such agreements. This is partly due to an existing hesitation about taking such a major step before the necessary conditions are present. The existence of solid competition laws and institutions in a number of countries, which do not

¹⁰ Hoekman, B.M. and Mavroidis P.C. (1996), 'Dumping, Antidumping and Antitrust', *Journal of World Trade*,

have them at present, is also required for a multilateral commitment for the national enforcement of existing national competition laws. In fact there have already been agreements developed consisting some bilateral, regional and plurilateral agreements exceeding an unilateral extraterritorial extension of national laws such as the agreement between European Union and the U.S.A. providing coordination between authorities, rules of international comity and an exchange of information regarding operations affecting markets of both partners, which prove the feasibility of such negotiations sowing hope for future agreements. The interface between international trade and international competition policies is only one aspect of the situation. Competition policy needs to be applied on other important issues like the lately increasing cross-border mergers and acquisitions, strategic business alliances and other consequences of the globalization process of markets. Knowing the resulting spillover effects of national competition practices, the question of developing international competition standards has been discussed and evaluated on different levels. As already pointed out the lack of competition law in certain countries , mainly LDCs, concerns over possible infringement of national sovereignty and an aversion to create another bureaucratic superstructure are some of the reasons behind the skepticism. Convergence of competition policy standards of countries participating in world-wide trade will be the decisive factor to the development of such regulations and agreements for the future. There is a positive tendency, though there are still obstacles appearing out of nowhere, which need to be taken on a route, nobody knows the final destiny of.

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