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## The International Dimension of Competition Policy

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# The International Dimension of Competition Policy

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## **Abstract**

In the 1960s and 1970s, many articles were written and speeches delivered on international competition law. In the last few years, however, the topic has been given a new and much wider meaning. The changing world economy and increasing internationalization of business transactions have created a new, global environment and new challenges for competition policy. Increasingly, developments outside of one's own market sphere have an impact on one's local competitive situation.

## ADDRESS

# THE INTERNATIONAL DIMENSION OF COMPETITION POLICY

*Claus-Dieter Ehlermann\**

In the 1960s and 1970s, many articles were written and speeches delivered on international competition law. In the last few years, however, the topic has been given a new and much wider meaning.

The changing world economy and increasing internationalization of business transactions have created a new, global environment and new challenges for competition policy. Increasingly, developments outside of one's own market sphere have an impact on one's local competitive situation.

In earlier years, the focus was mainly on the extraterritorial application of competition laws. This extraterritoriality was essentially a characteristic of the American antitrust laws, which are very broad in scope and apply not only to restrictions on competition within the U.S. market, but also to restrictions elsewhere which affect U.S. exports. In reality, however, this extraterritorial antitrust capability was not often used and, for a number of years, was even explicitly rejected by the U.S. Department of Justice.

A more frequently occurring problem related to the gathering of information located abroad. This often led to angry reactions from countries on whose territory the requested information was located. Because no clearly defined international rules on jurisdiction existed, countries tried other means of limiting the extraterritorial application of competition laws. On the multilateral level, the Organization for Economic Cooperation and Development ("OECD") issued a Recommendation concerning cooperation between member countries on restrictive business practices affecting international trade. The bilateral approach was followed by a number of countries who concluded cooperation agreements. Other countries preferred a unilateral re-

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sponse and adopted so-called "blocking statutes" that prohibited their nationals and companies from informing foreign public authorities, in any manner, about documents or information where this would impair the nation's sovereignty or essential interests.

All of these responses were defensive in nature. They sought to limit the extraterritorial application of competition laws. It is hard to judge how successful these measures were, other than to say that over the years major conflicts have been rare. There have been a few, however, the most obvious example which springs to mind being the *Laker*<sup>1</sup> case.

The European Union ("Union" or "EU") neither adopted a blocking statute, nor did it conclude any bilateral agreements of this type. It has seriously considered both of these possibilities, however, and although the Union itself decided that it was not the right time to adopt such measures, some of our Member States did adopt them. Thus, the Federal Republic of Germany concluded a bilateral agreement with the U.S., while blocking statutes were adopted by France and the United Kingdom. The EU relied essentially on the notification system set up under the OECD Recommendation. Up until the end of the 1980s, this led to satisfactory results in most cases. In the beginning of the present decade, however, or as you would say in Japan, more or less since the beginning of *Heisei*, the changing world economy and increasing internationalization of business transactions created a new environment and, at the same time, some new challenges for competition policy.

Traditionally competition authorities have focused mainly on their own markets, but the process of internationalization that is taking place everywhere means that, increasingly, developments outside of one's own market have an impact on the competitive situation within that market. As I explained earlier, the extraterritorial aspects of certain competition policy enforcement measures have been clear to people for quite some time. Increasingly, however, the actual practices and structures themselves also have such extraterritorial effects. No multilateral

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1. This reference is to a series of related cases in which Laker Airways Limited, a British airline, brought action against American and foreign defendants under American antitrust laws. See, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

rules exist to deal with this kind of extraterritorial effect. They do, however, exist at the regional level in Europe. In fact, it is the Union that has been the main driving force behind such rules, which is why I would like to return to them in a moment. No such rules exist, however, in EU relations with non-European countries, such as Japan and the United States. The Union has, therefore, been thinking about ways of remedying this vacuum. Although multilateral rules would provide the broadest coverage and, therefore, deal with the issue in the most comprehensive manner possible, their negotiation would be, without any doubt, a complicated and thus time-consuming process. We decided therefore, as a first step, to negotiate a bilateral agreement with the U.S. Those negotiations, between the European Commission and the U.S. Department of Justice and Federal Trade Commission, began in early 1991 and were successfully concluded, after just a few months of discussions, on September 23, 1991. The resulting Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of their Competition Laws<sup>2</sup> (the "Agreement") draws upon the positive aspects of earlier bilateral agreements on competition policy, which it then takes an important step further.

The more traditional elements of the Agreement are a notification requirement and an "exchange of information" clause. Under these, one party has to inform the other, *inter alia*, when it is taking actions which may affect the other party's important interests. These clauses have drawn a lot of attention from companies and lawyers in Europe, who were afraid the clauses would be used to "ship" important information across the Atlantic Ocean. However, one has to read these clauses in combination with the provisions on confidentiality. Because the confidentiality requirements on both sides are drawn fairly narrowly, the actual amount of information exchanged has to remain limited. More importantly, the notification requirement is not an end in itself. Rather, it is meant to facilitate the application of the Agreement's three main provisions, namely, the Cooperation Clause and the Positive and Negative Comity Clauses.

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2. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, *reprinted in* 30 I.L.M. 1491 (1991), 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 382 (Sept. 26, 1991).

The clause that most reflects the traditional approach to limiting the extraterritorial application of competition rules is the Comity Clause, now often referred to as the Negative Comity Clause to distinguish it from the Positive Comity Clause. This far-reaching comity provision provides that each party shall take into account, at all stages in its enforcement activities, the important interests of the other party. It then gives some fairly detailed criteria for deciding when and how this should be done. It is important to point out, however, that the Comity Clause applies within the framework of the laws, and to the extent compatible with the important interests, of the enforcing party.

The purpose of the Comity Clause is clearly to limit one party's enforcement activities, so as to minimize any negative effects on the other party's interests. The parties to the Agreement felt, however, that equally important effects on one party's interests might occur when a party did not enforce its laws against anticompetitive practices on its own territory. In a case where such anticompetitive practices would, for instance, create an obstacle for imports from the other party, the latter could be interested in the elimination of those practices. That is precisely what the Positive Comity Clause is intended to facilitate. In other words, whenever one party's important interests are affected by anticompetitive practices within the other party's territory, the affected party may ask the other to investigate the situation under its own laws and take any remedial action it may deem appropriate. From the point of view of a traditional lawyer or administrator worried mainly about problems of extraterritoriality, the Agreement therefore provides for a rather sophisticated response. First, it tells the parties to limit enforcement as much as possible in order to minimize negative effects on the other party's interests. It also provides an answer in cases where the U.S., under its broadly drawn competition rules, would like to take action under American law against anticompetitive practices in the EU which would affect American exports. In such a case the Agreement gives a preferred solution under which the U.S. should first ask the EU to apply EU rules to such a practice, rather than applying U.S. law extraterritorially.

It is important to emphasize, however, that the Positive Comity Clause does much more than simply provide an answer in the case of such problems of extraterritoriality. It is, in fact, the most innovative feature of the Agreement, and takes us right

into the major debate about the relationship between trade and competition policies.

Naturally, with the success of the positive comity provision's use at a bilateral level, it was thought to be of primary importance to initiate its inclusion at a suitable multilateral level. Therefore, it was with some mark of success that it was adopted in certain codes, in particular the TRIPS and Services Codes, with their provisions on restrictive business practices, of the Uruguay Round of the General Agreement on Trade and Tariffs (GATT),<sup>3</sup> which concluded on Dec. 15, 1993 after 2643 days of negotiations amongst the 107 current GATT Member States.

The Uruguay Round of the GATT addressed not only the consolidation and the reduction of tariff and non-tariff measures, but also covered areas such as intellectual property, services and trade-related investment measures. It also encompassed in a single undertaking the Final Act creating the World Trade Organization (WTO), a Memorandum of Understanding on dispute settlement procedures, a wide range of expanded Codes (Technical Barriers to Trade (TBT), procurement, subsidies, dumping, etc.), and comprehensive sectoral agreements.

The inclusion of the concept of positive comity in the Uruguay Round of the GATT provides a building block towards establishing an international competition policy, which will take into account the globalization of the international economy. This concept and the response of a possible international competition authority will be discussed below.

Let us now consider the Agreement's third main article, the Cooperation Clause. This article is also fairly innovative, as it contains implicitly the so-called "who-goes-first" procedure. This procedure applies in cases where both parties are simultaneously looking at the same practice or structure. In such a case, one party may decide to hold back its enforcement activities until the other has reached a decision. If that decision also solves the former party's problems, that party may decide that it no longer needs to take independent action. It is clear that such a situation will arise most frequently in the case of mergers. Because

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3. GATT SECRETARIAT, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS § II-A1A-3, 4, 7, A1B, A1C (1993). GATT was established by the General Agreement on Tariffs and Trade, 61 Stat. A3, 55 U.N.T.S. 187, *opened for signature* Oct. 3, 1947.

both the EU and the U.S. are required by law to deal expeditiously with merger cases, however, this is also the area where there is the least scope to utilize this procedure. Thus, it will be limited essentially to cases which deal with behavioral phenomena, rather than with structures.

Despite the successful conclusion of the EU-U.S. bilateral Agreement, its legal basis is uncertain due to a challenge by the French Government, which contends that the Commission lacked the authority to conclude such an agreement, and that the Agreement should have been approved by the EU Council of Ministers. The European Court of Justice is considering the case at present, and a decision is expected by autumn 1994. The Commission remains confident that a decision will be rendered in favor of the legality of the Agreement.

If the decision is a positive one, then the EU will continue to conclude more such agreements on a bilateral basis - with Canada being the next negotiating partner. A largely similar agreement has already been negotiated with the Canadian competition authority. If the Court of Justice decision were to recognize the right in principle of the Commission to conclude cooperation agreements, but rule that the Commission overstepped the limits imposed by its powers, then some modifications would have to be made to the Agreement so that it would withstand further attack without losing its essential provisions. One of the essential provisions is the one on positive comity, which provides for the cooperation between the EU and the U.S. on applying their own competition rules within their own respective borders against restrictive business practices. Thereafter, the EU will continue its course of bilateral antitrust agreements while working towards the eventual establishment of multilateral international competition rules.

However, if the Court were to decide that the Commission does not have any power to conclude such cooperation agreements, then a formal international treaty would have to be negotiated, with approval by legislative bodies on both sides.<sup>4</sup>

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4. *France v. Commission*, Case C-327/91, (Eur. Ct. J. Aug. 9, 1994) (not yet reported). In its judgment, the Court of Justice found that the agreement should not have been concluded by the Commission, but by the Council. In a press release issued the same day, the Commission declared:

The Commission is convinced that the agreement has so far proved beneficial in enhancing good cooperation between the relevant competition authorities



The usefulness of bilateral agreements such as the one between the EU and the U.S. is that they address not only public barriers to trade, but also private ones. The Havana Charter<sup>5</sup> (the "Charter"), which never entered into force, recognized that anticompetitive practices in one market may affect the important interests of another Party. The Charter laid down rules not only on governmental restraints to trade, such as tariffs and non-tariff barriers, but also rules on *private restraints*, as well as including a comprehensive chapter on what is termed *restrictive business practices*.

The Charter's emphasis on both private and public restraints provided a broader approach to trade liberalization. It recognized that private barriers to trade are just as important in restricting markets as are public or governmental restraints. However, the multilateral trade rounds such as the GATT, which replaced the Havana Charter, left untouched private restrictive practices. Consequently, there has not been as much success in opening markets in countries, such as Japan, where exclusionary behavior, biased distribution systems, and other private practices, can protect markets and prevent fair and open competition.

Although the GATT has developed over the years into a rather mature regulatory system, which combines substantive rules with a reasonably successful enforcement system, it did not contain the Charter's two-track approach to trade liberalisation. Instead, it dealt essentially with the more traditional governmental restraints to trade. Therefore, the area of private barriers to trade, in particular, lacks an international regime that even closely resembles that of the GATT structure. This narrow approach to trade liberalization taken by the GATT, and the lack of viable alternative multilateral procedures against private barriers to trade, are now increasingly creating difficulties.

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on an international level. It will therefore take the appropriate steps to ensure that the formal requirements for a correct conclusion of the agreement will be put in place as quickly as possible.

Since Member States have in essence not questioned its substance the Commission expects the agreement will be approved without difficulty by the Council in order to maintain close cooperation and coordination between the competition authorities of the European Union and the United States.

5. Havana Charter for an International Trade Organization, Mar. 24, 1948, U.N. Doc. E/CONF 2/78, *reprinted in* U.S. DEP'T OF STATE, PUB. NO. 3206 (1948).

The issue did not arise in the same manner when tariffs were high and non-tariff barriers were still very important. At that time, international trade had not attained the importance that it has today. However, with the reduction of trade barriers, the process of internationalization and globalization of manufacturing and sourcing came under way. Now anticompetitive practices in one market may deny companies access to markets they normally should have been able to enter into given the deletion of the governmental trade barriers. Even with the Uruguay Round of the GATT successfully concluded, it does not solve the issue of private barriers to trade.

The various rounds of multilateral trade negotiations have reduced tariffs to overall levels at which they no longer create a serious obstacle to trade. Important progress has also been achieved in the reduction of non-tariff barriers. As a result, those countries which used to rely mainly on tariffs and non-tariff barriers for the protection of their market, as was the case in the EU and the U.S., now have seen those barriers come down and their markets opened up to foreign competitors. Other markets were not protected as much, or in any case, not exclusively, by governmental barriers.

The result has been an unbalanced situation in which market access opportunities are unevenly distributed and EU companies cannot compete on a level playing field with companies from closed markets. Although the EU has in place a successful regulatory scheme and effective enforcement at the supranational level against anticompetitive practices, its internal measures are not sufficient to deal with the widening problem of restrictive business practices in third countries.

Now that the Uruguay Round has been concluded, a discussion should start in the GATT and its successor authority, the World Trade Organization, on extending the international trade rules to cover private restraints to trade, such as restrictive business practices. The WTO will employ a quasi-judicial integrated dispute settlement system covering, amongst others, goods, services, subsidies, and intellectual property rights, all of which are relevant to competition cases. Competition rules within the WTO structure could further the goal of a unified and coherent structure for the regulation of international economic relations.

A coherent policy towards competition rules on the interna-

tional level is necessary due to the integration of economies, the continuing growth of the volume of international trade in goods and services, the increase in foreign direct investment, the rising importance of multinational companies, and the increasing operations of private actors, such as mergers and joint ventures. All of these factors weigh against applying several different substantive rules from several different jurisdictions. As competition rules are different from country to country, there needs to be some consensus and coordination among competition authorities to achieve a level playing field in the global market.

Reaching such a consensus on international competition policy is important because, firstly, it could address the anticompetitive behavior of third country businesses whose actions result in distortions of competition in the EU's internal market. Secondly, it could create a level playing field for European industry in third country markets, which can only be achieved if there are no obstacles to market access.

In fact, the EU would prefer to see its two-track approach to competition policy adopted at the international level, with the removal of both public and private barriers to trade. The EU's objective in any international competition policy would follow the same concept as its own internal market policy, i.e., to ensure that markets in third countries are as open as the EU's own market.

The EU has been considering recently the adoption of international competition regulations with effective implementation procedures at the international level. The multilateral rules created under an international competition code would have to be very clearly stated, with the minimum level of anticompetitive practices set high enough so that the competition rules can be effectively implemented.

Any successful regulatory scheme must necessarily contain effective means of implementation, which requires a profound knowledge of the facts at hand. The difficulty with this proposal is that a precise knowledge of the facts may be difficult to obtain solely through the national competition authority. Evidence that is hard to produce in one's own territory is even more difficult to obtain when it takes place in another's territory. Due to increasing economic interdependence, companies have important disincentives against turning in another company. Forcing

the relevant parties to reveal the facts may actually result in the destruction of the proof needed to sanction the enterprises concerned.

In addition, the regulatory scheme must provide for the development of cooperation procedures at the international level, including a method of concerted action and an exchange of information mechanism. Several approaches can be taken to address this problem.

The most ambitious solution would be to put into place an international competition authority, which would be given powers of investigation and decision-making in monitoring the competitive behavior of enterprises at the international level, to be enforced through the national courts. This was a proposal of an international group of private competition experts called the "Fikentscher Group", in their draft international competition code. However, this proposal would mean that the international competition authority could enforce the rules within every contracting Party's territory, even if it conflicted with a decision taken by the contracting Party's own competition authority. At least in the beginning, such a system might be politically unacceptable and, therefore, unrealistic.

A second approach would be to submit conflicts between States on the application of the proposed international competition code to an international competition panel. However, as a panel cannot deal directly with specific undertakings and their behavior, it would not be able to ensure directly compliance with the rules in a timely fashion. As a panel procedure would leave actual enforcement to the national competition authorities, the potential to interfere with the decisions of these authorities would be reduced. Despite the drawback of direct review of compliance with its rulings, a panel may be useful either on its own or in conjunction with the establishment of an international competition authority, in order to provide a system which would subtly pressure reluctant or weak competition authorities to become more assertive.

The third approach would be to develop and reinforce at the multilateral level procedures for cooperation between competition authorities, similar to what has been achieved with the EU-U.S. bilateral antitrust agreement. This type of agreement could be readily adapted for the multilateral level, with the mini-

num requirement being the inclusion of a clause based on the principle of positive comity, as discussed above.

Naturally this final approach has some faults as well, as most States will believe this type of agreement is a double-edged sword. There has to be some education of the parties involved, therefore, to get them to realize that it is in the interests of both countries concerned to fight anticompetitive practices.

The role of industry is essential in this regard, as they can see first-hand the practical problems resulting from restrictive business practices. Industry must be convinced of the benefits of this procedure, and should provide the authority with any information on third-country restrictions on competition that affect their exports, so that the principle of positive comity will work in the way it was intended. Therefore, the confidentiality of industry's role in the proper functioning of an information exchange mechanism at a multilateral level, based on the principle of positive comity, must be assured. If industry can overcome its natural reluctance to provide information for fear of exposure to their competitors or business collaborators, and also in fear that the same methods used against their competitors would be used against them, then this approach may be a successful one, and one that could be rapidly achieved.

This idea of an exchange of information mechanism is also necessary in order to help antitrust authorities in each country obtain information from other countries in an antitrust suit. For instance, in the EU, there are legal barriers to the exchange of confidential business information from the EU to third countries - namely, Regulation 17/62, Article 20.<sup>6</sup> This regulation requires professional secrecy regarding the confidential business information provided by industry to the European Commission. Presently, the authorization of the company involved is necessary before any confidential business information can be exchanged between states. This means that the company involved may be reluctant to participate in an information exchange mechanism. If the antitrust authority is entirely dependent on the company's assistance, the result could be a total lack of cooperation and an ineffective multilateral exchange mechanism.

There is no such requirement when information is used between the European Commission and an EU Member State. In-

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6. O.J. C-204, at 62 (1962).

formation can be provided to a Member State without the company's permission, as long as the information is handled in accordance with the judgement in the *Spanish Banks* case.<sup>7</sup> In the *Spanish Banks* case, the European Court of Justice held that any information transmitted by the EU to another State's competent enforcing authority may not be used by the receiving authority *directly* in procedures before it. However, this does not prevent the enforcing authority from instituting its own investigations and obtaining the information separately.

This example is rather specific because of the involvement of the EU Member State in the proceedings before the European Commission. It may not be readily transposable to the international level to provide an effective procedure for the exchange of information between competition authorities. Nevertheless, we have to find a solution that would allow for a real exchange of information between competition authorities without jeopardizing industry's cooperation. We need to assure industry that confidentiality at the multilateral level will be guaranteed to some extent. As industry's cooperation is essential to the success of such a system, efforts must be made to obtain their cooperation and assent without limiting the effectiveness of the information mechanism.

Although the above approaches have centered mainly on governmental action, not all countries rely on the government for enforcement of their competition rules. For example, in the U.S., private enforcement plays an important role. The EU is also attempting to encourage victims of anti-competitive practices to use the available court procedures to achieve relief. Even where private action is legally possible, however, there are still cultural and other barriers to private action becoming an attractive option for a large number of enterprises.

In conclusion, the recent GATT accord is an important step in moving towards trade liberalization and the eventual dismantling of competition restraints on a multilateral scale. The institution of competition rules to restrain private anticompetitive behavior can be initiated through the GATT and WTO procedures on a multilateral level. The successful conclusion of the

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7. Dirección General de la Competencia v. Asociación Española de Banca Privada E.A., Case C-67/91, [1992] E.C.R. I-4785, [—] — C.M.L.R. — (regarding banks' alleged infringement of competition laws in area of banking services and commissions).

EU-U.S. bilateral Agreement on antitrust provides a framework for increased activity on behalf of the EU in the area of bilateral antitrust cooperation agreements with other countries. Eventually, the possibility of instituting international competition rules and an international competition authority may be considered as one of the final methods to regulate the increasingly important international dimension to each country's economic policy. This should include a system of interstate cooperation as an essential provision in order to break down barriers to trade on both the public and private spheres. Although the EU's experience in eliminating private barriers to trade is not the only model, applying its concepts internationally may provide the appropriate framework to obtain a truly level playing field in the international marketplace.