

**COMMUNICATION FROM THE EUROPEAN COMMUNITY AND
ITS MEMBER STATES**

The following communication, dated 18 April 2002, has been received from the Permanent Mission of the European Community and its member States with the request that it be circulated to Members.

A WTO Competition Agreement's Contribution to International Cooperation and Technical Assistance for Capacity-Building

I. BACKGROUND

Discussions in the WTO Working Group and other relevant fora, including UNCTAD, have clearly shown that anti-competitive practices are rarely confined to merely one jurisdiction. Increasingly, such practices are implemented in one jurisdiction while having their harmful effects in one or more other jurisdictions.

When faced with this type of anti-competitive practices, a country is essentially left with a choice between two options. Either to unilaterally apply its domestic competition law with the inherent legal and practical difficulties this entails, or, rely on international cooperation with other competition authorities with a stake in the matter, be it the authorities of the jurisdiction in which the anti-competitive practices were initially implemented or those of other jurisdictions adversely affected by the practices.

The UNCTAD Bangkok Declaration¹ – in addition to stressing the crucial role that competition law and policy play in operationalising the interlinkages between equity and efficiency in the globalisation process – spelled out that "in addition to national efforts, the international community as a whole has the responsibility to ensure an enabling global environment through enhanced cooperation in the fields of trade, investment, competition and finance." This pressing need for international cooperation in the field of competition was reaffirmed and further articulated during the 4th UNCTAD Review Conference and in the resulting Declaration which "Calls upon States to increase cooperation at all levels between their competition authorities and Governments in order to strengthen effective action in the field of merger control and against cartels as covered by the Set, especially when these occur at the international level."²

¹ TD/387.

² TD/RBP/CONF.5/15, para. 5.

II. STATE OF PLAY – SOME TYPES AND CHARACTERISTICS OF INTERNATIONAL COOPERATION

Needless to say, the *sine qua non* for international cooperation is the existence of a domestic competition law as the very basis on which cooperation takes place as well as some authority to apply and enforce the law.³

The types of international cooperation arrangements in the competition field today are many and varied. They range from stand-alone bilateral cooperation agreements such as the one concluded between the European Communities and the United States to competition provisions, including on cooperation, as integral parts of free trade agreements like the ones recently concluded by the European Communities with a number of its trade partners, including South Africa and Mexico. Also the EU/ACP Partnership Agreement ("Cotonou") contains important provisions on competition.⁴

Stand-alone cooperation agreements have so far mostly been concluded between developed countries where there is a high degree of similarity of experience and overall objectives pursued by the competition authorities involved and their competition laws and policies. What further characterises this particular type of agreement is the depth and intensity of the cooperation and the resources and experience required for their successful operation.

In addition to "formal cooperation", i.e. cooperation based on international agreements, competition authorities may also benefit from "informal cooperation" with colleagues from other competition authorities. Formal and informal cooperation can coexist side by side, just as bilateral cooperation agreements can coexist side by side with plurilateral or indeed multilateral arrangements such as the one the European Communities proposes for the WTO.

However, despite the relative growth in various cooperation arrangements in the competition field, it is clear that developing countries are usually not parties to such arrangements and thereby unable to reap the benefits. It is against this backdrop that the European Communities has continuously been advocating that a central element of any WTO competition agreement should be inclusive modalities for international cooperation whereby developing countries and their recently established competition authorities could also benefit from the advantages of international cooperation while at the same time not be required to become full-fledged parties to more traditional and resource-demanding bilateral cooperation agreements.

It should also be stressed already at this stage that the European Communities proposes that the cooperation modalities of a WTO competition agreement would apply to *all* anti-competitive practices having an impact on international trade. Cooperation would therefore not be limited only to hard-core cartels, but would also cover other trade-related anti-competitive practices of concern for developing countries, cross-border abuses of a dominant position affecting trade or anti-competitive practices with a market foreclosure effect. The cooperation provisions would therefore include responding to longstanding developing country concerns about the importance of assistance by "home" competition authorities in cases where foreign firms may be engaged in anti-competitive practices with an impact on developing country markets and their import or export trade.

³ Based on its own long-standing experience of regional economic integration, the European Communities acknowledges the important role competition policy can play at a regional level, especially as regards small and micro developing economies. In the experience of the European Communities, a regional approach can be complementary to a domestic approach. The European Communities has recently provided technical assistance to regional initiatives such as COMESA and other regional groupings.

⁴ The different types of international cooperation are described in the UNCTAD secretariat document "Experiences gained so far on International Cooperation on Competition Issues and the Mechanisms used", TD/B/COM.2/CLP/21.

In addition to this, the European Communities has argued that targeted and coordinated technical assistance for capacity-building purposes to boost and upgrade the human and institutional framework of developing country competition law implementation and enforcement is indispensable and could be reinforced by a WTO competition agreement.⁵

The present submission will therefore focus on the following two main issues:

- Modalities for international cooperation between competition authorities
- Technical assistance for capacity-building purposes

This submission will be followed by a separate submission on the arguments in favour of a universal ban on hard-core cartels and the ample documentation regarding their harmful effects, including on developing country economies. That later submission will illustrate how cooperation could take place under the proposed modalities for international cooperation. Annexed to that submission will also be concrete examples of the type of information which could be exchanged under such modalities.

III. COOPERATION MODALITIES IN A WTO COMPETITION AGREEMENT

Given the rapid growth in the adoption and implementation of domestic competition laws in developing and transition countries over the past decade the time is ripe for these countries to also benefit from international cooperation to better enable them to combat cross-border anti-competitive practices. As also noted by UNCTAD, "(...) initiation and progressive practice of enforcement cooperation would enhance effective implementation of competition laws and prepare the ground for more advanced cooperation."⁶ In other words, what may at first sight seem like a somewhat modest form of cooperation, is likely to provide a valuable learning experience for developing countries and could then develop into deeper and more intense cooperation over time.

A. MODALITIES FOR INTERNATIONAL COOPERATION

As already stated, provisions for international cooperation should be at the very centre of a WTO competition agreement. Such modalities should be sufficiently flexible to address the needs of countries at different stages in the development and implementation of a domestic competition law (i.e. ranging from technical assistance for the drafting of a law, reinforcement of domestic institutions, to general exchanges of experiences and case-specific cooperation).

The discussions to date in the Working Group have made it clear to the European Communities that two types of cooperation provisions would be needed in order to address developing countries' needs properly and effectively:

- provisions to facilitate case-specific cooperation on anti-competitive practices having an impact on international trade, and,
- provisions relating to general exchanges of information and experiences and joint analysis of global trade-related competition issues. This latter function could be

⁵ This type of technical assistance should be seen as separate and distinct from that which will be provided for purposes of enabling developing countries to participate effectively in future WTO negotiations on competition.

⁶ TD/B/COM.2/CLP/21, para. 32. The paper also makes the important observation that cooperation between countries with limited experience but faced with similar circumstances could be "of a more balanced character" and could provide a useful learning experience thereby making cooperation with more experienced partners fruitful.

undertaken by a Competition Policy Committee to be established once a WTO framework agreement has been concluded.

The cooperation provisions of a competition agreement, as well as the establishment of a multilateral forum for exchange of information and experiences, would be of great benefit for all WTO competition authorities, in particular those of developing countries. There are other fora where at least some (and sometimes a substantial number of) developing countries, as well as developed countries, can interact. These fora have their own dynamic and specific purposes with undoubted beneficial effects overall. However, a WTO-based multilateral forum constitutes the only way to ensure that all WTO members effectively benefit from international cooperation and exchanges of experiences regarding trade-related competition issues. We believe that all the fora, including the WTO, are complementary in nature, rather than alternatives.

It will also be necessary to envisage provisions aimed at addressing the specific cooperation needs of developing countries and transition economies. We should also examine whether the situation of least-developed countries warrants specific provisions in this particular context. (Section 5 below focuses on the important issues of technical assistance for capacity building and enforcement assistance for developing countries).

Undoubtedly the future meetings of the Working Group will help to further pinpoint the specific cooperation needs of countries that would need to be addressed in a competition agreement, including the needs of developing countries. However, based on the extensive and constructive discussions in the Working Group, as well as discussions in other fora such as UNCTAD, the European Communities proposes that the following key elements should be included in a WTO agreement in order to address the cooperation needs of all WTO Members:

B. CASE-SPECIFIC COOPERATION

A competition agreement should include provisions to facilitate voluntary case-specific cooperation in relation to anti-competitive practices having an impact on international trade. Such provisions should apply to three main types of anti-competitive practices:

- practices that affect international trade (e.g. international cartels);
- practices that affect market access (e.g. import cartels, exclusionary abuses of a dominant position), and,
- practices with an impact on the trade flows to and from a different geographical market than that in which the practices have been conceived (e.g. export cartels, abuse of a dominant position by a foreign corporation).

More specifically, the cooperation provisions could cover the following:

1. Exchanges of case-related information and evidence

One of the main difficulties for both developed and developing country competition authorities in dealing with international competition cases is to identify and obtain the necessary evidence located outside its own jurisdiction. The possibility of co-operation between the competition authorities of jurisdictions adversely affected by the same anti-competitive practices by exchanging case-specific information or evidence is of immense value. One should take into account the fact that a competition authority may be facilitated in making further progress in and better orient its investigations once it acquires (with the necessary assistance of a foreign authority) certain facts that are difficult to collect from abroad in the first place.

However, as discussions in the Working Group have also made clear, the main obstacle to these exchanges is the confidential character of some information as well as the existence of different rules limiting its use and disclosure without the consent of the party which has provided it. It is clear that under a WTO competition agreement there should be no requirement to exchange confidential information. The next European Communities submission addressing hard-core cartels will illustrate what type of information could be exchanged in cartel cases.

However, this is by no means an obstacle to exchange of useful non-confidential information which is not in the public domain. For a number of practical and resource-related reasons competition authorities do not automatically post *all* non-confidential information on their website - if they have one - thereby making it publicly accessible. There is a vast range of useful factual and legal information which could be crucial to other competition authorities when dealing with a specific case which falls into the broad category between publicly available and confidential information.

Furthermore, even with regard to confidential information as such, in each competition regime there can be specific elements/types of information that are not covered, not covered yet or no longer covered by the confidentiality protection rules. Also, under certain conditions - for instance where permission has been granted by the party which provided the information - even restricted or confidential information can be shared.

2. Consultations and exchanges of views on cases affecting the important trade interests of other WTO Members

Under a WTO agreement, WTO Members should be ready to enter into consultations in order to develop mutually satisfactory and beneficial measures to deal with anti-competitive practices having an impact on international trade. To better facilitate such consultations, a WTO Member should inform other Members whose important trade interests may be affected by ongoing investigations and proceedings under its competition laws. Similarly, a WTO Member may bring to the attention of another WTO Member evidence of an anti-competitive practice with an impact on its trade or investment and seek information about any possible competition investigation relating to such practices. In the context of consultations, a WTO Member should also be able to seek assistance from the home country of a foreign multinational in relation to an ongoing competition investigation and/or seek information which may be of value for enforcement activities in relation to international, import or export cartels.

Consultations would also provide an opportunity to exchange views about market analysis or possible remedies. Furthermore, where an anti-competitive practice has an impact on trade to and from several geographical markets and is subject to parallel competition investigations, WTO Members should seek, where appropriate, to co-ordinate their actions.

Finally, in order to minimise the potential for jurisdictional conflicts, a WTO agreement could also include principles of negative comity, i.e. a WTO Member should take into account the important and clearly stated trade interest of other Members concerned before action is taken.

IV. GENERAL EXCHANGES OF INFORMATION AND EXPERIENCE AND JOINT ANALYSIS: THE ROLE OF A WTO COMPETITION POLICY COMMITTEE

Many WTO Members, including developing countries, have repeatedly stressed the value of establishing a multilateral forum that would facilitate general exchanges of information and experiences on issues of common concern relating to the application of competition law to transactions having an impact on international trade. In this connection, it has been noted that, in addition to the establishment of core principles and facilitating case-specific cooperation, the WTO can also fulfil an important role in fostering policy dialogue and joint analysis. Such activities would reinforce the role, standing and visibility of competition authorities on the domestic front and could,

in particular, promote the integration of developing countries in international competition cooperation. The European Communities has on a number of occasions outlined its thinking on what could be considered in this respect, including:

- facilitation of exchanges of information on domestic laws, practices and developments through the establishment of "contact points" in the Competition authorities of each WTO Member, which could facilitate access to such information upon the request of other WTO Member. Some of this information is currently posted on the web sites of a number of competition authorities. Where necessary, assistance could also be provided to competition authorities in developing countries to develop and facilitate access to electronic means of information and the dissemination of such information through such means;
- exchanges of experiences and discussions on competition policy issues having an impact on international trade. This could include, for instance, further analysis and exchanges of experiences on the approaches followed by competition authorities when faced with different types of anti-competitive practices having an impact on international trade. It could also include exchanges of experiences on the competition advocacy role of competition authorities or the review of sectoral exclusions. Such analysis and exchanges of views could all serve to facilitate gradual convergence on the approaches followed by competition authorities and would also help competition authorities to benefit from the valuable experience of other authorities;
- voluntary "peer reviews" of WTO Members' competition policies. This would provide an opportunity for WTO Members to present their experiences relating to the application of competition law to anti-competitive practices having an impact on international trade and to benefit from the comments of others. Peer reviews would also allow for discussion of the enforcement policies of Members. Finally, the peer reviews would offer a very important tool for identifying capacity constraints and reviewing progress in technical assistance programmes;⁷
- joint analysis and discussion on global competition issues affecting international trade and the global economy. A possible tool to facilitate such analysis would be the preparation of a periodic report on major competition policy developments with an impact on international trade and the global economy. The report could draw on trends identified on the basis of the annual reports currently being published by many competition authorities.

The above functions could be carried out by a WTO Competition Policy Committee which would be established following the conclusion of a competition agreement.

V. SPECIFIC SUPPORT FOR COMPETITION INSTITUTIONS IN DEVELOPING COUNTRIES

While the provisions on cooperation discussed above would be of value for all WTO Member competition authorities, discussions in the Working Group have clearly shown that there would also be a need to consider more specific and targeted support for competition authorities in developing countries and transition economies.

As the European Communities has suggested, such specific provisions should ensure:

⁷ How "peer review" should work in practice, on what issues, as well as how to ensure the voluntary nature of such reviews, is a point on which the European Communities and its Member States believe the Working Group should come back at a later stage.

- a reinforced and more co-ordinated approach to technical assistance for capacity building;
- enforcement assistance for competition investigations undertaken by developing countries.

Together with provisions on "progressivity" and "flexibility" which will be addressed in a future European Communities submission, such targeted support would reflect the principle of special and differential treatment in a future competition agreement.

A. TECHNICAL ASSISTANCE FOR DEVELOPING COUNTRIES

The European Communities remains convinced that the WTO can make an important contribution towards the development of a reinforced and better co-ordinated approach to technical assistance in the competition field (as in other areas). As regards competition, it is clear that such a role should be undertaken in close cooperation with other relevant international organisations such as UNCTAD, the World Bank and bilateral donors and could only complement the primary role of the WTO, namely that of establishing binding rules and multilateral cooperation modalities. In other words, the WTO could be a facilitator rather than an actual provider of technical assistance and would ensure greater coherence and better use of the resources available.

However, this does not mean that a more coherent approach to technical assistance would only be considered after the actual conclusion of a WTO competition agreement. Experience with the implementation of the Uruguay Round Agreements has shown that the issue of capacity-building is one which needs to be considered straight from the outset. In line with this important lesson, the European Communities is suggesting that, in the case of new WTO agreements whose implementation may require development of domestic capacities, co-ordinated approaches to technical assistance should be developed *in parallel* to the negotiations of any new rules. The purpose of this would be to ensure that, once such an agreement is in place, a reinforced approach to technical assistance can be operationalised immediately and country-specific technical assistance programmes established shortly thereafter. Such programmes should be based on a demand-driven approach and would rely on coordination among all relevant international organisations and bilateral donors. These programmes could address the steps necessary to implement WTO commitments, but also more general capacity-building requirements. Thus, depending on the specific needs of each WTO Member, assistance could cover the drafting of domestic legislation, support for the establishment of a domestic competition authority, training for competition officials and exchange of experiences with other competition authorities. The proposed Competition Policy Committee once established could play a central role in monitoring the actual implementation of technical assistance programmes, in facilitating the exchange of information and experiences, and in promoting best practices.⁸

Some of the key principles for an reinforced approach to technical assistance include the following:

- a clear commitment by all development partners to give greater support to technical assistance in the competition field and to integrate such assistance into national development programmes. While some efforts are already made to better integrate competition in development cooperation activities, the European Communities

⁸ In the period leading up to the conclusion of a WTO agreement, the European Communities believes that the Working Group provides a very useful forum for the discussion of technical assistance needs and exchange of information and experiences. We note in this respect that UNCTAD, the World Bank and the OECD regularly attend the meetings of the Group and that the secretariats of the WTO and UNCTAD have already announced a number of joint seminars and workshops to take place. We further note that the Working Group agreed that technical assistance would appear as a permanent agenda item for the meetings of the Group.

remains convinced that the decisive "push factor" is only likely to be provided by the actual launch of negotiations on a multilateral agreement;

- an integrated approach to technical assistance to ensure continuous and coherent support for developing countries and transitional economies at different stages of the development of a domestic competition regime. Technical assistance should include, when requested, support for the drafting of a law and the establishment of a competition authority, building expertise in the area of enforcement, training staff and support for general information policies, improving the capacity to deal with complex "international" cases, etc. Delivery mechanisms should be geared towards the central goal of enhancing domestic capacity on a sustained basis;
- requests related to the implementation of a WTO agreement on competition should be included in integrated technical assistance programmes involving relevant international organisations and other donors. It should be noted, however, that technical assistance should not be limited to what is strictly required for implementation. An additional important objective should be to promote convergence towards "best practices" and to improve the capacity of domestic authorities to reap all the benefits from international cooperation;
- the development, within the framework of the WTO and in cooperation with relevant international organisations, of a "model work programme" on technical assistance for capacity-building in the competition field. The key elements for such a work programme could include stocktaking of ongoing technical assistance, demand-driven needs assessment, co-ordinated and integrated responses and procedures for monitoring and evaluation.

The European Communities believes that the approach to technical assistance outlined above will only work if there is a strong commitment to give greater priority to cooperation in the competition field and to improved co-ordination. A WTO agreement on competition could play a catalytic role in this respect and the WTO secretariat would obviously need to work in close cooperation with UNCTAD, the World Bank and other relevant organisations with experience in the competition field.

B. ENFORCEMENT ASSISTANCE SPECIFICALLY FOR DEVELOPING COUNTRIES

From the discussions in the Working Group, it would appear that fledgling competition authorities in developing countries need enforcement assistance from more experienced authorities. Apart from aspects unrelated to specific competition cases, such as for instance training in investigation and information-gathering techniques, procedural fairness and access to file issues, etc., which could be addressed under the broader framework of technical assistance discussed above, there are two situations where case-related enforcement assistance could be envisaged:

- making a developing country affected by anti-competitive practices (e.g. an international cartel or an activity of a multinational firm) which is illegal under its domestic competition rules, has an impact on its import or export trade and seriously distorts competition in its market aware of those practices and helping it launch investigations. The transmission of certain information can be of immense help to the country affected by the anti-competitive practices but has to be done in conformity with the confidentiality provisions applicable in the country in possession of the information;

- enabling a developing country targeted by anti-competitive practices implemented abroad to request the country or countries where these practices originate or where the firms suspected of anti-competitive activity are domiciled, to take action to remedy the situation or respond to the requesting country's concerns.

It is understood, of course, that enforcement responsibility lies with the country with primary jurisdiction over the anti-competitive practices in question and that enforcement assistance would remain "voluntary" in nature. In other words, the assistance would have to be compatible with applicable laws and regulations, enforcement priorities, important interests and available resources of the country presented with a request for such assistance. Some have argued that cooperation is unlikely to be effective if it is "merely" voluntary and does not provide for the exchange of confidential information. The European Communities experience, however, is that such limitations have not prevented a very close and steadily-evolving cooperative relationship with the competition authorities we deal with on a regular basis. Similar experiences have also been made by competition authorities of most European Communities member states which have considerable experience in case-related cooperation. Even the bilateral cooperation agreements which the European Communities has entered into with other developed economies (Canada and the United States) – although providing for intensive co-operation – are essentially voluntary in nature and do not contain provisions which allow one party to compel the other party to act in a particular manner. In other words, no party to these agreements can legally oblige the other party to cooperate and a party may have legitimate reasons not to cooperate on a specific matter.

We therefore suggest that rather than focus on the perceived shortcomings of the proposed cooperation modalities, one should be focusing on the real benefits to be had from such modalities, namely that with the negotiation and conclusion of a WTO competition agreement, developing country competition authorities would - for the first time - be able to benefit from the type of consultation and cooperation provisions which have become standard practice among OECD countries. Also, it should be borne in mind that the European Communities is proposing that WTO Members should be under a commitment to enter into consultations and give sympathetic consideration to requests for cooperation. The more exact circumstances under which consultations can be envisaged would need to be spelled out in the framework agreement. It could reasonably be expected that the agreement would create particular incentives to develop such enforcement cooperation, especially where requests are made by developing country competition authorities.

The European Communities is keenly interested in further ideas of other WTO Members and a debate on this important subject, including suggestions on which specific modalities would be needed to meet the particular needs of developing countries.
