WORLD TRADE ORGANIZATION

WT/WGTCP/W/194
28 June 2002

(02-3637)

Working Group on the Interaction between Trade and Competition Policy

Original: English

COMMUNICATION FROM SWITZERLAND

The following communication, dated 26 June 2002, has been received from the Permanent Mission of Switzerland with the request that it be circulated to Members.

Provisions on Hard Core Cartels

Doha Ministerial Declaration Paragraph 25(ii)

As many other countries, developed and developing alike, Switzerland considers that hard core cartels have a particularly pernicious effect on local markets and – in the case of agreements impacting several economies – on international trade. Switzerland thus considers it important to fight against cartels, both domestic and international ones. The Doha mandate takes up this issue for further clarification and discussion in the WTO.

The purpose of this communication is to contribute to the on-going discussion on competition matters in WTO by presenting the Swiss experiences in dealing with hard core cartels and, in line with earlier Swiss communications (e.g. WT/WGTCP/W/151, p.2), by drawing some preliminary conclusions for a possible multilateral agreement in this field. This is preceded by some remarks on harmful effects of cartels – the starting point of any discussion on how to act against such anti-competitive agreements, practices, etc. We hope that our experiences, together with those of other countries, will help those developing countries which are in the process of devising their own laws and procedures.

I. HARMFUL EFFECTS OF HARD CORE CARTELS

Hard core cartels are usually defined as anti-competitive agreements, practices or arrangements by competitors to fix prices, restrict quantities or allocate markets geographically[1].

The intention behind such an anti-competitive agreement is to gain from a mark-up in prices without putting extra efforts in the development of a product. Hard core cartels thus harm consumers by raising prices. Furthermore, raw material and components from enterprises participating in such practices are more expensive.

Generally these agreements can only be effective if either the vast majority of competitors of the relevant market is part of it or if every (potential) competitor trying to enter the relevant market can be effectively hindered to do so (e.g. by a boycott). By limiting competition that would normally prevail between competitors, undertakings avoid the pressure that would lead them to innovate. This

[1] For further elements of an international understanding about hard core cartels, see the Recommendation of the Council of the OECD concerning Effective Action Against Hard Core Cartels (Adopted on 25 March 1998).

loss of innovation restricts supply and impairs efficiency. In the long term, hard core cartels not only lead to a loss of competitiveness but also reduce employment opportunities. Furthermore, there is no legitimate economic or social benefit that would justify the losses that hard core cartels generate.

Although the extent of the harm done by an international cartel is difficult to quantify, prosecuted cartel cases in countries with a competition law have disclosed that cartel mark-ups over the competitive price may reach 65 per cent.[2] Empirical evidence shows that damage inflicted by hard core cartels is not negligible; one estimate is that one set of 14 investigated cartels affected products representing 7% of developing country imports, or 1.2% of developing countries' GDP.[3] As cartels are more and more international, it has been shown that developed and developing countries alike are affected by them. The fact that hard core cartel operators keep their agreements secret shows their awareness about their harmful and unlawful conduct.

II. TREATMENT OF HARD CORE CARTELS IN SWISS COMPETITION LAW

The article in the Swiss Federal Act on Cartels and other Restraints of Competition (Acart)[4] relevant for cartels reads as follows:

"Article 5: Unlawful Agreements

1. Agreements that significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the suppression of effective competition are unlawful.

2. An agreement is deemed to be justified on grounds of economic efficiency:

   (a) when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and

   (b) when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition.

3. The following agreements among actual or potential competitors are presumed to lead to the elimination of effective competition when they:

   (a) directly or indirectly fix prices; or

   (b) restrict the quantities of goods or services to be produced, bought or supplied; or

   (c) allocate markets geographically or according to trading partners."

Article 5(3) contains the presumption that the mentioned horizontal agreements (which are agreements between competitors) lead to the elimination of effective competition. Because the presumption does not refer to the question whether an agreement is lawful or not, it can be rejected by the proof that competition continues to exist despite the agreement. When this proof can in fact be delivered by the undertakings concerned, the agreement will fall under Article 5(1) and can possibly be justified on grounds of economic efficiency under Article 5(2).

---

[2] Result of a survey of more than 100 cartel cases in Working Party 3 of the OECD Competition Committee.

[3] Margaret Levenstein and Valerie Suslow, Private International Cartels and Their Effect on Developing Countries (Background Paper for the World Bank's World Development Report 2001, 9 January 2001).

[4] For a comprehensive description of the Acart see Trade Policy Review of Switzerland, 2000 (WT/TPR/S/77, p. 53-55) and (WT/WGTCP/W/29).

The objective of competition rules is to ensure effective competition. In the case of a horizontal agreement where e.g. producers fix the selling price, competition in the domestic market is severely impaired or nullified and the proof of existing competition (e.g. that potential competitors can exist in the relevant market) will be almost impossible to deliver – in particular if the cartel succeeds in keeping foreign competitors out. The intention of this agreement is to benefit from high mark-ups and therefore the participants of the agreement try to prevent other competitors from entering the market. According to Swiss competition law, only those horizontal agreements are qualified as "hard core cartels" which have the purpose to restrict competition.

The case is different with e.g. a specialization agreement on production, where small firms without the financial resources to produce a good by themselves co-operate with foreign companies (so called "co-operation agreements"). The intention of the firms in the latter example is not to eliminate "outside competition" and such an a agreement would in all probability not be considered as a "hard core cartel".

Under Swiss cartel law a person harmed by an unlawful restraint of competition may request the removal of the obstacle or the cessation of the harmful practice, damages and reparations or remittance of illicitly earned profits. These actions will be judged by the competition authority as the competent authority to scrutinize the unlawful conduct of the undertakings concerned. The removal of the obstacle might be requested if the restraint is on-going, cessation of the harmful practice if it is imminent. Damages and reparations will be granted if the following can be proven: damage, unlawful conduct, a link between the damage and the unlawful conduct and the intention of restraint of competition.

With an eye on practice, one can record the following facts: in 2001 the Swiss Secretariat of the Competition Commission (Comco) completed 13 investigations of which 7 concerned unlawful agreements falling under Article 5(3) Acart. One case was closed with no action taken for lack of evidence of an unlawful restraint while in another case the firm in question discontinued the alleged restraint by itself. Yet another case was closed by an amicable settlement between the competition authority and the firms concerned. In two cases the competition authority made a decision on the unlawful agreement. Two cases are still in progress.

Despite this record, it is envisaged to further develop the law. The currently valid Swiss law only foresees fines in the case of a violation of administrative decisions and amicable settlements. Therefore a mandate was given to a group of experts to revise the valid law. The aim is *inter alia* to introduce direct sanctions for the harmful effects of agreements like hard core cartels. The experience of competition authorities in other WTO Member States has demonstrated that stiff fines are a great deterrence to cartels by making the prospect of gain less likely. Furthermore, the mandate contains a proposal to introduce leniency based on the good experience e.g. in the EU, where fines can be reduced or concessions made for companies revealing cartels or otherwise co-operating with the competition authority during the investigation of such infringements. Leniency programs result from the awareness that the possibility of avoiding a fine weakens the loyalty under cartel operators, especially if the fine is high. In this respect, the two aspects of the proposed amendment to the Acart are linked. The ongoing revision of Acart, in particular with the intention to introduce direct sanctions and a leniency program, is in that sense a step in the right direction[5] and in line with ongoing and finished revisions of competition laws in the EU and in other European countries.

III. CONCLUSIONS

Although traditionally many cartels focused primarily on the domestic market hard core cartels increasingly have international dimensions and affect several economies at the same time, thus increasing the overall harm as well. There is sufficient evidence to demonstrate that both developing and developed economies suffer from the effects of such international cartels. The potential negative

[5] See the annual report on Switzerland, 2001 – 2002, OECD.

impact of such business practices was already recognized in 1948, when the Havana Charter for an International Trade Organization declared the following practices, among others, subject to investigations: fixing prices, allocating or dividing any territorial market or field of business activity, allocating customers, fixing sales quotas or purchase quotas, limiting production etc.[6] Economic globalization has created new challenges in combating anti-competitive practices of global activities as competition law is only exercised within the confines of national territory; curbing effects of hard core cartels has indeed become a universal problem.[7]

In such cases it is very difficult for a single competition authority (in particular for a small one like in Switzerland) to successfully prosecute an internationally operating cartel that has an effect in several economies. Even with the possibility to decide on direct sanctions against hard core cartels, the question remains how to obtain the relevant information about the impact in other countries and to establish whether the sanctions of the countries concerned exceed the gain of the cartel, as it should be in order to effectively apply deterrence.

All this leads to the conclusion that the authorities should be able to co-operate in prosecuting those infringements they consider as the most harmful ones. There are two ways to achieve this co-operation: by bilateral agreements or by a multilateral agreement. Bilateral agreements demand time-consuming, often expensive negotiations and implementation measures. Furthermore, multilateral cartels may affect other or more countries than are covered by a bilateral agreement. In a multilateral agreement, no country will be excluded from the exchange of general information and its implementation is likely to be less burdensome.

Switzerland supports the idea of creating a minimum standard for fighting hard core cartels and other restraints of competition in an international context without putting in doubt countries' sovereignty to regulate and to fully apply their own competition law. This should be complemented with the possibility of co-operation (e.g. by exchanging information) in a multilateral framework in order to improve the chances of dismantling hard core cartels.

[6] Havana Charter, Article 46, Paragraph 3 (a), (b), (d).

[7] Extracts from the concluding remarks by the Chairman of the OECD Trade Committee on "trade and competition" at the OECD Global Forum on Trade (Workshop on the development dimensions of the Singapore Issues), held in Hong Kong, China, June 19 and 20, 2002.