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# COMPLEMENTARITIES BETWEEN TRADE AND COMPETITION POLICIES

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**Introduction**

This note addresses the subject of the complementarities between trade and competition policies. It builds on prior work of: the Working Party of the Trade Committee and Working Party No. 1 of the Committee on Competition Law and Policy and the Joint Group on Trade and Competition. It has been prepared pursuant to a request by delegations in the Seventh Meeting of the Joint Group of 10 June 1998 during the discussion of the Notes prepared by the Secretariat on Consistencies and Inconsistencies Between Trade and Competition Policies and Competition Elements in International Trade Agreements: A Post-Uruguay Round Overview of the World Trade Organization (WTO) Agreements. Delegations were invited by the Co-chair to supplement their oral remarks in the meetings with written comments citing practical examples of their own experience with the complementarities of trade and competition policies. At the time of writing this note, no comments were received by the Secretariat so this note builds on the themes developed in the discussion in order to frame further discussion by delegations in the Eighth meeting of the Joint Group.

**Trade liberalisation: the traditional model of complementarity**

Competition policies and trade liberalisation policies are, in general, complementary and mutually reinforcing. Successive rounds of trade negotiations since the end of the Second World War have resulted in dramatic reduction of tariffs world-wide. With the Tokyo and Uruguay Rounds, significant progress has also been made in strengthening and expanding the rules and disciplines needed to ensure that non-tariff measures do not unfairly distort trade. By reducing tariffs and non-tariff barriers to trade, trade liberalisation as embodied through the WTO Agreements creates new export opportunities and spurs international commercial competition, which in turn induces business investment, technological innovation and long-term economic growth. The lowering of tariffs and enhanced competition contribute to lower consumer and input prices, while the consequent expansion of trade will yield higher incomes. In short, the ultimate objectives and outcomes of a successful policy of trade liberalisation will in many instances closely resemble or complement those achieved through the instruments of competition policy.

The reduction or elimination of tariff and non-tariff barriers to trade is perhaps the most natural complementarity between trade and competition policy. This is because, at base, in many respects. competition policy is about protecting consumers from private firms who, unilaterally or collectively set prices that are higher than would prevail under competitive market conditions. When a firm, acting alone, or together with other firms has the power to raise and sustain price above the competitive level, it has "market power". Firms are unlikely to have market power where entry into the particular market is relatively easy. Tariffs often serve as a barrier to entry by raising prices of otherwise less costly imports. Thus, tariffs may raise prices to consumers, and also make it possible for domestic firms, unilaterally or collectively, to raise prices above the competitive level behind the tariff shield from foreign competition.

Like trade policy, competition policy also attempts to protect consumer interests by dealing with matters that directly affect decision-making by private firms. Trade liberalisation protects consumer interests from sub-optimal firm decision making by increasingly disciplining government activities that

inappropriately impede or distort firm decision making from what it would be in open and competitive markets.

Competition law attempts to protect consumer interests from anti-competitive firm decision making by policies and rules that curb the exercise of private market power. Domestic competition laws can be viewed as complementing trade liberalisation agreements by ensuring that the benefits of such agreements are realised and not negated by private restraints to trade. Strong competition in domestic markets also helps to smooth the structural adjustments that arise from trade liberalisation accords. It is therefore critical to the success of trade liberalisation and effective market access that anti-competitive practices be checked through effective competition policies. In short, effective competition policies complement trade liberalisation agreements in the removal of barriers to the competitive process and play an important part in maximising the benefits of trade liberalisation initiatives.

In addition to playing a complementary role to trade liberalisation, competition policy can be an important policy safety net which can allow countries to reduce direct price and market regulation. Competition law can safeguard the interests of consumers and public welfare and thereby promote political support for regulatory reform.

Consequently, both trade policy and competition policy can be strongly pro-competitive and pro-consumer notwithstanding that one tends to deal with government action “at the border”, the other private action “behind the border”. In fact, this distinction is not always clear cut in each real-world setting.

**Administrative interaction: examples at work**

At the same time, the application of trade policy measures may not always exempt firms from competition law disciplines. This interaction may benefit from an analysis of different circumstances in which trade policy measures may be relevant from a competition policy perspective.

A trade restrictive agreement among domestic and foreign producers may be fully subject to competition law disciplines, even if such an agreement may have been entered into as an alternative to or in order to avoid the possible application of trade policy measures. The enforcement of competition law in such cases is of particular importance, since it limits the risk that domestic producers may use the threat of initiating action under domestic trade remedies law, or otherwise lobbying for protection, in order to induce foreign exporters to enter into unlawful restrictive agreements. It also ensures that trade policy measures may only be taken by public authorities in accordance with domestic procedures and in conformity with WTO obligations.

Competition law may be fully applicable if, following the adoption of a trade policy measure, domestic and/or foreign producers engage in anti-competitive practices, which further restrict trade or have a negative impact on consumer welfare. This would include both agreements and concerted practices among competitors, whether domestic or foreign, as well as possible abuses of a dominant position. The application of competition law, under such circumstances, is an important guarantee to limit any risk that trade policy measures foster an anti-competitive structure in the market or result in non-transparent and permanent restraints on trade flows.

The presence of trade policy measures – as well as other forms of government intervention – may be a factor taken into account in competition analysis, in particular for the definition of the relevant market. Competition authorities may define such a market in national terms if actual or potential import competition is limited as a result of trade measures or other regulatory obstacles. Since this may make it

easier to establish the existence of a dominant position in the market, there may be a greater risk for domestic firms of being subject to competition law remedies or of a merger being prohibited by competition authorities. Regulatory obstacles can also result in a more narrow product definition of the market or enhance the restrictive effects of an agreement among firms, such as certain types of vertical restraints (for instance, when government regulation makes it more difficult to set up alternative distribution outlets).

Apart from those instances in which competition law applies, competition authorities can also play a role in the trade policy field through competition advocacy. Such advocacy can take different forms and its specific modalities depend on the domestic legal and institutional framework. In some instances, competition authorities can play a general advocacy role in support of an overall open trade policy stance by highlighting the benefits of such liberalisation for consumer welfare and enhancing the structure of competition in the market. Competition authorities may be directly involved in trade liberalisation and deregulation initiatives, in particular when complementary competition law disciplines are seen as essential to ensure that the benefits of such liberalisation are not negated through anti-competitive practices undertaken by dominant firms. Competition authorities may also be consulted when, within the framework of the application of trade remedies law, issues arise concerning the structure of competition in the market.

A number of examples can illustrate the interaction between trade policy measures and the application of competition law.

Canadian competition law places a great emphasis on actual and potential foreign competition in analysing the competitive effects of a merger. For example, the 1989 acquisition by Asea Brown Boveri Inc. (ABB) of the electric power transmission business of Westinghouse Canada Inc. was approved by the Competition Tribunal. However, the Tribunal required ABB to divest certain assets if ABB was unable to convince the Department of Finance to agree to specific tariff relief measures, including full remission on tariffs on imports of certain large transformers for a five year period.[1] Upon the expiry of the remission order in 1994, the Director of Investigation and Research, assisted the parties by making representations to the Department of Finance supporting its extension until the end of 1999. The Director concluded that the Remission Order had been effective in maintaining competitive supply conditions for large transformers. It had also allowed new overseas competitors to enter the Canadian market to submit bids and obtain orders from Canadian public utilities. However, the accelerated reduction of tariffs on imports under the then Canada-US. Free Trade Agreement did not lead to the anticipated entry of a large US competitor which was expected to become an effective supplier and to replace competition lost as a result of the merger.[2] In the 1990 merger of Canada's two largest flour millers, the parties rejected the Director's initial proposal that the transaction be deferred for six months after the removal of import restrictions on US wheat producers under the then Canada-US Free Trade Agreement to allow factual verification of the

1. The onus is put on the merging parties who are claiming that the merger will not prevent or lessen competition substantially to request the tariff reduction from the Department of Finance. This process usually involves demonstrating that there is broad industry support for the tariff reduction. Requiring the merging parties to make it easier for potential foreign competitors to enter the market (seemingly against their rational self-interest) tends to test the resolve of the merging parties, and their claims that the merger is actually not anti-competitive.

2. See Industry Canada, Annual Report Director of Investigation and Research for the Year ended March 31, 1995 24 (1996).

degree of US entry. The transaction was abandoned, and subsequent monitoring demonstrated that US flour imports represented less than one percent of 1991 Canadian flour consumption. [3]

In the 10 June 1998 meeting of the Joint Group, the Italian delegate referred to an Italian merger decision between an EC sodium producer and a Bulgarian producer. He noted that the merger would have resulted in a dominant position, but that the Italian competition authority approved it on the condition that the antidumping duty administered at the EC-level was lifted. The Norwegian delegate cited a similar experience in a merger case in the Norwegian flower market. In that case, the Norwegian competition authority concluded that the merger would create a dominant position in Norway, but that a lower customs tariff would permit Swedish flowers to enter the market. [4]

With respect to an aluminium case, the EC condemned an agreement by which the main western aluminium producers agreed to buy certain limited quantities of aluminium from foreign trade organisation of East European countries in exchange for their commitment not to sell to other potential buyers in the Western European market. One of the arguments put forward as a defence by the parties to the anti-competitive agreement was that the restriction was justified since aluminium sales from the foreign trade organisations would have been at dumping prices. The argument was dismissed by the Commission, which stated in its decision: "This argument assumes that private parties may arrogate to themselves public functions. It obscures a clear difference between the regulation of trade by a public authority and regulation by cartels. A public authority must take into account the rights and interests of third parties as well as a general public interest. A cartel is habitually for the benefit of the participants and takes no account of the other two concerns".

With respect to the Soda Ash case, the EC condemned as an abuse of a dominant position a policy of progressive fidelity rebates and supply contracts tying up its major customers undertaken by Solvay, the dominant producer of Soda Ash in part of the Community market. Several aspects of this case are of interest. At the time of the investigation, antidumping duties were in force on US and Eastern European producers. At the same time, the Commission Decision notes that, as a result of changes in exchange parities, Solvay was well aware that US producers could sell in Europe at prices substantially below average EC prices without being guilty of dumping and that the duties were under review. In establishing that Solvay had a dominant position in the market, the application of antidumping duties was one of the factors taken into account by the Commission. Moreover, the Commission found that the effect of the system of progressive rebates applied by Solvay was to make it difficult or impossible for other suppliers to enter the market for the marginal tonnage without selling at unprofitable or dumping prices. The Commission issued a termination order requiring Solvay to abandon its system of fidelity rebates and applied a fine of ECU 20 million. [5]

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3. See Industry Canada, Annual Report Director of Investigation and Research for the Year ended March 31, 1992 7 (1992).

4. The Co-Chair cited an Australian case in which the parties to the transaction convinced the competition authority that it would pose no competition problem in Australia. However in the wake of the merger, the merged firm sought protection from foreign competition. He also cited several examples where Australian firms were able to collude in an environment of import restrictions. The Swedish delegated cited an EC concentration case in which a Swedish firm was found to have a dominant position because in the presence of an antidumping duty the relevant market was defined as an EU market instead of a global market.

5. These European examples are drawn from the Communication from European Community and its Member States to the Working Group on the Interaction between Trade and Competition Policy dated 7 July 1998. [WT/WGTCP/W/78].

The Japan Fair Trade Commission (JFTC) passed a recommendation decision ordering four Japanese firms not to decide upon the total quantity of natural soda ash (so-called "trona ash") imports, the price of imports, the allocation rates among firms, or the trading partners for import. After the JFTC's decision, the Japanese market for soda ash apparently changed in the following ways:

(a) an increase in the import of "trona ash", despite the downward trend for the demand of soda ash, and the quantity of imports increased as much as eight times in the four years after the JFTC's decision.

(b) significant changes in market shares among soda ash manufacturers.

(c) major increases of the quantity of imports per importer and the number of trading partners of "trona ash".

(d) rapid and major reductions in the price of soda ash - the price dropped by 20 per cent in the four years after the JFTC's decision.

The JFTC published Guidelines Concerning Distribution Systems and Business Practices in order to prohibit anti-competitive behaviour by the Japanese sole import distribution agent, which pressured the exporter not to sell products to Japanese parallel importers. The JFTC rigorously pursued the elimination of this import-restricting behaviour. For example, in cases such as Hungarian-made porcelain (1994), German-made pianos (1994), and the U. S.-made ice creams (1994), the JFTC judged that actions taken by the sole import distribution agents in Japan to block parallel imports were violating the Anti-Monopoly Act. As a result, parallel imports have now increased.[6]

There are also examples of how these complementarities are addressed in the United States. In the 1994 Pilkington case, the United States Department of Justice (DOJ) charged a British firm and its US subsidiary with monopolising the world-wide flat glass market. The complaint charged that Pilkington entered into unreasonably restrictive licensing arrangements with its likely competitors (including US firms) and, for over three decades, used these arrangements and threats of litigation to prevent US firms from competing to design, build, and operate flat glass plants in other countries, even though Pilkington no longer had enforceable intellectual property rights to warrant such restrictions. The case was settled by a consent decree.[7]

More generally, past work in the Joint Group has explored the power of trade associations, standards setting, conformity assessment and certification bodies to block market access and limit competition. Several US cases, including those involving boilers and pressure vessels and material handling equipment, and a Spanish case involving wire netting used for concrete reinforcement, were discussed.[8] These cases showed that such bodies can have considerable power, both direct and indirect over who competes in a market and that this power has been used to restrain imports, particularly when domestic firms are involved in the decision-making. These cases thus demonstrated a clear

6. These Japanese examples are drawn from the Communication from Japan to the Working Group on the Interaction between Trade and Competition Policy dated 26 September 1997 [WT/WGTCP/W/32].

7. United States v. Pilkington plc, 1994-2 Trade Cas. (CCH) ¶70,842 (D.Ariz. 1994).

8. See generally: the Secretariat's Synthesis Note of Past Case Discussions [COM/DAFFE/CLP/TD(98)21]; and the submissions from the United States and Japan COM/TD/DAFFE/CLP/RD(96)101; COM/TD/DAFFE/CLP(96)142; COM/TD/DAFFE/CLP/RD(96)101; COM/TD/DAFFE/CLP(96)142], COM/DAFFE/CLP/TD(96)145 and ADDENDUM.

complementarity of interest among trade and competition authorities in the operation of such bodies. Moreover, these cases showed that both communities can contribute to the elimination of at least some of the anti-competitive and market-access blocking practices in this area. Clear complementarities emerged in the way both communities could work to eliminate problems posed by both public and private bodies.

In particular, in the area of technical standards and certification, implementation of the TBT agreement was cited as one way trade officials could reduce market access blocking conduct of such bodies, including, in particular, public bodies which might otherwise be beyond the jurisdiction of the competition authorities. (In a number of countries, the actions of government are immune from attack under the competition laws.) The widespread applicability of the TBT agreement is also useful given the great number of bodies with some technical standard-setting or certification responsibility; enforcement actions by the antitrust authorities can deal directly with only a relatively few cases at any one time. Nonetheless, law enforcement actions by competition authorities have been effective in attacking private standards setting and certification bodies which excluded foreign firms. These government enforcement actions should have a deterrent effect on other bodies and can be bolstered by private actions in those jurisdictions which permit them.

**The General Agreement on Trade in Services (GATS) and the basic telecommunications agreement: more recent models of complementarity**

The notion that international liberalisation of services needs to be complemented by provisions to protect the openness of a market from potential private anti-competitive practices has been most explicitly recognised in the WTO General Agreement on Trade in Services (“GATS”). With respect to sectors covered in a Member's schedule, Article VIII requires the Member to ensure that a monopoly supplier does not "abuse its monopoly position" when it competes in the supply of services outside its monopoly rights. Article IX(1) provides that "Members recognise that certain business practices of service providers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services." Article IX obliges Members to accede to any request for consultation with any other Member concerning such practices “with a view to eliminating” them. It also imposes a duty to co-operate in the provision of non-confidential information of relevance to the matter in question.

This was taken even further in the GATS negotiations on basic telecommunications, which were concluded in February 1997. Traditionally, the telecommunications sector has of course been dominated by monopoly suppliers. In many respects, the GATS Agreement on Basic Telecommunication Services is the most explicit example of the mutually reinforcing nature of competition and trade policies in the context of a trade agreement. That agreement addresses both governmental measures and private conduct (albeit in an indirect manner) and addresses both at the border and behind the border concerns using both trade and competition policy instruments and concepts.

Specifically, the Reference Paper to the Agreement contains a general commitment of Members to maintain adequate measures to prevent suppliers unilaterally, or collectively, from engaging in or continuing anti-competitive practices.. First, a “major supplier” is defined as one with the power "to materially affect the terms of participation (having regard to price and supply", either due to control over essential, network facilities or its market position.

In addition, the Reference Paper gives several specific examples of anti-competitive practices. These are:

– Anti-competitive cross-subsidisation;

- Use of information obtained from competitors (with "anti-competitive results"); and

- Withholding technical and commercially relevant information.

The Reference Paper also applies to "interconnection" issues: e.g., the linking with suppliers providing public telecommunications transport networks or services to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier. However, the extent of this obligation is limited to the specific commitments undertaken by a Member. Interconnection must be provided:

a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

The Reference Paper also builds on transparency in order to ensure that the Agreement can actually be operationalized. The procedures applicable for interconnection to a major supplier will be made publicly available, and a major supplier must make publicly available either its interconnection agreements or a reference interconnection offer. With respect to settlement of disputes under the Agreement, the Reference Paper appears to distinguish between disputes about anti-competitive practices and disputes about interconnection. There is no particular form of dispute settlement provided for disputes over anti-competitive practices of major suppliers. With respect to interconnection, the Reference Paper indicates that the primary avenue of dispute settlement is to a domestic body. A service supplier requesting interconnection with a major supplier will have recourse, either: "at any time" or "after a reasonable period of time which has been made publicly known" to an independent domestic body, which may be a regulatory body.[9] That body must be given the authority to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously. It is conceivable that in some countries, the chosen body might not be a regulator, but rather a competition authority.

The Reference Paper also reflects a balance between the objectives of both trade liberalisation and competition policy and other social or policy objectives of interest to governments and civil society. Article 3 provides that any Member has the right to define the kind of universal service obligation it wishes to maintain, and such obligations will not be regarded as anti-competitive per se. However, those

9. The regulatory body must be separate from, and not accountable to, any supplier of basic telecommunications services, and its decisions of and the procedures used by regulators must be impartial with respect to all market participants.

requirements must be administered in a transparent, non-discriminatory and competitively neutral manner and cannot be more burdensome than necessary for the kind of universal service defined by the Member. Similarly, any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, must be carried out in an objective, timely, transparent and non-discriminatory manner.

It might be worth asking whether the model of addressing the trade and competition complementarity in the Reference Paper with respect to anti-competitive practices, interconnection, dispute settlement, and balancing other policy objectives could be generalised in other bilateral, regional or multilateral trade agreements. Alternatively, is this a sector-specific model, or are there other sectors to which it conceivably could be applied? Does this Agreement reflect industry-specific technological developments, and/or a broad cross-country consensus on the need for regulatory reform of this particular sector? What doctrinal or regulatory preconditions, if any, are necessary for this model to be successfully replicated?

**Other bilateral and regional models**

There are other bilateral and regional trade agreements that attempt to address proactively, to varying degrees, the complementarity of trade and competition policies. For instance, the Northern Ameican Free Trade Agreement (NAFTA), Chapter 15 contains express provisions relating to monopolies and state enterprises. The NAFTA is a good representative example of the kinds of provisions found in these agreements. It includes provisions ensuring that monopolies: do not infringe the NAFTA in the exercise of any regulatory, administrative or other governmental authority that has been delegated to them; act solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market; provides non-discriminatory treatment to NAFTA investments and investors; does not assert or extend is monopoly position outside the grant of its monopoly power. With respect to state monopolies, the NAFTA commitments are more narrow. Each Party must assure that state enterprises: do not infringe the NAFTA in the exercise of any regulatory, administrative or other governmental authority that has been delegated to them; and accord non-discriminatory treatment in its sale of goods or services. These provisions are subject to the NAFTA state/state (Chapter 20) and investor/state (Chapter 11) dispute settlement provisions.

Delegations might want to consider what lessons can be drawn from the experience the NAFTA and other bilateral and regional models for addressing the complementary objectives of trade and competition policies.

**The role of international competition policy enforcement**

Enhanced international co-operation in the competition field could result in significant gains from both the trade and competition policy perspectives. These gains could arise from addressing obstacles to market access arising from anti-competitive practices. This might not only result in an expansion of trade liberalisation and greater security of market access commitments, but also in the more consistent application of competition law as a complement to the process of trade liberalisation.

**Conclusion**

From the above, it can be seen that competition and trade policies share a complementary underlying rationale: the elimination or reduction of barriers to, and distortions of, markets. When

pursued effectively, trade liberalisation and the application of competition policy are complementary and mutually reinforcing. Trade and competition policy share the common objectives of promoting economic efficiency and welfare and are based on common principles such as transparency, non-discrimination and the need for rule-based economic behaviour. The trade policy objectives of trade liberalisation, non-discrimination and transparency can generally go a long way toward facilitating robust competition in markets. By the same token, the establishment and vigorous enforcement of sound competition laws and competition policies can generally go a long way toward assuring the conditions which are conducive to expanding and sustaining free and open trade among nations. This note has tried to show that complementarity between the two policies is a key requirement for their effectiveness. In the absence of an effective competition policy, the gains of trade liberalisation may be compromised as a result of restraints on trade by private or public undertakings. Conversely, in the absence of a sustained process of trade liberalisation, the impact of competition policy in promoting the contestability of markets is limited.